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11
12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**

14
15 WILLIAM MARTIN and LORI
MITCHELL, each individually and on
16 behalf of all others similarly situated,

17 Plaintiffs,

18 vs.

19 TOYOTA MOTOR CREDIT
CORPORATION, a California
20 Corporation

21 Defendant.

Case No.: 2:20-cv-10518-JVS-MRW

SECOND AMENDED CLASS ACTION

COMPLAINT FOR:

- (1) BREACH OF CONTRACT;
- (2) VIOLATIONS OF THE CALIFORNIA CONSUMER LEGAL REMEDIES ACT ;
- (3) VIOLATIONS OF THE CALIFORNIA UNFAIR BUSINESS PRACTICES ACT; and
- (4) DECLARATORY RELIEF

JURY TRIAL DEMANDED

1 Plaintiffs William Martin (“Martin”) and Lori Mitchell (“Mitchell”) (collectively,
2 “Plaintiffs”), on behalf of themselves and all others similarly situated (the “Class”), bring
3 this action against Defendant Toyota Motor Credit Corporation (“Toyota” or “TMCC”
4 or “Defendant”) to recover monetary damages, injunctive relief, and other remedies for
5 breach of contract, violations of California’s Unfair Business Practices Act (the “UCL”),
6 violations of California’s Consumer Legal Remedies Act (the “CLRA”) and declaratory
7 relief. The following allegations are based upon Plaintiffs’ personal knowledge with
8 respect to their own acts and based upon information and belief as to all other matters.

9 **INTRODUCTION**

10 1. This action concerns Toyota’s practice of knowingly collecting unearned
11 fees for Guaranteed Automobile Protection Waivers (“GAP Waivers”) after the early
12 payoff of a customer’s retail installment sales contract (also referred to herein as the
13 “finance agreement”). Toyota knows these fees have not and will never be earned but
14 collects them anyway. Toyota then refuses to refund this unearned money to its
15 customers, even though Toyota is contractually and legally obligated to do so as the
16 creditor and assignee of the finance agreement and GAP Waiver. As a result of this
17 unlawful and fraudulent practice, Toyota knowingly collects and keeps tens of millions
18 of dollars in unearned fees from its customers each year.

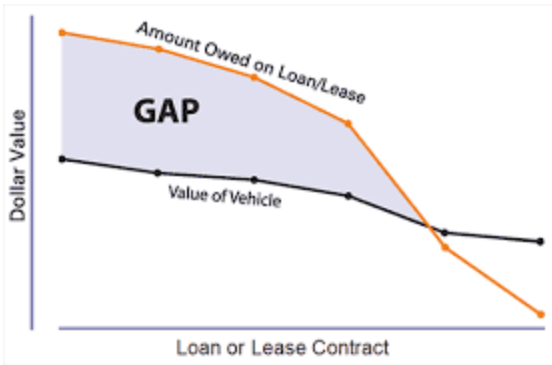
19 **FACTUAL BACKGROUND**

20 2. **What is a Retail Installment Sales Contract?** Plaintiffs and the Class
21 financed the purchase of their cars by entering into retail installment sales contracts with
22 auto dealerships (the “dealers”). Under the agreements, Plaintiffs and the Class agreed
23 to pay for the price of their cars in the future over a fixed period of years, with interest,
24 in monthly installment payments. The dealers then immediately sold and assigned those
25 contracts to Toyota. Thereafter, all future payments on the contracts were made directly
26 to Toyota.

27 3. **What is the difference between a Retail Installment Sales Contract and**
28 **a Loan?** Although similar, a retail installment sales contract is different than an auto

1 loan. As the U.S Consumer Financial Protection Bureau explains: “A loan is a
 2 transaction between you and a bank or other lender for money, where you use the money
 3 to purchase a vehicle and agree to repay the loan balance plus interest. A retail
 4 installment sale, on the other hand, is a transaction between you and the dealer to
 5 purchase a vehicle where you agree to pay the dealer over time, paying both the value of
 6 the vehicle plus interest. A dealer could sell the retail installment sales contract to a
 7 lender or other party.” (See [www.consumerfinance.gov/ask-cfpb/what-is-a-retail-
 8 installment-sales-contract-or-agreement-is-this-a-loan-en-817/](http://www.consumerfinance.gov/ask-cfpb/what-is-a-retail-installment-sales-contract-or-agreement-is-this-a-loan-en-817/).) That is exactly what
 9 happened in the present case. Plaintiffs and the Class entered into retail installment sales
 10 contracts with the dealers, which were then immediately sold and assigned to Toyota.
 11 Thereafter, Toyota became the creditor on the agreements.

12 **4. What is a GAP Waiver?** Each of the retail installment sales contracts at
 13 issue in this lawsuit included a GAP Waiver. A GAP Waiver is an addendum to the retail
 14 installment sales contract which amends the terms of the contract and becomes a part of



the agreement. It is a debt cancellation agreement,
 15 which provides that in the event a customer
 16 suffers a “total loss” of their vehicle and the actual
 17 cash value of their vehicle is worth less than the
 18 balance owed to the creditor, then the creditor will
 19 agree to waive the difference. This difference is

20 known as the “deficiency balance” or “GAP.”

21 **5.** For example, assume a customer’s car is stolen and the customer still owes
 22 \$10,000 in payments on their retail installment sales contract. Also, assume the
 23 customer’s liability insurer only agrees to pay \$8,000 for the “total loss” of the vehicle.
 24 Without a GAP Waiver, the customer would still owe the \$2,000 difference to Toyota as
 25 the creditor on the contract, even though the customer no longer possesses the vehicle.
 26 However, if the retail installment sales contract has a GAP Waiver, then Toyota is
 27

1 required to “waive” the \$2,000 difference.¹

2 **6. How does a customer pay for GAP Coverage?** Customers pay for GAP
3 coverage in monthly installments over the life of their finance agreement. The total cost
4 of GAP coverage for the full term of the contract is separately listed on the retail
5 installment sales contract as part of the total amount financed (the “GAP fees”). The
6 contract will also list the total amount of interest that the customer will pay over the full
7 term of the contract (the “finance charge”). However, while the customer is told up-front
8 what the total cost of the GAP coverage and finance charge will be for the full term of
9 the contract, the customer actually pays these amounts incrementally over time to Toyota
10 on a month-to-month basis, which is included in the monthly payments for their car.

11 **7. What are Unearned GAP Fees?** When customers pay off their finance
12 agreements early (before the original maturity date) this results in what Toyota and the
13 rest of the auto finance industry refer to as “unearned GAP fees” and “unearned finance
14 charges.” For example, if the total cost of GAP protection for four years of GAP coverage
15 is \$800, but the customer pays off their finance agreement in two years, this results in
16 \$400 of “unearned GAP fees” for the unused half of the contract term. This portion of
17 the GAP fees is “unearned” because once the finance agreement is paid-off early, there
18 is no possibility of a GAP and the customer is no longer receiving anything of value by
19 paying for future GAP protection. Similarly, when the finance agreement is paid off
20 early, the difference between the interest that had accrued up to the date of the early
21 payoff and the total finance charge listed on the contract is known as the “unearned
22 finance charge,” because the customer no longer owes interest for the unused term of the
23 agreement.

24 **8. How is Toyota Collecting and Keeping Unearned GAP Fees?** When a
25 customer wants to pay off their finance agreement early (i.e., before the end of the
26

27 ¹ By structuring the transaction as a “debt cancellation agreement,” rather than
28 “insurance,” Toyota is able to avoid insurance regulations designed to protect consumers,
such as regulations regarding the amount charged for insurance protection and a dealer’s
ability to offer GAP coverage to customers without an insurance license.

1 contract term), Toyota informs the customer of the total payoff amount. Toyota will
2 typically not include the unearned finance charge in the total payoff amount quoted to
3 customers, but it will include the amount of the unearned GAP fees. In other words, at
4 the time of the early payoff, Toyota fraudulently represents to its customers (including
5 Plaintiffs and the Class) that they owe Toyota the unearned GAP fees for the remaining
6 term of the contract, even though Toyota knows these fees are not earned, and can never
7 be earned, because the finance agreement is terminating early. Toyota then collects and
8 keeps these unearned GAP fees, unless the customer affirmatively requests a refund,
9 which rarely happens. As a result of this practice, Toyota routinely collects and keeps
10 tens of millions of dollars of unearned money *each year* that rightfully belongs to its
11 customers.

12 **9. Toyota Always Knows Its Customers are Entitled to a Credit or Refund**
13 **of Unearned GAP Fees When There is an Early Payoff of the Finance Agreement.**

14 Toyota *always* knows when there has been an early payoff of the finance agreement
15 because Toyota, as the creditor, is the entity receiving the early payoff. Likewise, Toyota
16 *always* knows its customers are entitled to a credit or refund of the unearned GAP fees
17 after an early payoff, because Toyota knows that once the retail installment sales contract
18 is terminated early, there is no basis for continuing to charge customers for future GAP
19 coverage. Consequently, there is no legitimate basis for Toyota to include the unearned
20 GAP fees in the early payoff amount quoted to customers, nor is there any legitimate
21 basis to collect such unearned money from its customers and then refuse to give it back
22 unless the customers affirmatively request a refund.

23 **10. The Early Payoff of the Finance Agreement Automatically Cancels the**
24 **GAP Waiver.** As explained above, the GAP Waiver is simply an addendum to the retail
25 installment sales contract and is a part of the agreement. Consequently, the early payoff
26 of the contract results in an *automatic* termination and cancellation of the GAP Waiver
27 addendum. Toyota's own internal agreements with its dealers explain that coverage
28

1 under the GAP Waiver addendum will “terminate” as soon as the finance agreement
2 “expires, is paid off, or is otherwise terminated.”

3 11. **Toyota’s “Condition Precedent” Defense is not Well Taken.** Toyota
4 claims that the “fine print” language on the back of the GAP Waiver addendums provide
5 that customers must send a written notice of cancellation as a “condition precedent” to a
6 credit or refund of the unearned GAP fees. Based on well-established contract
7 interpretation principles applicable in all 50 states, Toyota’s “condition precedent”
8 defense is not well taken for several reasons:

9 a. **Any Ambiguities in the GAP Waiver Addendum Must Be**
10 **Construed Against Toyota.** The GAP Waiver addendums are form contracts prepared
11 by and/or approved by Toyota and offered to customers on a take-it-or-leave-it basis. In
12 other words, they are “contracts of adhesion.” As such, any ambiguities in the GAP
13 Waiver addendums must be strictly construed against Toyota as the drafter and/or
14 assignee of GAP addendum.

15 b. **Conditions Precedent are Disfavored Under the Law in all 50**
16 **States.** A condition precedent is an act or event that must occur before a duty to perform
17 arises. (13 Williston on Contracts, § 38:7; MDY Industries, LLC v. Blizzard
18 Entertainment, Inc., 629 F.3d 928, 939 (9th Cir. 2010).) Conditions precedent are
19 disfavored under the law because they tend to work as forfeitures -- in this case, a
20 forfeiture of the “unearned GAP fees.” (Id.) Thus, whenever possible, courts construe a
21 provision in a contract as a promise or covenant, rather than a condition precedent, unless
22 it is established by clear and unmistakable language that the failure to perform will result
23 in a forfeiture. (Id.; see also Hammes Co. Healthcare, LLC v. Tri-City Healthcare Dist.,
24 2011 WL 6182423, at *5 (S.D. Cal. Dec. 13, 2011) (“It is well-established that conditions
25 precedent are disfavored, and that ‘a contract is not to be construed to provide a forfeiture
26 unless no other interpretation is reasonably possible’”).) The difference is important,
27 because the failure to perform a covenant or promise does not generally excuse the other
28 party’s performance, and instead only allows the non-breaching party to assert a claim

1 for damages (if any) caused by the breach. (Id.) As Williston on Contracts explains,
 2 “[t]his interpretation protects both parties to the transaction, is based on a policy of
 3 avoiding the harsh effect of forfeiture which may result from a failure of a condition
 4 precedent, and does not result in a minor failure to perform exactly as called for, wholly
 5 destroying all rights under the contract.” (13 Williston on Contracts, § 38:7.)

6 **c. Toyota’s Gap Waiver Forms Do Not Clearly and**
 7 **Unambiguously Provide that Customers will Forfeit their Unearned GAP Fees**
 8 **Unless They Request a Refund.** Toyota operates its own GAP program through its
 9 company Toyota Motor Insurance Services (“TMIS”). Toyota also accepts GAP Waiver
 10 forms prepared by the third-party GAP administrators. With respect to Toyota’s own
 11 GAP form, Toyota is relying on a provision in their GAP Waiver addendum which
 12 provides as follows:

13 You have the right to cancel this Agreement at any time and to
 14 request a refund if no benefit has been provided under this
 15 Agreement. To cancel this Agreement, You must submit a
 written request to the Program Administrator² [Toyota] at the
 address shown above. (**Exhibit A.**)

16 The second sentence in this provision -- stating that the customer “must submit a written
 17 request” to cancel this Agreement -- is referring to situations when a customer wants to
 18 *voluntarily* cancel his or her GAP coverage during the contract term. In those situations,
 19 Toyota obviously would need to know that the customer wants to *voluntarily* cancel the
 20 coverage, which is why written notice is required. In contrast, as explained in
 21 Paragraph 10 above, the early payoff of the finance agreement *automatically* cancels the
 22 GAP Waiver that is a part of the agreement. Consequently, the second sentence in this
 23 provision – requiring a “written request” to cancel the agreement – is not applicable to
 24 situations where the contract is *automatically* terminated due to an early payoff. In fact,
 25 later versions of Toyota’s GAP Waiver addendum make it clear that there is a distinction
 26 between a *voluntary* cancellation of GAP coverage and an *automatic termination* of

27 _____
 28 ² The Program Administrator is Toyota Motor Insurance Services (“TMIS”), which
 operates under the same trade name as Defendant Toyota Motor Credit Corporation
 (“TMCC”), i.e., “Toyota Financial Services.”

1 coverage due to an early payoff of the finance agreement. (**Exhibits B & C.**) For
2 example, recognizing that its notice provisions did not clearly and unambiguously apply
3 to early payoffs, Toyota revised the provision as follows:

4 To cancel this Agreement and receive any refund due to the
5 cancellation of this agreement, You must submit a written
6 request to the Program Administrator at the address shown
7 above. **If cancellation is due to the early termination of Your
finance or lease contract, cancellation must be made in
writing to the Program Administrator.** (Exhibit C (emphasis
added).)

8 This change demonstrates that Toyota's prior GAP Waiver forms did not clearly and
9 unambiguously apply to early payoffs, and this provision cannot be construed as a
10 condition precedent, especially with respect to the earlier versions of the GAP Waiver
11 forms.

12 **d. Plaintiffs and the Class Actually and/or Substantially Complied**
13 **with any Purported Notice Prerequisites.** Regardless of which GAP Waiver form was
14 provided to its customers, the notice provisions relied on by Toyota, at most, require
15 written notice of cancellation of the finance agreement and its GAP Waiver addendum.
16 Toyota's customers (including Plaintiffs and the Class) *always* provide written notice of
17 cancellation to Toyota when they pay off their finance agreements early. These early
18 payoffs are made by the customers in writing to Toyota (by written instrument, check or
19 electronic payment), recorded in writing in Toyota's database and confirmed in writing
20 by an "early payoff" letter sent by Toyota to its customers. Thus, Toyota always receives
21 written notice of the cancellation of the agreement after an early payoff, thereby
22 triggering its obligation to issue a credit or refund of the unearned GAP fees. While
23 customers may not have sent the notice to the correct "address" listed on the GAP
24 Waiver form for the "Program Administrator," the law does not consider such minor and
25 immaterial deviations from a contract provision to be grounds for a forfeiture. In all
26 circumstances, Toyota received actual notice of the cancellation of the finance
27 agreement and its GAP Waiver addendum, so the purpose of any purported notice
28 prerequisite was fulfilled.

1 e. **Numerous States Have Laws or Regulations Concerning GAP**
2 **Waivers that Require the Creditor to Automatically Issue a Credit or Refund of**
3 **the Unearned GAP Fees After an Early Payoff, Without Any Further Notice or**
4 **Request for a Refund from Customers.** There are currently at least 12 States in the
5 United States, including Plaintiff Lori Mitchell’s home State of Colorado, which prohibit
6 creditors like Toyota from refusing to automatically refund unearned GAP fees after an
7 early payoff. These States include Alabama, Colorado, Indiana, Iowa, Massachusetts,
8 New Jersey, Oklahoma, Oregon, Texas, Vermont, Wisconsin and Wyoming.
9 Consequently, to the extent Toyota contends that customers are required to request a
10 refund as a “condition precedent” to a credit or refund of unearned GAP fees after an
11 early payoff in those States, such provisions are unlawful and cannot be enforced.

12 f. **Interpreting the Notice Provisions as Requiring Strict**
13 **Compliance as a Condition Precedent to a Credit or Refund of Unearned GAP Fees**
14 **will result in a Disproportionate Forfeiture.** Even if the notice provision was
15 interpreted as a “condition precedent” (and it should not be), strict compliance with a
16 condition precedent will be excused if “literal and exact performance” will result in a
17 “disproportionate forfeiture.” (Restatement of Law (Second) of Contracts, § 229.)
18 When determining whether there will be a “disproportionate forfeiture” a court must
19 weigh the extent of the forfeiture by the obligee (the customer) against “the importance
20 of the risk the from which [the obligor (Toyota)] sought to be protected and the degree
21 to which that protection will be lost if the non-occurrence of the condition is excused.”
22 (Id.) This presents a question of fact. Here, Toyota is refusing to refund the unearned
23 GAP fees, because customers (including Plaintiffs and the Class) purportedly failed to
24 send written notice of cancellation to the correct address listed in the GAP Wavier
25 addendums. Toyota contends these customers forfeited their right to a refund of such
26 fees, and customers are, in fact, no longer able to obtain a refund of this money as a
27 result of this purported deviation from the notice provision. These customers (including
28 Plaintiffs and the Class) did not receive anything of value in exchange for paying

1 unearned GAP fees after the early payoff, because once the retail installment sales
 2 contract is paid off early there is no potential GAP to protect against. In contrast, Toyota
 3 did not suffer any harm from a customer’s purported failure to mail notice of cancellation
 4 to the correct address specified in the contract, because it is undisputed that Toyota
 5 received actual notice of the cancellation. Allowing this trivial deviation to result in a
 6 forfeiture of a customer’s money would be the very definition of “disproportionate.”

7 **12. Toyota’s Early Payoff Letters are Misleading and Fraudulently**
 8 **Conceal Toyota’s Obligations to Refund the Unearned GAP Fees.** After an early
 9 payoff, Toyota sends its customers (including Plaintiffs and the Class) a uniform letter
 10 from “Toyota Financial Services” confirming that the finance agreement has been “paid
 11 in full.” (**Exhibit D.**) In the letter, Toyota informs customers that “[i]f you have paid
 12 off your account before the original maturity date” (i.e., an “early payoff”) “you may be
 13 entitled to a refund” for products such as GAP, and “you can cancel these products by
 14 contacting your dealer or the product provider/administrator directly.” (*Id.*) This letter
 15 is highly misleading because Toyota knows its customers are, in fact, entitled to a refund
 16 of the unearned GAP fees after an early payoff and Toyota knows the exact amount of
 17 the refund. Thus, informing customers that they “may be entitled to a refund” of an
 18 unknown amount deceptively suggests that a refund is not certain, and this language is
 19 used as an effort to deter customers from pursuing the refund. Further, the early payoff
 20 of the finance agreement automatically cancels the GAP Waiver, because it is a part of
 21 the contract, so there is no need to “contact” anyone to “cancel” the product. In addition,
 22 under the GAP Waiver, it is Toyota, not the dealer, that owes the refund to the customer,
 23 so directing customers to contact the dealer is an effort at misdirection. Finally, with
 24 respect to Toyota’s own GAP Waiver forms, the “program provider/administrator” of
 25 the GAP Waiver is “Toyota Financial Services” – the same company sending the pay-
 26 off letter – but this is not disclosed in the letter.³ This is all designed to misleadingly

27 _____
 28 ³ The provider of the Toyota GAP Waiver form is listed as “Toyota Financial Services”
 and the “Program Administrator” is TMIS. (**Exhibit A, B, and C.**) Both TMCC and

Continued on the next page

1 15. Venue is proper in the Central District of California under 28 U.S.C. § 1391
2 because Defendant's headquarters were located in the Central District in Torrance,
3 California up until approximately September 2017, Defendant would be subject to
4 personal jurisdiction in the Central District if that district was a separate State and
5 Defendant still maintains its most significant California operations in the Central District.
6 Further, a substantial portion of the events or omissions giving rise to this Action
7 occurred in the Central District, including but not limited to (a) the creation and
8 implementation of Defendant's policy to include unearned GAP fees in the early payoff
9 amount quoted to customers and to collect and fail to refund those unearned fees to their
10 customers; (b) the creation and dissemination of the GAP Waiver forms at issue in this
11 Action; (c) the creation and dissemination of the final payoff letters at issue in this Action;
12 (d) the acceptance of the assignment of the finance agreements from Plaintiff William
13 Martin and other Class Members who purchased their cars prior to at least September
14 2017; and (e) the collection of unearned GAP fees from Class Members prior to at least
15 September 2017.

THE PLAINTIFFS

16
17 16. Plaintiffs are individuals (a) who entered into finance agreements with GAP
18 Waiver addendums that were assigned to Toyota, (b) who paid off their finance
19 agreements to Toyota before the end of the original contract term, and (c) who did not
20 receive a refund of the unearned GAP fees collected by Toyota and/or the accrued interest
21 on those unpaid amounts.

22 17. At all relevant times, Plaintiff William Martin ("Martin") was a citizen of
23 the State of California, and a resident of Novato, California. On or about February 10,
24 2012, Martin purchased a 2012 Toyota Tundra from the Toyota Marin dealership, located
25 in San Rafael, California. As part of this purchase, Martin entered a retail installment
26 sales contract with a Toyota GAP Waiver addendum, a true and correct copy of which is
27
28

1 attached as **Exhibit A**.⁴ The original contract term was for 84 months and the full cost
2 of GAP coverage for that term would have been \$545.37. The finance agreement and
3 GAP Waiver addendum were immediately sold and assigned to Toyota. On or around
4 May 17, 2018, approximately 75 months after the contract start date, Toyota informed
5 Martin of the total payoff amount for his finance agreement if he wanted to pay off the
6 agreement early. Toyota included unearned GAP fees of approximately **\$57.37** in the
7 total payoff amount. Martin paid the total amount quoted by Toyota and provided Toyota
8 with written notice that the finance agreement was terminated. Toyota collected and
9 failed to refund the unearned GAP fees of approximately **\$57.37** to Martin and Toyota
10 contends that Martin has forfeited the right to receive a refund of those fees or any
11 applicable interest. After the early payoff of his finance agreement, Martin moved from
12 California and is now currently a citizen and resident of the State of Nevada.

13 18. At all relevant times, Plaintiff Lori Mitchell (“Mitchell”) has been and is
14 currently a citizen of the State of Colorado, and a resident of Lakewood, Colorado. On
15 or about May 8, 2018, Mitchell purchased a 2018 Toyota Highlander from the Mountain
16 States Toyota dealership, located in Denver, Colorado. In connection with this purchase,
17 Mitchell entered a retail installment sales contract with a Toyota GAP Waiver addendum,
18 a true and correct copy of which is attached as **Exhibit B**. The original contract term was
19 for 75 months and the full cost of GAP coverage for that term would have been \$450.00.
20 The finance agreement and GAP Waiver addendum were immediately sold and assigned
21 to Toyota. On or around May 18, 2019, just over a year after the contract start date,
22 Toyota informed Mitchell of the total payoff amount for her finance agreement if she
23 wanted to pay off the agreement early. Toyota included unearned GAP fees of
24 approximately **\$376.12** in the total payoff amount. Mitchell paid the total amount quoted
25 by Toyota and provided Toyota with written notice that the finance agreement was

26
27 ⁴ Martin only had the front page of his GAP Waiver addendum. Based on the form
28 number listed in the bottom right-hand corner of the addendum, Plaintiffs are informed
and believe that the second page included in **Exhibit A** is a true and correct copy of the
terms on the back page of Martin’s GAP Waiver addendum with Toyota Financial
Services.

1 terminated. Toyota collected and failed to refund the unearned GAP fees of
2 approximately \$376.12 to Mitchell and Toyota contends that Mitchell has forfeited the
3 right to receive a refund of those fees or any applicable interest.

4 **DEFENDANT**

5 19. Defendant Toyota Motor Credit Corp. (“TMCC”) is a California
6 Corporation. Toyota is the assignee of the finance agreements of Plaintiffs and the Class,
7 including the GAP Waiver addendums that are part of those finance agreements.
8 Toyota’s headquarters were located in Torrance, California until approximately
9 September 2017, at which time it moved its headquarters to Plano, Texas. Toyota,
10 nevertheless, still maintains significant operations in Torrance, California.

11 20. Non-party Toyota Motor Insurance Services, Inc. (“TMIS”) is a California
12 Corporation. TMIS is listed as the “Program Administrator” in the Toyota GAP Waiver
13 forms signed by Plaintiffs and the Class.

14 21. TMCC and TMIS both operate under the trade name and service mark
15 “Toyota Financial Services.”⁵ TMCC and TMIS share many of the same officers and
16 directors and operate out of the same offices.

17 22. On information and belief, Plaintiffs allege that, at all relevant times,
18 Defendant TMCC and non-party-TMIS were acting as an agent of each other, within the
19 course and scope of such agency and with the knowledge and/or understanding of each
20 other.

21 **CLASS ACTION ALLEGATIONS**

22 23. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil
23 Procedure on behalf of the following Class and Subclasses:

24 **a. Nationwide Class:** Plaintiffs seek to represent a nationwide class
25 including all persons: (1) who entered into finance agreements with a GAP Waiver
26 addendum that were assigned to Toyota, (2) who paid off their finance agreements before
27

28 ⁵ TMCC and TMIS also both operate under the service marks “TFS,” “Lexus Financial Services” and “LFS.”

1 the end of the contract term, and (3) who did not receive a credit or refund of the unearned
2 GAP fees and/or the accrued interest on those amounts (the “Nationwide Class” or
3 “Class”). On behalf of the Nationwide Class, Plaintiffs are asserting claims against
4 Toyota for breach of contract, money had and received and declaratory relief. The class
5 period is based on the applicable statutes of limitations in each State.

6 **b. The California Subclass:** Plaintiff Martin is seeking to represent a
7 subclass of consumers who fit the definition of the Nationwide Class, but which is limited
8 to consumers who entered finance agreements with a Toyota GAP Waiver addendum in
9 the State of California (the “California Subclass”). On behalf of the California Subclass,
10 Plaintiff Martin is asserting claims against Toyota for breach of contract, money had and
11 received, violation of California’s Business & Professions Code section 17200 (the
12 “UCL”), violation of California’s Consumer Legal Remedies Act (the “CLRA”), and
13 declaratory relief. The class period is based on the applicable statutes of limitations.

14 **c. The Colorado Subclass:** Plaintiff Mitchell is seeking to represent a
15 subclass of consumers who fit the definition of the Nationwide Class, but which is limited
16 to consumers who entered finance agreements with a Toyota GAP Waiver addendum in
17 the State of Colorado (the “Colorado Subclass”). On behalf of the Colorado Subclass,
18 Plaintiff Mitchell is asserting claims against Toyota for breach of contract and declaratory
19 relief. The class period is based on the applicable statutes of limitations.

20 **d. Statutory Refund Subclass.** Plaintiff Mitchell is seeking to represent
21 a subclass of consumers who fit the definition of the Nationwide Class, but which is
22 limited to those customers who entered GAP Waiver addendums in States which have
23 specific statutes or regulations (“Automatic Refund Laws”) requiring the assignee and
24 holder of the finance agreement (Toyota) to directly refund the unearned GAP fees upon
25 the early payoff of the finance agreement (the “Statutory Refund Subclass”). This
26 subclass includes consumers who entered Toyota GAP Waivers in the States of Alabama,
27 Colorado, Indiana, Iowa, Massachusetts, New Jersey, Oklahoma, Oregon, Texas,
28 Vermont, Wyoming and Wisconsin and whose early payoffs occurred while the

1 Automatic Refund Laws were in effect. On behalf of the Statutory Refund Subclass,
2 Plaintiffs are asserting claims against Toyota for breach of contract and declaratory relief.
3 The class period is based on the applicable statutes of limitations.

4 24. Excluded from the proposed Class and Subclasses are: (a) Defendant and its
5 agents, officers, directors, parent companies, subsidiaries, and affiliates; (b) counsel
6 representing Plaintiffs and any person employed by counsel; and (c) any judicial officers
7 assigned to this case and their staff.

8 25. Plaintiffs reserve the right to revise the definition of the Class and
9 Subclasses based upon subsequently discovered information.

10 26. **Numerosity:** While the exact numbers of the members of the Class and
11 Subclasses are unknown to Plaintiffs at this time, membership in the Class and Subclasses
12 may be ascertained from the records maintained by Toyota. At this time, Plaintiffs are
13 informed and believe that the Class includes hundreds of thousands of members and the
14 Subclasses includes tens of thousands of members. Therefore, the Class and Subclasses
15 are sufficiently numerous that joinder of all members of the Class and Subclasses in a
16 single action is impracticable under Rule 23(a)(1) of the Federal Rules of Civil
17 Procedure, and the resolution of their claims through a class action will be of benefit to
18 the parties and the Court.

19 27. **Ascertainability:** The names and addresses of the members of the Class and
20 Subclasses are contained in Toyota's records. Notice can be provided to the members of
21 the Class and Subclasses through direct mailing, email, publication, or otherwise using
22 techniques and a form of notice similar to those customarily used in consumer class
23 actions arising under State and Federal law.

24 28. **Common Facts:** Common facts exist as to all members of the Class and
25 Subclasses and predominate over any issues affecting individual members of the Class
26 and Subclasses. The common facts include the following:

27 a. Plaintiffs and the members of the Class and Subclasses entered into
28 finance agreements with GAP Waiver addendums.

1 b. The finance agreements and GAP Waiver addendums were standard
2 form contracts offered to customers on a take-it-or-leave-it basis.

3 c. The finance agreements and GAP Waiver addendums were purchased
4 by and assigned to Toyota.

5 d. Every finance agreement entered by Plaintiffs and the members of the
6 Class and Subclasses contained a provision stating that: “Any holder of this consumer
7 credit contract is subject to all claims and defenses which the debtor could assert against
8 the seller of goods or services obtained pursuant hereto or with the proceeds hereof.”

9 e. Toyota was the assignee and “holder” of every finance agreement and
10 GAP Waiver addendum entered by Plaintiffs and the members of the Class and
11 Subclasses.

12 f. The total purchase price for GAP coverage for the full term of the
13 finance agreement was listed as a separate line item on the first page of the finance
14 agreement and included in the “total amount financed.”

15 g. After the assignment to Toyota, Plaintiffs and the members of the
16 Class and Subclasses were required to make all payments under the finance agreements
17 to Toyota with interest, including, but not limited to, the monthly payment of GAP fees.

18 h. Toyota is responsible for preparing, drafting and/or approving the
19 terms and language in every GAP Wavier form.

20 i. Toyota, as the purchaser and assignee of the finance agreement, was
21 the “Creditor/Lessor” of every GAP Waiver form entered by Plaintiffs and the members
22 of the Class and Subclasses;

23 j. After the assignment, every reference in the GAP Waiver forms to
24 “We, Us or Our” refers to Toyota;

25 k. Every GAP Waiver form provides that customers have the right to
26 cancel the GAP Waiver at any time and to request a refund.

27 l. Every GAP Waiver addendum is automatically cancelled when the
28 finance agreement is paid off before the end of the contract term.

1 m. Every Toyota GAP Waiver form provides that if the GAP Waiver is
2 cancelled thirty-one (31) days or more from the contract start date, the customer will
3 receive a refund of a portion of the purchase price based on the elapsed time from the
4 Agreement Effective Date to the cancellation date.

5 n. Toyota and the auto finance industry refer to the unused portion of the
6 total GAP purchase price as “unearned fees” or “unearned GAP fees.”

7 o. Plaintiffs and the members of the Class and Subclasses paid off the
8 balances on their finance agreements early – i.e., before the end of the original contract
9 term.

10 p. Toyota received written notice that Plaintiffs and the members of the
11 Class and Subclasses paid off their finance agreements before the end of the original
12 contract terms and thereby cancelled their GAP Waiver addendums early, because
13 (1) these customers paid off their balances through checks, wires or electronic payments,
14 (2) Toyota recorded the pay-off date, in writing, in Toyota’s computer records and
15 (3) Toyota issued written confirmation letters confirming the finance agreements were
16 paid off before the end of the original contract terms.

17 q. Toyota possessed all of the information necessary to calculate the
18 unearned GAP fees when Plaintiffs and the members of the Class and Subclasses paid off
19 their finance agreements early, including (1) the method for calculating the refund (e.g.,
20 the pro-rata method), (2) the total purchase price for GAP coverage for the full term of
21 the contract, (3) the date of the early payoff and resulting cancellation of the agreement,
22 and (4) the amount of time remaining under the original contract term.

23 r. Rather than deduct the unearned GAP fees from the total payoff
24 amount, Toyota’s common policy and practice throughout the United States is to include
25 the unearned GAP fees in the total payoff amount quoted to customers when customers
26 seek to pay off their finance agreements early.

27
28

1 s. In conformance with its common policy and practice, Toyota included
2 the unearned GAP fees in the total payoff amount quoted to Plaintiffs and the members
3 of the Class and Subclasses.

4 t. In conformance with its common policy and practice, Toyota
5 collected the unearned GAP fees from Plaintiffs and the members of the Class and
6 Subclasses and did not issue a credit or refund of the unearned GAP fees.

7 u. Toyota’s common policies and practices with respect to GAP Waivers
8 are the same regardless of the language in the GAP Waiver forms. In other words, Toyota
9 treats all GAP Waiver forms as uniform in its business operations.

10 v. **Exhibits A, B and C** reflect the three versions of Toyota GAP Waiver
11 forms used by Toyota during the Class Period. Any other differences in the forms are
12 non-material.

13 w. In practice, Toyota regularly does not require customers to strictly
14 comply with any applicable notice provisions in the GAP Waiver forms, thereby
15 demonstrating that strict compliance is not required by the contracts.

16 x. After an early payoff, Toyota sends customers a standard payoff letter
17 confirming that the finance agreement has been “paid in full” and informing customers
18 that they “may be entitled to a refund” for their GAP Product and they should contact the
19 dealer or GAP provider/administrator to cancel the product. Toyota misleadingly
20 conceals and fails to disclose in its payoff letter that: (i) Toyota knows for a fact that the
21 customer is entitled to a refund of the unearned GAP fees; (ii) Toyota knows the exact
22 amount of the refund; (iii) Toyota knows that Toyota is the entity that is contractually
23 obligated to issue the credit or refund of the unearned GAP fees to the customer, not the
24 dealer; and (iv) Toyota is the provider/administrator of the GAP product for the Toyota
25 GAP forms.

26 y. Toyota contends that Plaintiffs and the members of the Class and
27 Subclasses have forfeited their right to a refund of unearned GAP fees by failing to strictly
28 comply with the GAP Waiver’s purported notice requirements.

1 29. **Common Questions of Law:** Common questions of law exist as to all
2 members of the Class and Subclasses and predominate over any issues solely affecting
3 individual members of the Class and Subclasses. The common questions of law include,
4 but are not limited to:

5 a. Whether the early payoff of the finance agreement automatically
6 cancels the GAP Waiver addendum.

7 b. Whether Toyota, as the assignee, owes a contractual obligation to the
8 customer to issue a credit or refund of unearned GAP fees when required under the GAP
9 Waiver addendums.

10 c. Whether Toyota, as the “holder” of the finance agreement and GAP
11 Waiver addendum is responsible for issuing the credit or refund of the unearned GAP
12 fees to the customer pursuant to the “holder rule” mandated by 16 C.F.R. § 433.2.

13 d. Whether Toyota was required to directly refund the unearned GAP
14 fees after the early payoff of the finance agreement pursuant to the following State
15 statutes and regulations: Alabama (Ala. Code 1975 § 8-37-6; Ala. Admin. Code r. 155-
16 2-2-.13); Colorado (4 Colo. Code Regs. § 902-1-8), Indiana (Ind. Code § 24-4.5-3-202;
17 Ind. D.F.I., GAP Program Approval, Standardized GAP Agreements, No. 14), Iowa (Ia.
18 St. § 537.2510), Massachusetts (Ma. St. 140D § 22, Mass Gen. Laws Ch. 255B § 16);
19 New Jersey (N.J. Stat. § 17:16BB-6(b)); Oklahoma (Ok. Admin. Code § 160:45-5-5);
20 Oregon (Or. Rev. Stat. § 50.646A), Texas (Tex. Admin. Cod § 83.812; Tex. Fin Code §
21 354.007), Vermont (8 V.S.A. § 10405(11)), Wisconsin (WSA § 218.0148); and
22 Wyoming (Wyo. Stat. § 40-14-454(a)).

23 e. Whether Toyota owes the interest that accrued on the unpaid refund
24 amounts.

25 f. Whether Toyota’s actual notice that the finance agreements have been
26 paid off early is sufficient to trigger Toyota’s credit and refund obligations under the
27 GAP Waivers.

28

1 g. Whether the payment of the final payoff amount constitutes written
2 notice to Toyota that the finance agreement has been paid off early thereby entitling
3 Plaintiffs and the members of the Class and Subclasses to a refund of their unearned GAP
4 fees.

5 h. Whether Toyota's records of the final payoff date and Toyota's
6 payoff confirmation letters constitute sufficient written notice to Toyota under any
7 applicable notice provision that the finance agreements have been paid off early thereby
8 entitling Plaintiffs and the members of the Class and Subclasses to a refund of their
9 unearned GAP fees.

10 i. Whether Plaintiffs and the members of the Class and Subclasses
11 "substantially complied" with any purported notice requirements in the GAP Waiver
12 addendums by providing notice to the party with the refund obligation (Toyota) that the
13 finance agreements have been paid off early.

14 j. Whether it would be unjust to conclude that Plaintiffs and the
15 members of the Class and Subclasses forfeited their right to a refund of the unearned
16 GAP fees as a result of technical deviations from the GAP Waiver's purported notice
17 requirements, especially where, as here, the party with the refund obligation (Toyota)
18 received actual notice.

19 k. Whether it would be unconscionable to conclude that Plaintiffs and
20 the members of the Class and Subclasses forfeited their right to a refund of the unearned
21 GAP fees as a result of technical deviations from the GAP Waiver's purported notice
22 provisions, especially where, as here, the party with the refund obligation (Toyota)
23 received actual notice.

24 l. Whether the knowledge of TMCC is imputed to TMIS, and vice-
25 versa.

26 m. Whether Toyota has received money which belongs to Plaintiffs and
27 the members of the Class and Subclasses and which in equity and good conscience should
28 be paid over to Plaintiffs and the members of the Class and Subclasses.

1 n. Whether a contractual provision, if any, requiring Plaintiffs and the
2 members of the Class and Subclasses to send a subsequent written notice that the finance
3 agreement has been paid off early as a condition precedent to the refund is enforceable,
4 when the party with the refund obligation (Toyota) already knows the finance agreement
5 has been paid off early.

6 o. Whether Toyota's interpretation of the notice provisions as a
7 condition precedent requiring strict compliance would result in a disproportionate
8 forfeiture of unearned GAP fees after an early payoff.

9 p. Whether Toyota's practice of including unearned GAP fees in the
10 early payoff amount quoted to customers is an unfair, fraudulent or unlawful business
11 practice under the UCL.

12 q. Whether Toyota's practice of denying its refund obligations is an
13 unfair, fraudulent or unlawful business practice under the UCL.

14 r. Whether Toyota's payoff confirmation letter is deceptive and
15 misleading in violation of the UCL.

16 s. Whether Toyota violated the CLRA because it represented to its
17 customers that they owed unearned GAP fees in the total payoff amount, even though
18 Toyota knew those fees were not earned and could never be earned as a result of the early
19 payoff.

20 t. Whether Toyota's interpretation of its notice provisions as a condition
21 precedent requiring strict compliance and a forfeiture of unearned GAP fees would be
22 unconscionable and violate the CLRA.

23 u. Whether Plaintiffs and the members of the Class and Subclasses are
24 entitled to damages and restitution in the amount of the unearned GAP fees, as well as
25 the accrued interest on those unpaid amounts.

26 v. Whether Plaintiffs and the members of the Class and Subclasses are
27 entitled to an award of reasonable attorneys' fees and costs.

28

1 w. Whether the Court should issue a public injunction requiring Toyota
2 to either: (1) refrain from including unearned GAP fees in the total payoff amount quoted
3 to customers; or (2) automatically refund those unearned fees back to the customer
4 promptly upon the early payoff of the finance agreement

5 30. **Typicality:** Plaintiffs' claims are typical of the claims of the members of
6 the Class and Subclasses. Plaintiffs have been subjected to the same wrongful business
7 practices and have been damaged in the same manner. Specifically, Toyota included
8 unearned GAP fees in the total payoff amount quoted to Plaintiffs and then proceeded to
9 collect those unearned GAP fees without issuing a credit or refund back to Plaintiffs, nor
10 pay interest on the delinquent amounts.

11 31. **Adequacy:** Plaintiffs will fairly and adequately represent and protect the
12 interests of the Class and Subclasses as required by Federal Rule of Civil Procedure Rule
13 23(a)(4). Plaintiffs are adequate representatives of the Class and Subclasses because they
14 do not have any interests which are adverse to the interests of the members of the Class
15 or Subclasses. Plaintiffs are committed to the vigorous prosecution of this action and, to
16 that end, Plaintiffs have retained counsel who are competent and experienced in handling
17 class action litigation on behalf of consumers.

18 32. Plaintiffs' interests are co-extensive with, and not antagonistic to, those of
19 the absent members of the Class and Subclasses. Plaintiffs will undertake to represent
20 and protect the interests of the absent members of the Class and Subclasses.

21 33. Plaintiffs have engaged the services of the undersigned counsel. Counsel is
22 experienced in complex consumer class action litigation, will adequately prosecute this
23 action, and will assert and protect the rights of, and otherwise represent, Plaintiffs and
24 the absent members of the Class and Subclasses.

25 34. **Superiority:** A class action is superior to all other available methods for the
26 fair and efficient adjudication of the claims asserted in this action under Rule 23(b)(3) of
27 the Federal Rules of Civil Procedure because: (a) the expense and burden of individual
28 litigation make it economically unfeasible for members of the Class and Subclasses to

1 40. A true and correct copy of Plaintiff Mitchell’s finance agreement and GAP
2 Waiver addendum is attached as **Exhibit B**.

3 41. The GAP Waiver addendums provide that Toyota will issue a credit or
4 refund of unearned GAP fees if the GAP Waiver is cancelled before the end of the
5 original contract term, so long as the creditor (Toyota) has not been required to waive
6 any GAP amounts under the agreement.

7 42. Plaintiffs and the members of the Class and Subclasses paid off the finance
8 agreements early (i.e., before the end of the original contract term), which resulted in the
9 automatic cancellation of the GAP Waiver addendum.

10 43. At the time of the early payoff, Toyota included the unearned GAP fees in
11 the total payoff amount quoted to Plaintiffs and the members of the Class and Subclasses.

12 44. Plaintiffs and the members of the Class and Subclasses paid the total payoff
13 amount to Toyota, including the unearned GAP fees.

14 45. Plaintiffs and the members of the Class and Subclasses provided written
15 notice to Toyota that they were cancelling the GAP Waiver by paying off the finance
16 agreement early (i.e., prior to the end of the original contract term).

17 46. Plaintiffs and the members of the Class and Subclasses actually and/or
18 substantially complied with all of their contractual obligations under the GAP Waiver
19 addendum, including but not limited to any purported written notice requirements.

20 47. In breach of the finance agreements and GAP Waiver addendums, Toyota
21 wrongfully collected the unearned GAP fees upon the early payoff of the finance
22 agreements and failed to refund those amounts to Plaintiffs and the members of the Class
23 and Subclasses as required under the GAP Waiver addendums.

24 48. Plaintiffs and the members of the Class and Subclasses were harmed,
25 suffered out-of-pocket loss, and did not receive the benefit of their bargains because
26 Toyota failed to issue a credit or refund of the unearned GAP fees after the early payoff
27 of the finance agreements and failed to pay the interest that accrued on those unpaid
28 amounts.

1 49. Toyota is liable to Plaintiffs and the members of the Class and Subclasses
2 for the damages they suffered as a direct result of Toyota's collection and failure to
3 promptly issue a credit or refund of the unearned GAP fees, as well as the interest that
4 accrued on those unpaid amounts.

5 50. Allowing Toyota to keep unearned money due to a purported failure to
6 strictly comply with the GAP Waiver's notice provisions would result in a
7 disproportionate forfeiture as described in Paragraph 11(f) above.

8 **SECOND CLAIM**
9 **BREACH OF CONTRACT IN STATUTORY REFUND STATES**
10 **(On Behalf of Plaintiff Lori Mitchell, the Colorado Subclass and the Statutory**
11 **Refund Subclass)**

11 51. Plaintiff Mitchell hereby repeats, realleges and incorporates by reference
12 each and every allegation contained above as though the same were fully set forth herein.

13 52. Plaintiff Mitchell brings this claim on behalf of herself and the members of
14 the Colorado Subclass and the Statutory Refund Subclass.

15 53. Plaintiff Mitchell and the members of the Colorado Subclass and the
16 Statutory Refund Subclass entered into finance agreements with GAP Waiver addendums
17 that were assigned to Toyota. These agreements were entered into in the States of
18 Alabama, Colorado, Indiana, Iowa, Massachusetts, New Jersey, Oklahoma, Oregon,
19 Texas, Vermont, Wisconsin and Wyoming.

20 54. A true and correct copy of Plaintiff Mitchell's finance agreement and GAP
21 Waiver addendum is attached as **Exhibit B**.

22 55. The GAP Waiver addendums provide that Toyota will issue a credit or
23 refund of unearned GAP fees if the GAP Waiver is cancelled before the end of the
24 original contract term.

25 56. Plaintiffs and the members of the Colorado Subclass and Statutory Refund
26 Subclass paid off the finance agreements early (i.e., before the end of the original contract
27 term), which resulted in the automatic cancellation of the GAP Waiver addendums.

28

1 57. At the time of the early payoff, Toyota included the unearned GAP fees in
2 the total payoff amount quoted to Plaintiff Mitchell and the members of the Colorado
3 Subclass and Statutory Refund Subclass.

4 58. Plaintiff Mitchell and the members of the Colorado Subclass and Statutory
5 Refund Subclass paid the total payoff amount to Toyota, including the unearned GAP
6 fees.

7 59. The following State statutes and regulations require Toyota, as the assignee
8 and creditor of the GAP Waiver addendums, to automatically issue a credit or refund of
9 unearned GAP fees upon the early payoff of the finance agreement: Alabama (Ala. Code
10 1975 § 8-37-6; Ala. Admin. Code r. 155-2-2-.13); Colorado (4 Colo. Code Regs. § 902-
11 1-8), Indiana (Ind. Code § 24-4.5-3-202; Ind. D.F.I., GAP Program Approval,
12 Standardized GAP Agreements., No. 14), Iowa (Ia. St. § 537.2510), Massachusetts (Ma.
13 St. 140D § 22, Mass Gen. Laws Ch. 255B § 16); New Jersey (N.J. Stat. § 17:16BB-
14 6(b)); Oklahoma (Ok. Admin. Code § 160:45-5-5); Oregon (Or. Rev. Stat. § 50.646A);
15 Texas (Tex. Admin. Cod § 83.812; Tex. Fin Code § 354.007), Vermont (8 V.S.A. §
16 10405(11)), Wisconsin (WSA § 218.0148) and Wyoming (Wyo. Stat. § 40-14-454(a)).

17 60. Plaintiff Mitchell and the members of the Colorado Subclass and Statutory
18 Refund Subclass actually and/or substantially complied with all of their contractual
19 obligations under the GAP Waiver addendums.

20 61. In breach of their legal and contractual obligations under the finance
21 agreements and GAP Waiver addendums and the aforementioned State laws and
22 regulations, Toyota wrongfully collected the unearned GAP fees upon the early payoff
23 of the finance agreements and failed to promptly issue a credit or refund of those amounts
24 to Plaintiff Mitchell and the members of the Colorado Subclass and Statutory Refund
25 Class

26 62. Plaintiff Mitchell and the members of the Colorado Subclass and Statutory
27 Refund Subclass were harmed, suffered out-of-pocket loss, and did not receive the
28 benefit of their bargains because Toyota failed to refund the unearned GAP fees after the

1 early payoff of the finance agreements and failed to pay the interest that accrued on those
2 unpaid amounts.

3 63. Toyota is liable to Plaintiffs and the members of the Colorado Subclass and
4 Statutory Refund Subclass for the damages they suffered as a direct result of Toyota’s
5 collection and failure to promptly issue a credit or refund of the unearned GAP fees, as
6 well as the interest that accrued on those unpaid amounts as required under the applicable
7 State laws and regulations.

8 **THIRD CLAIM**
9 **VIOLATION OF CALIFORNIA’S CONSUMER LEGAL REMEDIES ACT**
10 **(On Behalf of Plaintiff William Martin and the California Subclass)**

11 64. Plaintiff Martin hereby repeats, realleges and incorporates by reference each
12 and every allegation contained above as though the same were fully set forth herein.

13 65. Plaintiff Martin brings this claim for violations of California’s Consumer
14 Legal Remedies Act, California Civil Code section 1750 et seq. (the “CLRA”). This
15 claim is brought on behalf of himself and the members of the California Subclass.

16 66. The finance agreements and GAP Waiver addendums are consumer service
17 contracts covered by the CLRA.

18 67. California Civil Code section 1770(a), subdivision (14), prohibits a seller of
19 consumer goods or services from representing that a transaction confers or involves
20 rights, remedies or obligations that it does not have.

21 68. California Civil Code section 1770(a), subdivision (19), prohibits a seller of
22 consumer goods or services from inserting an unconscionable provision in a contract.

23 69. The GAP Waiver addendums are adhesion contracts.

24 70. Toyota violated California Civil Code section 1770(a), subdivision (14),
25 because it represented to its customers that they owed unearned GAP fees in the total
26 payoff amount, even though Toyota knew those fees were not earned and could never be
27 earned as a result of the early payoff.

28 71. Toyota violated California Civil Code section 1770(a), subdivision (19) by
including unconscionable provisions in its GAP Wavier forms. Any provision in the

1 GAP Waiver forms that purports to require customers to send a subsequent written notice
2 to Toyota, the dealer or any other party that the finance agreement has been paid off early
3 as a condition precedent to a credit or refund of unearned GAP fees is unfair,
4 unconscionable and unenforceable, because the party with the refund obligation (Toyota)
5 already knows the finance agreement has been paid off early. Consequently, any
6 provision that would result in a customer forfeiting the refund of unearned GAP fees in
7 these circumstances would be overly harsh, would unreasonably favor Toyota and is
8 unconscionable as a matter of fact and law.

9 72. Plaintiff Martin intends to finance cars in the future, including Toyota
10 vehicles, and enter into GAP Waiver agreements.

11 73. In light of this violation of the CLRA, Plaintiff Martin, on behalf of himself
12 and the members of the California Subclass, hereby seeks an order pursuant to the CLRA
13 enjoining Toyota from including unearned GAP fees in the total payoff amount quoted
14 to customers. Without such an order, there is a continuing threat to Plaintiff Martin and
15 the members of the California Subclass, as well as to members of the general public, that
16 Toyota will continue to improperly include unearned GAP fees in the total payoff amount
17 quoted to its customers. Absent an injunction, Plaintiff Martin and other California
18 Subclass Members will suffer an informational injury in that they will be unable to trust
19 or rely on the validity of the information contained in Toyota's total payoff amount
20 quotes. Although monetary relief in the form of restitution or damages may ultimately
21 remedy future collections of unearned GAP fees by Toyota, there is no adequate remedy
22 at law for the informational injury suffered as a result Toyota improperly including the
23 unearned GAP fees in the total payoff amount. In the absence of an injunction enjoining
24 Toyota from including unearned GAP fees in the total payoff amount quoted to
25 customers, Plaintiff Martin and members of the California Subclass will suffer an
26 irreparable informational injury.

27 74. Plaintiff Martin sent a CLRA Demand Letter via certified registered mail to
28 Toyota demanding, *inter alia*, that (a) Toyota no longer include unearned GAP fees in

1 the total payoff amount quoted to customers; (b) Toyota promptly issue a credit or refund
2 of the unearned GAP fees upon the early payoff of the finance agreement; (c) Toyota
3 issue a refund of the unearned GAP fees with accrued interest to all customers in
4 California who paid off their finance agreements early and did not receive a credit or
5 refund of the unearned GAP fees; and (d) Toyota no longer purport to require additional
6 written notice of the cancellation of the GAP Waiver addendum after an early payoff as
7 a purported condition precedent to a credit or refund of unearned GAP fees. Toyota failed
8 to implement the requested corrective measures.

9 75. Toyota is liable to Plaintiffs and the members of the Class for the damages
10 they suffered as a direct result of Toyota’s collection and failure to promptly issue a credit
11 or refund of the unearned GAP fees, as well as the interest that accrued on those unpaid
12 amounts.

13 76. Toyota acted with malice, oppression or fraud. Plaintiff Martin therefore
14 further seeks punitive damages under the CLRA.

15 **FOURTH CLAIM**
16 **VIOLATION OF CALIFORNIA’S UNFAIR COMPETITION LAW**
17 **(On Behalf of Plaintiff William Martin and the California Subclass)**

18 77. Plaintiff Martin hereby repeats, realleges and incorporates by reference each
19 and every allegation contained above as though the same were fully set forth herein.

20 78. Plaintiff Martin brings this claim for violation of California Business and
21 Professions Code section 17200 *et seq.* (the “UCL”) on behalf of himself and the
22 members of the California Unfair Business Practices Subclass.

23 79. The UCL prohibits acts of “unfair competition” including any unfair,
24 fraudulent or unlawful business practices.

25 80. Toyota violated the UCL by wrongly including the unearned GAP fees in
26 the total payoff amount, and Plaintiff Martin, in reliance on that representation, paid the
27 unearned GAP fees to Toyota. Toyota then wrongfully refused to acknowledge its refund
28 obligation and its liability under the UCL, CLRA and the FTC’s “holder rule” for such
amounts. It further actively concealed its refund obligation by sending a uniform payoff

1 letter misleadingly stating the customer “may” be entitled to a refund of a portion of their
2 GAP fees and they should contact the dealer or the product provider/administrator to
3 cancel the product. This payoff letter is deceptive and misleading because it fails to
4 disclose that: (i) Toyota knows for a fact that the customer is entitled to a refund of the
5 unearned GAP fees upon an early payoff; (ii) Toyota knows the exact amount of the
6 refund; (iii) Toyota knows that Toyota is the entity that is contractually and legally
7 obligated to issue the credit or refund of the unearned GAP fees to the customer, not the
8 dealer; and (iv) for Toyota’s own GAP Waiver forms, Toyota is the
9 provider/administrator of the GAP product. These practices are likely to and actually did
10 mislead Plaintiff Martin and other reasonable consumers into paying unearned GAP fees
11 to Toyota and failing to seek a refund of such fees from Toyota.

12 81. Toyota’s practice of including unearned GAP fees in the total payoff amount
13 quoted to customers and then collecting and failing to refund unearned GAP fees after
14 the early payoff of the finance agreement is an “unfair” business practice proscribed by
15 the UCL. There is no reasonable basis for Toyota including unearned GAP fees in the
16 total payoff amount quoted to customers and to then collect and fail to refund fees that
17 Toyota knows are not earned and will never be earned. Further, there is no legitimate
18 basis to require customers to send a subsequent written notice to Toyota or its agents that
19 the finance agreement has been paid off early as a condition precedent for the refund,
20 when the party with the refund obligation (Toyota) already knows the finance agreement
21 has been paid off early. This practice is substantially injurious to consumers and has
22 allowed Toyota to be unjustly enriched at the consumers’ expense. This substantial
23 injury is not outweighed by any countervailing benefits to customers or competition.

24 82. Toyota’s inclusion of unearned GAP fees in the total payoff amount quoted
25 is a “fraudulent” business practice under the UCL in that it is likely to deceive a
26 reasonable consumer and did in fact deceive Plaintiff Martin and the members of the
27 California Subclass, into paying money to Toyota that Toyota did not earn and could
28 never be earned. Toyota’s refusal to acknowledge its obligation to refund the unearned

1 GAP fees in its payoff letters, and its liability under the “holder rule” for such amounts,
2 is a “fraudulent” business practice under the UCL in that it is tantamount to an incorrect
3 and misleading assertion that no claims for refunds may be brought against Toyota.
4 Likewise, Toyota’s practice of misdirecting customers to contact the dealer about a
5 possible refund, when Toyota knows customers are, in fact, entitled to a refund of the
6 unearned GAP fees from Toyota when the finance agreement is paid off early, is a
7 “fraudulent” business practice under the UCL, because it is likely to deceive and deter a
8 reasonable consumer from seeking such refunds from Toyota.

9 83. Toyota’s practices described above are unlawful and, at a minimum, violate
10 California’s Consumer Legal Remedies Act (the “CLRA”) which prohibits Toyota from
11 representing that a transaction confers or involves rights, remedies and obligations that it
12 does not have and prohibits the inclusion of unconscionable terms in a consumer contract.

13 84. As a direct and proximate result of Toyota’s violations of the UCL, Plaintiff
14 Martin and each of the members of the California Subclass have been injured in fact and
15 suffered lost money or property in that Toyota collected and failed to refund their
16 unearned GAP fees after the early payoff of their finance agreements.

17 85. Pursuant to section 17203 of the UCL, Plaintiff Martin and the members of
18 California Subclass, are seeking restitution of all unearned GAP fees that Toyota failed
19 to refund after the early payoff of their finance agreements, with accrued interest on the
20 unpaid amounts. Plaintiff Martin seeks such restitution for violations of the UCL under
21 an alternative legal theory, not as an alternative remedy. That is, pursuant to Federal
22 Rule of Civil Procedure 8, Plaintiff Martin alleges alternatively and/or hypothetically,
23 that Toyota has engaged in unfair and fraudulent business practices in violation of the
24 UCL even if (a) the contracts of Plaintiff Martin and/or any members of the California
25 Subclass contain enforceable conditions precedent requiring written notice of
26 cancellation to Toyota as a “condition precedent” to a credit or refund of the unearned
27 GAP fees; (b) Plaintiff Martin and/or any members of the California Subclass did not
28

1 comply⁷ with such conditions precedent, and (c) Toyota has not violated the CLRA. In
2 that alternative and/or hypothetical world, Plaintiff Martin and the members of the
3 California Subclass have no adequate monetary remedy at law for Toyota’s violations of
4 the UCL.

5 86. With respect to any California Subclass members whose claims for
6 violations of the CLRA are barred by the CLRA’s 3-year statute of limitations but not by
7 the UCL’s 4-year statute of limitations, Plaintiff Martin further alleges, alternatively
8 and/or hypothetically that Toyota has violated the UCL even if (a) the contracts of any
9 such members of the California Subclass contain enforceable conditions precedent
10 requiring written notice of cancellation to Toyota as a “condition precedent” to a credit
11 or refund of the unearned GAP fees; and (b) any such members of the California Subclass
12 did not comply with such conditions precedent. In that alternative and/or hypothetical
13 world, Plaintiff and the members of the California Subclass have no adequate monetary
14 remedy at law for Toyota’s violations of the UCL.

15 87. Plaintiff Martin and the members of the California Subclass are further
16 seeking an order pursuant to the UCL enjoining Toyota from including unearned GAP
17 fees in the total payoff amount quoted to customers. Without such an order, there is a
18 continuing threat to Plaintiff Martin and the members of the California Subclass, as well
19 as to members of the general public, that Toyota will continue to improperly include
20 unearned GAP fees in the total payoff amount quoted to customers. Absent an injunction,
21 Plaintiff Martin and other California Subclass Members will suffer an informational
22 injury in that they will be unable to trust or rely on the validity of the information
23 contained in Toyota’s total payoff amount quotes. Although monetary relief in the form
24 of restitution or damages may ultimately remedy future collections of unearned GAP fees
25 by Toyota, there is no adequate remedy at law for that informational injury. In the
26 absence of an injunction enjoining Toyota from including unearned GAP fees in the total
27

28 ⁷ The phrase “comply” includes substantial compliance to the extent substantial
compliance is legally sufficient, as contended by Plaintiffs.

1 payoff amount quoted to customers, Plaintiff Martin and members of the California
2 Subclass will suffer an irreparable informational injury.

3 **FIFTH CLAIM**
4 **DECLARATORY RELIEF**
5 **(On Behalf of all Plaintiffs and the Class and Subclasses)**

6 88. Plaintiffs hereby repeat, reallege and incorporate by reference each and
7 every allegation contained above as though the same were fully set forth herein.

8 89. There exists a present controversy between the parties as to the following
9 issues:

10 a. Whether Toyota, as the assignee, owes a contractual obligation to the
11 customer under the GAP Waiver to refund unearned GAP fees when the finance
12 agreement has been paid off early.

13 b. Whether Toyota is required to pay interest on any unearned GAP fees
14 that it collects when the finance agreement has been paid off early and which it
15 subsequently fails to promptly refund.

16 c. Whether Toyota is legally required to refund the unearned GAP fees
17 it collects from customers who pay off their finance agreements early under the following
18 State statutes and regulations: Alabama (Ala. Code 1975 § 8-37-6; Ala. Admin. Code r.
19 155-2-2-.13); Colorado (4 Colo. Code Regs. § 902-1-8), Indiana (Ind. Code § 24-4.5-3-
20 202; Ind. D.F.I., GAP Program Approval, Standardized GAP Agreements, No. 14), Iowa
21 (Ia. St. § 537.2510), Massachusetts (Ma. St. 140D § 22, Mass Gen. Laws Ch. 255B § 16);
22 New Jersey (N.J. Stat. § 17:16BB-6(b)); Oklahoma (Ok. Admin. Code § 160:45-5-5);
23 Oregon (Or. Rev. Stat. § 50.646A), Texas (Tex. Admin. Cod § 83.812; Tex. Fin Code §
24 354.007); Vermont (8 V.S.A. § 10405(11)); Wisconsin (WSA § 218.0148); and
25 Wyoming (Wyo. Stat. § 40-14-454(a)).

26 d. Whether Toyota is legally required to pay interest on the unpaid
27 refund amounts under the following State statutes and regulations: Alabama (Ala. Code
28 1975 § 8-37-6; Ala. Admin. Code r. 155-2-2-.13); Colorado (4 Colo. Code Regs. § 902-
1-8), Indiana (Ind. Code § 24-4.5-3-202; Ind. D.F.I., GAP Program Approval,

1 Standardized GAP Agreements, No. 14), Iowa (Ia. St. § 537.2510), Massachusetts (Ma.
2 St. 140D § 22, Mass Gen. Laws Ch. 255B § 16); New Jersey (N.J. Stat. § 17:16BB-6(b));
3 Oklahoma (Ok. Admin. Code § 160:45-5-5); Oregon (Or. Rev. Stat. § 50.646A), Texas
4 (Tex. Admin. Cod § 83.812; Tex. Fin Code § 354.007); Vermont (8 V.S.A. § 10405(11));
5 Wisconsin (WSA § 218.0148); and Wyoming (Wyo. Stat. § 40-14-454(a)).

6 90. Plaintiffs and the members of the Class and Subclasses contend Toyota
7 owes these obligations.

8 91. Accordingly, Plaintiffs and the members of the Class and Subclasses hereby
9 request the Court issue an order declaring that:

10 a. Toyota, as the assignee, owes a contractual obligation to the customer
11 under the GAP Waiver to refund unearned GAP fees when the finance agreement has
12 been paid off early.

13 b. Toyota is required to pay interest on any unearned GAP fees that it
14 collects when the finance agreement has been paid off early and which it subsequently
15 fails to promptly refund.

16 c. Toyota is legally required to refund the unearned GAP fees it collects
17 from customers who pay off their finance agreements early under the following state
18 statutes and regulations: Alabama (Ala. Code 1975 § 8-37-6; Ala. Admin. Code r. 155-
19 2-2-.13); Colorado (4 Colo. Code Regs. § 902-1-8), Indiana (Ind. Code § 24-4.5-3-202;
20 Ind. D.F.I., GAP Program Approval, Standardized GAP Agreements, No. 14), Iowa (Ia.
21 St. § 537.2510), Massachusetts (Ma. St. 140D § 22, Mass Gen. Laws Ch. 255B § 16);
22 New Jersey (N.J. Stat. § 17:16BB-6(b)); Oregon (Or. Rev. Stat. § 50.646A); Oklahoma
23 (Ok. Admin. Code § 160:45-5-5); Texas (Tex. Admin. Cod § 83.812; Tex. Fin Code §
24 354.007); Vermont (8 V.S.A. § 10405(11)); Wisconsin (WSA § 218.0148); and
25 Wyoming (Wyo. Stat. § 40-14-454(a)).

26 d. Toyota is legally required to pay interest on the unpaid refund
27 amounts.

28

PRAYER FOR RELIEF

1
2 WHEREFORE, Plaintiffs request that this Court enter a judgment against Toyota
3 in favor of Plaintiffs and the members of the Class and Subclasses and award the
4 following relief:

5 1. An order certifying this lawsuit as a class action pursuant to Rule 23 of the
6 Federal Rules of Civil Procedure, appointing Plaintiffs as the representatives of the Class
7 and their respective Subclasses, and appointing Plaintiffs’ counsel as Class Counsel for
8 the Class and Subclasses;

9 2. An order declaring the following:

10 a. Toyota, as the assignee, owes a contractual obligation to the customer
11 under the GAP Waiver to refund unearned GAP fees when the finance
12 agreement has been paid off early.

13 b. Toyota is required to pay interest on any unearned GAP fees that it
14 collects when the finance agreement has been paid off early and which it
15 subsequently fails to promptly refund.

16 c. Toyota is legally required to refund the unearned GAP fees it collects
17 from customers who pay off their finance agreements early under the
18 following state statutes and regulations: Alabama (Ala. Code 1975 § 8-
19 37-6; Ala. Admin. Code r. 155-2-2-.13); Colorado (4 Colo. Code Regs.
20 § 902-1-8), Indiana (Ind. Code § 24-4.5-3-202; Ind. D.F.I., GAP Program
21 Approval, Standardized GAP Agreements, No. 14), Iowa (Ia. St. §
22 537.2510), Massachusetts (Ma. St. 140D § 22, Mass Gen. Laws Ch.
23 255B § 16); New Jersey (N.J. Stat. § 17:16BB-6(b)); Oklahoma (Ok.
24 Admin. Code § 160:45-5-5); Oregon (Or. Rev. Stat. § 50.646A), Texas
25 (Tex. Admin. Cod § 83.812; Tex. Fin Code § 354.007); Vermont (8
26 V.S.A. § 10405(11)); Wisconsin (WSA § 218.0148); and Wyoming
27 (Wyo. Stat. § 40-14-454(a)).
28

d. Toyota is legally required to pay interest on the unpaid refund amounts in the aforementioned States.

3. An award to Plaintiffs and the members of the Class and Subclasses of all appropriate relief, including actual damages, restitution and disgorgement of the unearned GAP fees;

4. Punitive damages;

5. An award of all costs for prosecuting the litigation, including expert fees;

6. An award of pre- and post-judgment interest;

7. An award of attorneys' fees; and

8. An order granting any such additional relief as this Court may deem just and proper.

Dated: June 10, 2022

FRANK SIMS & STOLPER LLP

/s/ Jason M. Frank

JASON M. FRANK, ESQ.
ANDREW STOLPER, ESQ
SCOTT H. SIMS, ESQ.

Attorneys for Plaintiffs

DEMAND FOR JURY TRIAL

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiffs hereby demand a trial by jury as to all claims in this action.

Dated: June 10, 2022

FRANK SIMS & STOLPER LLP

/s/ Jason M. Frank

JASON M. FRANK, ESQ.
ANDREW STOLPER, ESQ
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