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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

LILIA PERKINS, on behalf of herself and all others similarly situated,

Plaintiff,

v.

PHILIPS ORAL HEALTH CARE, INC., a Washington corporation; PHILIPS ELECTRONICS NORTH AMERICA CORPORATION, a Delaware corporation, and DOES 1 through 20, inclusive,

Defendants.

No. 12-CV-1414H (BGS)

MOTION OF TRUTH IN ADVERTISING, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN OPPOSITION TO PROPOSED SETTLEMENT

DATE: November 4, 2013
TIME: 10:30 a.m.
LOCATION: Court Room 15A

Hon. Marilyn Huff

MOTION OF TRUTH IN ADVERTISING, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN OPPOSITION TO PROPOSED SETTLEMENT

Truth in Advertising, Inc. (TINA) respectfully requests leave of the Court to file the attached *amicus curiae* brief in the above-captioned case in opposition to the proposed settlement. The basis for this motion is that the proposed amicus has a significant interest in this case that may be helpful to the Court in considering whether the proposed settlement is fair, just, and reasonable.

TINA is a 501(c)(3) nonprofit organization dedicated to protecting consumers nationwide from false and deceptive marketing. TINA aims to achieve its mission through education, advocacy, and the promotion of truth in advertising.

The attached amicus brief explains in detail why TINA opposes the proposed settlement, which consists entirely of vouchers. First, the brief explains why the vouchers in the proposed settlement do not provide Class Members with meaningful or adequate compensation. Second, the brief explains how the proposed settlement will reward the Philips defendants for their false and deceptive marketing and will not deter them from engaging in deceptive marketing in the future.

For these reasons, TINA moves to submit the attached brief in opposition to the proposed settlement as amicus curiae.

Dated: October 10, 2013

Respectfully,

By /s/ Earl L. Bohachek

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BRIEF OF *AMICUS CURIAE* TRUTH IN ADVERTISING, INC. IN OPPOSITION TO PROPOSED SETTLEMENT

DATE: November 4, 2013
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Hon. Marilyn Huff

INTRODUCTION

Plaintiffs filed this class action lawsuit against Philips Oral Health Care, Inc. and Philips Electronics North America Corporation (hereinafter "Philips") alleging that Philips falsely advertised its Sonicare AirFloss as an easy replacement for floss when, in reality, the product – an oral irrigator – cannot remove plaque between the teeth the same way that traditional floss can. The parties negotiated a settlement that consists entirely of vouchers, which has the effect of forcing Class Members to do more business with Philips if they are to receive any "benefit." The settlement does not provide Class Members with any cash refund or require Philips to change the manner in which it markets the Sonicare AirFloss. As such, the only party to the settlement receiving any meaningful benefit is Philips.[1] Accordingly, Truth in Advertising, Inc., a national consumer advocacy organization devoted to protecting consumers from false and deceptive advertising, respectfully opposes the terms of the proposed settlement reached between the parties in the above-referenced class action.

INTEREST OF *AMICUS CURIAE*

Truth in Advertising, Inc. (TINA) is a 501(c)(3) nonprofit that was launched at the beginning of this year with a mission of being the national go-to online resource dedicated to empowering consumers to protect themselves and one another against false advertising and deceptive marketing. TINA aims to achieve this mission through education, advocacy, and the promotion of truth in advertising.

To further its mission, TINA's Legal Department performs in-depth investigations and files complaint letters with federal and state government agencies, among others, urging them to take action to put an end to various companies' deceptive marketing.

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[1] The proposed settlement also provides for attorneys' fees "not to exceed a total of $114,500.00." Stipulation of Class Action Settlement, 14-6 and 26, May 28, 2013.

ARGUMENT

As alleged in the complaint, Philips markets its Sonicare AirFloss as an easy way to clean and remove plaque between the teeth. Based on these representations, the Class Members spent in excess of $100 in order to purchase the product. (First Amended Compl. ¶¶ 21-22, 63). Unfortunately for these consumers, oral irrigators, such as the Sonicare AirFloss, simply direct a stream of water to remove particles of food from around and between the teeth. They do not remove plaque between the teeth and are not a substitute for flossing. The Journal of the American Dental Association, JADA, Vol. 133, Page 1587, Nov. 2002, available at http://www.ada.org/sections/scienceAndResearch/pdfs/patient_20.pdf (attached hereto as Exhibit A). Thus, these consumers, who purchased Sonicare AirFloss, have been damaged as a result of Philips' actions.

The proposed settlement, however, only provides nominal vouchers to the Class Members, which presents two significant problems: (1) the settlement does not provide any meaningful benefit to the Class Members; and (2) the true beneficiary of this settlement is the defendant because Philips is not required to disgorge any of its ill-gotten gains; Philips is not enjoined from making the false marketing claims at issue; and Philips will reap the benefit of requiring Class Members to give it more business. *See Synfuel Tech., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006) and *Figuera v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1302 (S.D. Fla. 2007), both citing Christopher R. Leslie, "The Need to Study Coupon Settlements in Class Action Litigation," 18 Geo. J. Legal Ethics 1395, 1396-97 (2005) (Coupon settlements "do not provide meaningful compensation to class members; they often fail to disgorge ill-gotten gains from the defendant; and they often require class members to do future business with the defendant in order to receive compensation.")

The Proposed Settlement Does Not Provide Meaningful Compensation to Class Members

Despite having purchased an expensive product under the false impression that it could replace flossing, Class Members will not receive any cash refunds if the proposed settlement is approved. Rather, Class Members will receive a voucher for $7, $23, or $33 (depending on the number of products their household purchased and whether they have proof of their purchases) that they can use to purchase more Philips products. Stipulation of Class Action Settlement 9, 14-6, May 28, 2013.

These coupons do not provide the Class Members with any meaningful or adequate compensation. *See In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 806-7 (3d Cir. 1995) (holding that the district court erred in approving the coupon settlement because it "ignored the fact that the coupons provided no cash value and made no provision for repairing the [alleged wrongdoing]," and therefore the settlement was not within the range of reasonableness); *Galloway v. The Kansas City Landsmen, LLC*, 2012 U.S. Dist. LEXIS 147148, at *20 (W.D. Mo. 2012)[2] (denying approval of a proposed coupon settlement finding that the settlement did not "provide the class with reasonable value for their claims."); *Wilson v. DirectBuy, Inc., et al.*, 2011 U.S. Dist. LEXIS 51874, at *23-24 (D. Conn. 2011) (denying motion for settlement approval and noting that coupon settlements provide little or no value to class members); *Sobel et al. v. Hertz Corp. et al.*, 2011 U.S. Dist. LEXIS 68984, at *41 (D. Nev. 2011) (denying motion for approval of coupon settlement, stating that "there is no basis upon which the court might find that this settlement produces 'real value' for the class"); *True et al. v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1069 (C.D. Cal. Feb. 26, 2010) (denying motion for settlement approval and noting that coupon settlements are "generally disfavored"); *Figuera,* at 1327 (denying the parties'

[2] All unreported decisions are collectively attached hereto in alphabetical order as Exhibit B.

request for approval of settlement, stating that the proposed coupon settlement could not be considered fair); *Kearns v. Ford Motor Co.*, 2005 U.S. Dist. LEXIS 41614, at *3, fn. 1 (C.D. Cal. Nov. 18, 2005) ("'[C]oupon settlements' ... produce hardly any tangible benefits for the members of the plaintiff class..."); *Schlesinger et al. v. Ticketmaster*, No. BC304565, at 19 (Super. Ct. of Cal., County of Los Angeles, Sept. 26,1012) (denying motion for approval of coupon settlement, stating that the Court was "not convinced that the settlement imposes a significant benefit on the class").

Specifically, Class Members, who are the victims of deceptive marketing, will not receive any compensation whatsoever from the settlement unless they purchase another product from Philips. *See Schlesinger*, at 20 (noting that "[i]f the classmember does not use Ticketmaster again, he or she will get no benefit from the instant settlement").

To make matters worse, the de minimis value of the already small vouchers is significantly decreased by the fact that they will come with a time restriction – Class Members must use their vouchers within one year. *Galloway*, at *17 (noting that restrictions on use diminish the value of a coupon); *see also In re HP Inkjet Printer Litigation*, 716 F.3d 1173, 1179 (9th Cir. 2013) ("Unlike a cash settlement, coupon settlements involve variables that make their value difficult to appraise, such as redemption rates and restrictions.") Therefore, if the Class Members do not purchase any Philips products within 12 months, they will not receive any compensation from the settlement. *See* Stipulation of Class Action Settlement, 15, May 28, 2013.

Moreover, as Philips is surely aware, the likelihood that the Class Members will lose out entirely on receiving any compensation from the settlement either because they chose not to do business with Philips again or simply fail to redeem their voucher within the allotted time is extremely high. In fact, the Central District of California in *True v. Am. Honda Motor Co.* cited a redemption rate of less

than two percent in such coupon settlements. *True,* at 1074-75, citing *White v. Gen. Motors Corp.,* 835 So. 2d 892, 896-97 (La. Ct. App. 2002) (less than 1.7% of class redeemed coupons); Goldberg Obj., Ditlow Decl. P 9, Att. A (settlement report from *Gray v. Ford Motor Co.,* Sacramento Co. Sup. Ct. Case No. 03AS0391, June 26, 2009) (approximately .0075% of class redeemed coupons). *See also* Steven B. Hantler and Robert E. Norton, *Coupon Settlements: The Emperor's Clothes of Class Actions,* http://www.ftc.gov/bcp/workshops/classaction/writ_materials/hantler.pdf (attached hereto as Exhibit C) (noting that in one case, *Buchet et al. v. ITT Financial Corp. et al.*, only two out of 96,754 coupons were redeemed, resulting in a 0.002 percent redemption rate); The Associated Press, *Ford-Explorer Settlement Stresses the Shortfalls of Class Actions*, *CBC NEWS* (Aug. 3, 2009 11:57 AM), www.cbc.ca/news/ford-explorer-settlement-stresses-shortfalls-of-class-actions-1.802995 (attached hereto as Exhibit D) (noting that in one case, only 75 coupons out of approximately 1 million offered were ever used, for a redemption rate of 0.000075 percent); Ashby Jones, *The Ford Rollover Litigation: The Scoop On the Coupons,* *THE WALL STREET JOURNAL* (Aug. 3, 2009), http://blogs.wsj.com/law/2009/08/03/the-ford-rollover-litigation-the-scoop-on-the-coupons/ (attached hereto as Exhibit E) (same); Judge Thomas A. Dickerson and Brenda V. Mechmann, *Consumer Class Actions and Coupon Settlements: Are Consumers Being Shortchanged?*, http://www.classactionlitigation.com/library/dcoupon.html (attached hereto as Exhibit F) (noting that in one case, only 150 class members out of approximately 500,000 claimed coupons offered as part of a class action settlement, for a redemption rate of 0.0003 percent); John Markoff, *Intel Settles Suit by Offering Rebates to Some Customers*, NEW YORK TIMES (July 21, 1997), www.nytimes.com/1997/07/21/business/intel-settles-suit-by-offering-rebates-to-some-customers.html (attached hereto as Exhibit G) (same).

These low redemption rates are likely to be repeated here, where aggrieved consumers who have been deceived by Philips will not want to purchase more

products from the company. *See True,* at 1074 ("The class includes persons who believe they were mislead about the fuel economy of their vehicle or were otherwise disappointed in the car they bought. Some class members undoubtedly will purchase another Honda..., but it appears unlikely that aggrieved HCH owners or lessees will make repeat Honda purchases at the same rate as Honda customers in general.").

For all these reasons, the proposed settlement will not provide Class Members with any meaningful or adequate compensation.

The Proposed Settlement Effectively Rewards Philips for Its Deceptive Marketing

If the proposed settlement is approved, the true beneficiary will be Philips. First, the settlement allows the company to keep the profits it made from selling the deceptively marketed Sonicare AirFloss. Providing vouchers to Class Members does not have the same effect on Philips as paying out cash. *See Sobel,* at 19 ("[T]he coupons are less costly than cash to the Defendants.); *Wilson,* at *24 ("As with most in-kind benefits, the dollar amount ascribed to the benefit does not represent its actual cost to [the defendant]").

Second, because the vouchers require class members to do future business with Philips in order to receive any compensation, the result will be increased sales and brand loyalty to Philips. *See Synfuel Tech.* (7th Cir. 2006) at 654 (noting that coupons require the claimants to return to the defendant to do business with him); *Menasha Corp. v. News Am. Marketing In-Store, Inc.,* 354 F.3d 661, 662 (7th Cir. 2004) ("Coupons promote sales without lowering the price to everyone (that is, holding a 'sale')"); *In re GMC* (3d Cir. 1995) at 808 ("[R]ather than providing substantial value to the class, the certificate settlement might be little more than a sales promotion for [the defendant]..."); *Wilson* (D. Conn. 2011) at *24 (stating that the proposed coupon settlement "might well result in an increase in [defendant]'s membership base"); *True* (C.D. Cal. 2010) at 1075 ("For each class member who

purchases another [of defendant's products] who would not have done so without the settlement rebate, [the defendant] will experience a net benefit."); *Figuera* (S.D. Fla. 2007) at 1327 ("Rather than resulting in Defendant disgorging any wrongfully obtained gains, the result will likely be increased sales of Defendant's products to class members or any third-parties who may wish to purchase the $19 coupons from class members."); *Schlesinger* (Super. Ct. Cal. 2012) at 19 ("In the Court's opinion, this [coupon] settlement represents a windfall for [defendant]").

Third and finally, the proposed settlement does not enjoin Philips from making the false advertising claims at issue or any other similarly deceptive marketing claims. *Schlesinger,* at 25 ("[T]here is also no injunctive relief provided in the settlement. While this is not a deal-breaker..., it is notable because there is no mechanism by which to deter the allegedly unlawful conduct of [defendant]..."). Accordingly, there is absolutely no reason for Philips to change the deceptive manner in which it markets the Sonicare AirFloss, thereby potentially harming more consumers.[3]

CONCLUSION

In sum, the proposed settlement is neither fair, just, nor reasonable. It is wholly lacking any real benefit to the Class Members and will have no deterrent effect on Philips. In fact, the only change that will result from the proposed settlement is an increase in sales for the company that falsely marketed its product. For all these reasons, we respectfully urge this Court to deny approval of the proposed settlement.

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[3] Philips is still currently marketing the Sonicare AirFloss as a replacement for floss. *See, e.g.*, "The Science Behind Sonicare AirFloss," available at http://www.sonicare.com/professional/en_us/pdf/AirFloss_Clinical_Study_Booklet.pdf (last checked on October 8, 2013), attached hereto as Exhibit H ("Sonicare AirFloss replaces traditional flossing with micro bursts of water and air."); Our Products – AirFloss, available at http://www.sonicare.com/professional/en_us/OurProducts/AirFloss.aspx (last checked on October 8, 2013), attached hereto as Exhibit I ("With Sonicare AirFloss, interdental cleaning has just been reinvented.")

Dated: October 10, 2013

Respectfully,

By /s/ Earl L. Bohachek

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LIST OF EXHIBITS

Exhibit I	104-105	Our Products – AirFloss, available at http://www.sonicare.com/professional/en_us/OurProducts/AirFloss.aspx

EXHIBIT A

Buying oral care products

Maintaining a healthy smile begins at home. Besides regular dental checkups, spending a few minutes caring for your teeth and gums each day can help keep your smile healthy.

Among today's plaque-busting artillery is an assortment of toothbrushes (powered and manual), as well as toothpaste, floss, interdental cleaners, oral irrigators and more. When buying oral care products, how do you know which ones are right for you? Even savvy shoppers sometimes are baffled by the seemingly endless variety of dental care products.

First, ask your dentist or dental hygienist for a recommendation. They may suggest a particular type of product or brand or give you an opinion about the products you currently use.

Next, look for products that display the American Dental Association's Seal of Acceptance. For more than 125 years, the ADA has sought to ensure the safety and effectiveness of dental products. The Seal is an assurance that the product has met ADA criteria for safety and effectiveness. The labels and advertising for products awarded the Seal also must present true and accurate information.

TOOTHBRUSHES

When selecting a toothbrush, look for one that is comfortable to hold and fits your mouth. The ADA says that manual toothbrushes can be just as effective as powered toothbrushes. People whose motor skills are impaired, such as people with arthritis, may find powered toothbrushes helpful. Toothbrushes should be replaced every three to four months, or sooner if the bristles become frayed. Toothbrushes with frayed bristles will not clean teeth effectively.

TOOTHPASTES

All toothpastes awarded the ADA Seal of Acceptance contain fluoride to help prevent tooth decay. Today you can buy toothpaste in a pump or a tube, in paste or gel form, for children or adults. You can buy toothpaste with special ingredients for controlling tartar or sensitivity or for whitening teeth.

DENTAL FLOSS

A toothbrush can't reach all of the spots in which plaque collects. Dental floss is needed to remove the plaque and debris that collect between the teeth and under the gumline. Waxed and unwaxed dental floss both are effective. Waxed floss may be easier to use if your teeth are tightly spaced. If you find it difficult to manipulate long strands of floss, consider using a special floss holder.

INTERDENTAL CLEANING AIDS

Another way to remove plaque is with an interdental cleaning aid. These products include special picks or sticks. People who have trouble handling dental floss may find it easier to use interdental cleaners. Discuss the proper use of these cleaning aids with your dentist and follow instructions to avoid injuring your gums.

ORAL IRRIGATORS

These devices direct a stream of water to remove particles of food from around and between the teeth. They may be helpful to people with braces or fixed partial dentures. They are useful for cleaning hard-to-reach areas and may help reduce gingivitis. However, using an oral irrigator is not a substitute for brushing and flossing.

MOUTHRINSES

Mouthwashes generally are used for cosmetic reasons; they temporarily freshen breath or "sweeten" the mouth. Although they can aid in removing food particles, their primary purpose is to mask mouth odor. Nonprescription fluoride mouthrinses, which have received the ADA Seal of Acceptance, can be effective tools in preventing tooth decay. Your dentist may recommend using an antiplaque or antigingivitis mouthrinse to control plaque or prevent gum disease.

FOR MORE INFORMATION

For more information on products with the American Dental Association's Seal of Acceptance, visit "www.ada.org". ■

"For the Dental Patient" provides general information on dental treatments to dental patients. It is designed to prompt discussion between dentist and patient about treatment options and does not substitute for the dentist's professional assessment based on the individual patient's needs and desires.

EXHIBIT B

1 of 1 DOCUMENT

Galloway v. Kan. City Landsmen,LLC

Case No. 4:11-1020-CV-W-DGK

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

2012 U.S. Dist. LEXIS 147148

October 12, 2012, Decided
October 12, 2012, Filed

SUBSEQUENT HISTORY: Later proceeding at Galloway v. Kansas City Landsmen, LLC, 2013 U.S. Dist. LEXIS 92650 (W.D. Mo., July 2, 2013)

COUNSEL: [*1] For John T Galloway, individually and on behalf of a class, Plaintiff: Brian J Christensen, Lindsay Todd Perkins, LEAD ATTORNEYS, Spencer, Fane, Britt & Browne, OPKS, Overland Park, KS; Bryant T. Lamer, Spencer Fane Britt & Browne LLP-KCMO, Kansas City, MO.

For The Kansas City Landsmen, L.L.C., doing business as Budget Rent A Car, Defendant: Ryan C. Fowler, Thomas R. Pickert, LEAD ATTORNEYS, Logan Logan & Watson, LLP, Prairie Village, KS; Scott K. Logan, LEAD ATTORNEY, Logan Logan & Watson, LC, Prairie Village, KS; Barry Golden, PRO HAC VICE, Rachel Kingrey, PRO HAC VICE, Ronald M. Gaswirth, PRO HAC VICE, Gardere Wynne Sewell, LLP, Dallas, TX.

JUDGES: GREG KAYS, UNITED STATES DISTRICT JUDGE.

OPINION BY: GREG KAYS, JUDGE

OPINION

ORDER DENYING APPROVAL OF PROPOSED CLASS SETTLEMENT

This case is a putative class action in which Plaintiff John Galloway is suing Defendants, twenty-one Budget brand rental car businesses, for violating the Fair and Accurate Credit Transactions Act ("FACTA"), 15 U.S.C. § 1681. Now before the Court is the parties' "Unopposed Motion for (1) Conditional Class Certification; (2) Appointment of Class Representative; (3) Appointment of Class Counsel; (4) Preliminary Approval of Class Action Settlement **[*2]** and Notice to Class; and (5) Setting of Final Approval Hearing" (Doc. 36). In short, the parties are requesting Court approval of their proposed Stipulation and Settlement Agreement ("the Settlement").

After carefully reviewing the motion and the parties' Suggestions in Support, the Court has no objection to conditional certification of a class for settlement purposes and no objection to appointing Galloway as class representative or Galloway's counsel as class counsel. With respect to the Settlement, the Court finds portions of it are fair and reasonable but has questions about some provisions and strong reservations about others. The Court

is particularly concerned that the Settlement will not provide the class members with adequate notice of this lawsuit or sufficient compensation for their claims. The Court concludes that the interests of the class members are not better served by the Settlement than by continued litigation, and so declines to grant preliminary approval or set a date for a final approval hearing.

The parties seek approval of all five elements of the motion as a package and so the Court cannot grant the motion in part. Because the Court declines to approve the Settlement **[*3]** as currently written, the motion is DENIED.

Standard

1. Standard governing class certification

Rule 23 governs class certification. A party seeking class certification must satisfy all of the requirements of Rule 23(a) and at least one of the requirements of Rule 23(b). The decision whether or not to certify a class is not a reflection of the merits of the case. *Elizabeth M. v. Montenez*, 458 F.3d 779, 786 (8th Cir. 2006).

Under Rule 23(a) class certification is appropriate when "(1) the class is so numerous that joinder of all members is impracticable . . . (2) there are questions of law or fact common to the class . . . (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). These requirements are typically summarized as numerosity, commonality, typicality and adequacy. *In re Constar Int'l Inc. Sec. Litig.*, 585 F.3d 774, 780 (3d Cir. 2009).

Under Rule 23(b), a party seeking class certification must also show that,

> (1) prosecuting separate actions by or against individual class members would create a risk of:
>
> > (A) inconsistent **[*4]** or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
> >
> > (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
> > (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> >
> > (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> >
> > (C) the desirability **[*5]** or undesirability of concentrating the litigation of the claims in the particular forum; and
> >
> > (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3).

In addition to these explicit requirements, Rule 23 implicitly requires that a class exist, that the proposed representative be a member of the class, and that the proposed class be "ascertainable or identifiable" and "administratively manageable." *Dumas v. Albers Med., Inc.*, No. 03-0640-CV-W-GAF, 2005 U.S. Dist. LEXIS 33482, 2005 WL 2172030, at *5 n.7 (W.D. Mo. Sept. 7, 2005); *see also In re Paxil Litig.*, 212 F.R.D. 539, 546 (C.D. Calif. 2003) (holding that certification is not appropriate where proposed representatives "have not met their burden of defining proper classes" due to an inability of class members to be determined until late in the litigation).

Finally, the party seeking class certification bears the burden of showing that all of the requirements of class certification have been met. *Perez-Benites v. Candy Brand, LLC*, 267 F.R.D. 242, 246 (W.D. Ark. 2010).

2. Standard governing settlement approval

Under Rule 23(e) a court must review any "settlement, voluntary dismissal, or compromise" of the "claims, issues, or defenses of a certified **[*6]** class." Fed. R. Civ. P. 23(e). The court is responsible for determining that the settlement terms are fair, adequate, and reasonable, and the court must also act as a fiduciary "serving as a guardian of the rights of class members." *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir. 2005). In determining whether a settlement is fair, adequate, and reasonable, the court must consider four factors: (1) the merits of the plaintiff's case, weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement. *Id.* "The most important consideration . . . is 'the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement.'" *Id.* at 933 (quoting *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1150 (8th Cir. 1999)). Ultimately, the court must determine whether the interests of the class are better served by settlement than by further litigation. *In re Wireless*, 396 F.3d at 932.

Background

Congress enacted FACTA as an amendment to the Fair Credit Reporting Act with the goal of decreasing identify theft. In relevant **[*7]** part, FACTA mandates that, "No person that accepts credit cards or debit cards for the transaction of business shall print more than the last five digits of the credit card number or the expiration date upon any receipt provided to the cardholder at the point of sale or transaction." 15 U.S.C. § 1681c(g). The purpose of this truncation requirement is to prevent "dumpster divers" from recovering discarded receipts which contain consumers complete credit or debit card numbers. To encourage compliance, the statute provides for the award of civil damages between $100 and $1,000 for each "willful" violation. 15 U.S.C. § 1681n. The definition of "willful" includes not only knowing violations but acts done with "reckless disregard" of the law. *Safeco Ins. Co. v. Burr*, 551 U.S. 47, 57-58, 127 S. Ct. 2201, 167 L. Ed. 2d 1045 (2007). Recklessness entails "an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Id.* at 68. A negligent violation is also actionable, but damages for negligent violations are limited to actual damages and attorneys' fees. 15 U.S.C. § 1681o.

The Amended Complaint alleges Defendants *willfully* violated FACTA by failing to truncate credit and debit card numbers and expiration **[*8]** dates on electronically printed receipts. Am. Compl. (Doc. 32) at ¶¶ 60, 65. It specifically alleges Defendants knew of their duty to truncate the expiration date and card numbers; that the FTC specifically alerted businesses about the requirement; that all of the credit card companies explicitly instructed merchants on the law's requirements; and that Defendants received multiple notices regarding the truncation requirement and its importance for preventing identity theft. Am. Compl. at ¶¶ 43-49, 57, 60, 63-65. Galloway has not pled a cause of action for negligence, thus if he cannot prove the Defendants acted willfully, the class cannot prevail.

The parties agree that Defendants are now complying with the law. After the lawsuit was filed, but before any settlement was reached, Defendants installed software at their stores which mask all credit or debit card numbers except the last four digits. The parties agree, at least for settlement purposes, that Defendants electronically printed approximately 1.3 million receipts that did not comply with FACTA for approximately 770,000 individuals. Sugg. In Supp. (Doc. 37) at 5. The parties also agree that there is no litigation currently pending **[*9]** involving similar claims against the Defendants. Sugg. in Supp. at 11.

The parties disagree about the merits of this lawsuit or Plaintiffs' likelihood of success, including whether each class member is a "consumer" under the statute, whether the violations were willful, and whether a statutory damage award of $130 million to $1.3 billion would be constitutional. Sugg. in Supp. at 17. Also relevant to the Court's analysis, Defendants have submitted an affidavit suggesting that a Plaintiffs' verdict on even the low end of the damages spectrum would result in Defendants' "financial destruction." Sugg. in Supp. at 16, Aff. (Doc. 37-4) at ¶¶ 13-14.

Summary of the Proposed Settlement

1. Class definition

The parties propose defining the settlement class as,

> All individuals who, on or after December 4, 2006 and on or before October 7, 2011, used any debit or credit card at any of Budget's rental locations where Budget provided or facilitated the provision of an electronically printed receipt at the point of sale or transaction that contained the credit or debit card's expiration date and/or more than the last four digits of the credit or debit card number.

Settlement (Doc. 37-5) at ¶ 1(h). Exactly **[*10]** which Budget rental locations are covered by the Settlement is somewhat unclear. Neither the Settlement nor the proposed notice identifies the locations, but the parties have attached a list of covered locations as an exhibit to the Settlement. Ex. 1 to App. I.

2. Benefits provided by the Settlement

The proposed Settlement is a "claims made" settlement. With the exception of the named plaintiff, who will receive a $3,000 cash payment, the Settlement provides relief only to eligible class members who fill out paperwork and submit a valid claim.

Each class member who submits a valid claim will receive a coupon (also called a "certificate" in the Settlement) redeemable for $5.00 off any car rental or

$25.00 off of any car rental exceeding $150.00, excluding taxes and fees. Class members receive one coupon for each violation, up to a maximum of four. There is no cap on the total number of coupons Defendants will provide to the class. A coupon is transferrable but comes with a number of restrictions on its use. It cannot be used in conjunction with any other gift certificate, voucher, coupon, or price discount; it is not redeemable for cash; it must be used within 120 days from the date it **[*11]** is issued; and only one coupon can be used per rental. The long-form notice states, "[t]here are additional restrictions as well." Settlement Ex. D. The coupons themselves list restrictions which are not set forth in the settlement agreement. A sample coupon states it "may not be available during holiday and other blackout periods. Blackout dates include New Year's Day, Martin Luther King, Jr. Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day. Call specific location for details." Settlement Ex. A.

Under the Settlement, Defendants will pay all administrative costs of the settlement, estimated to be $45,000, as well as Plaintiffs' counsel's attorneys' fees, expenses and costs up to $175,000. [1] Defendants also agree to the entry of a court order requiring them to comply with FACTA at all of their rental locations.

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1 Defendants have also agreed not to contest the reasonableness of Plaintiffs' attorneys' fees, expenses, and costs up to $175,000.

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3. Class notification

The parties propose that the class members be notified of the lawsuit and settlement by newspaper publication, a posting at the covered rental locations, and a website. **[*12]** The Settlement does not provide for direct notification. The Settlement provides that "the Court may order additional notice as well, and Budget will comply with such order." But if any change is a material change, Budget may terminate the agreement. Settlement ¶¶ 1(m), 10(c)(ii)-(iii), 14.

The newspaper notification consists of a short notice, set out in exhibit C, published in the following seven regional newspapers: The Atlanta Journal-Constitution, Birmingham News, The Kansas City Star, The Commercial Appeal, Omaha World Herald, The Salt Lake Tribune, and The Wichita Eagle. Settlement at ¶ 10(c)(ii). The notice will be published once on a weekday. Defendants will also post a short notice at each of their rental locations "in a conspicuous place." What constitutes a "conspicuous place" is undefined. A comprehensive notice, set out in exhibit D, will be posted on a website created by the claims administrator.

The notice does not clearly indicate who is an eligible class member. The publication class notice states that "Whether you are a class member will depend, in part, on the Budget location where you made your purchase. For a list of eligible locations, log onto [the class web site]." **[*13]** It appears the parties have attached a list of covered locations as an exhibit (Doc. 37-5 at 77). The long form notice does not include any such language (Doc. 37-5 at 55).

4. The claims process

Defendants will provide a coupon to every class member who "shows that he or she made a credit/debit card transaction at one of Defendants' retail locations during the Class Period" (Doc. 37 at 14.) It is unclear what proof class members will have to submit to prove they have a valid claim. The proposed publication class notice states, "Class members will be required to attest to the accuracy of the information set forth in any submitted claim form and may require further information before the award of a Certificate." Settlement Ex. C.

5. Opt out provision

To opt out of the settlement and avoid being bound by the settlement, a class member must submit an exclusion form provided on the website to both Plaintiffs' counsel and Defense counsel. The opt-out form requests minimal information, but it must be both emailed *and* either sent by first class mail or hand-delivered. The settlement does not contain any provision that allows Defendants to withdraw from the settlement if a certain number of class **[*14]** members decide to opt out. Settlement ¶¶ 1(m), 21.

Discussion

At the outset, the Court commends the parties for their efforts to reach an amicable resolution to this dispute so early in the litigation. The Court has no concerns about much of what the parties propose: The Court has no objection to appointing Galloway as class representative or Plaintiff's counsel as class counsel; the Court agrees that class certification for settlement purposes is appropriate under Federal Rule of Civil Procedure 23(a) and 23(b)(3); and the Court finds the implicit requirements for class certification are met. The Court's only quibble with respect to class certification is that the class definition clearly delineate which Budget rental locations are covered by the Settlement.

The Court, however, has significant reservations about other provisions which preclude granting approval. The Court is concerned that portions of the Settlement are unclear, that the opt-out procedure is unnecessarily onerous, that the notice is insufficient, and, most importantly, that the compensation provided to the class is inadequate. The Court discuss each concern below.

1. Unclear Settlement provisions

The Court would like the **[*15]** parties to clarify: (1) which Budget rental locations are covered by the Settlement (and thus who is an eligible class member); (2) what are the "additional restrictions" and the precise "blackout" dates on the coupons use; and (3) what materials class members will have to provide to prove they have a valid claim. The parties can easily amend the Settlement and notice forms to answer these questions.

2. Notice

The Court is not convinced that the notice provided to the class members is the "best notice practicable under the circumstances." First, it is unclear whether the parties have considered whether the preferred mode notice, direct notice, is possible or feasible here. Since the parties can determine that there were approximately 1.3 million transactions affecting 770,000 customers, it may be possible to notify each class member individually by sending notice directly to the address of record for each credit or debit card. If direct notice is not possible or feasible, the Court would like the parties to explain their

reasoning on the record.

With respect to the notice suggested by the parties, the Court finds notice in each retail location and on the internet is reasonable, but publishing **[*16]** the notice once in a newspaper on a weekday is not. It appears to the Court that publishing the notice on both weekdays and weekends, perhaps multiple times, would provide more notice to the class without being cost-prohibitive.

The Court is concerned that the notice be improved so that a large number of class members will participate in the settlement. The Court cautions it will not give final approval to any settlement unless a significant percentage of the class members benefit.

3. Opt-out procedure

To opt out of the settlement and avoid being bound by the settlement, a class member must submit an exclusion form to both Plaintiffs' counsel and Defense counsel, and the form must be both emailed *and* either mailed first-class or hand-delivered. This procedure seems unnecessarily onerous.

4. Class members' compensation

Finally, the Court is concerned that the Settlement offers insufficient value for the class members' claims. Although every class member could receive a coupon, it is a coupon which is generally available to any frugal shopper, [2] a fact which weighs against approving the Settlement. The coupons have no cash value, and while transferable, they cannot reasonably be expected **[*17]** to be sold in a secondary market, because no one will buy a coupon if an equivalent is available for free on the internet. Even used as coupons the coupons have little value because they contain many restrictions on their use. *Id.* For example, the coupons are only good for 120 days from issuance, cannot be combined with any other offers, and may not be used during any holiday or other black-out period, the times when many consumers are most likely to rent a car.

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2 A quick search of the internet found comparable coupons for a Budget brand rental car.

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Furthermore, few class members will likely file claims because the benefit of doing so is not worth the effort. *See Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006). The Settlement requires each claimant to provide information proving "that he or she made a credit/debit card transaction at one of Defendants' retail locations during the Class Period." Sugg. in Support at 14, 21. Each claimant will also have to attest to the accuracy of this information and may be required to submit additional information. Few class members are likely to rummage through their records to find old credit-card receipts (assuming they still have them), **[*18]** swear to the viability of their claim, and agree to submit additional information just to receive a run-of-the-mill coupon with a number of restrictions on its use. Obviously, this also weighs against the settlement.

Likewise, the provision whereby Defendants agree to obey the law in the future provides no marginal value to the class members, because Defendants are already in compliance. After the lawsuit was filed, Defendants invested in software to comply with FACTA's truncation requirement. Since they now own the software,

there is no reason for Defendants to stop complying. Indeed, if they did stop complying, a new lawsuit could be filed and the plaintiff could easily prove a willful violation.

Of course, the reasonableness, fairness, and adequacy of the Settlement ultimately depends on the strength of the class members' claims and the opposing defenses. *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D 197, 212 (D. Me 2003). After carefully reviewing this case, the Court sees nothing that suggests the class has a weak case and should settle for very little. There are no unusual barriers to certification or novel legal questions that might unexpectedly derail **[*19]** Plaintiffs' case. Although Plaintiffs will have to prove willfulness, this should not come as a surprise to Plaintiffs' counsel because it is an element of the cause of action here, and counsel "performed extensive research and investigation as part of the filing and litigating of Plaintiff's claims." Sugg. in Supp. at 13. Presumably Plaintiffs' counsel would not have filed this case unless they believed that had a reasonable chance of prevailing, and given the assertions made about Defendants willfulness in the Amended Complaint, it appears that the class has at least a fighting chance of prevailing. Consequently, there is no need to conduct a fire sale of the class members' claims.

Of course, the Settlement does give the class members something right now--a coupon-- and avoids the risks inherent with continued litigation. But the value of the Settlement is dwarfed by the potential upside of continuing the litigation. From the class members' perspective, the worst thing that can happen by proceeding to judgment on the merits is that they will not receive a few coupons they can get simply by searching the internet. On the other hand, the potential upside of continuing the litigation is **[*20]** quite high. If the class prevails, each member would be entitled to least $100 in cash per violation. Granted, the parties have intimated that Defendants might not be able to pay such a judgment, but this claim is little more than a bare assertion. And even if Defendants are unable to pay a judgment of $100 per claim, nothing in the record suggests they cannot afford to settle these claims for something less. Consequently, the interests of the class members are better served by continued litigation.

Any settlement should provide the class with reasonable value for their claims. As currently written, however, the Settlement does not, and so the Court cannot approve it.

Conclusion

The parties' motion (Doc. 36) is DENIED. The Court encourages the parties to confer on an alternate settlement agreement that addresses the Court's concerns. Should the parties reach a new proposed agreement, the Court will promptly consider it. In the meantime, the parties should proceed with discovery. If a revised scheduling order is needed, the parties should submit a joint proposed revised scheduling order to the Court on or before November 1, 2012.

IT IS SO ORDERED.

Date: October 12, 2012

/s/ Greg Kays

GREG KAYS, **[*21]** JUDGE

UNITED STATES DISTRICT COURT

1 of 1 DOCUMENT

Kearns v. Ford Motor Co.

Case No. CV 05-5644 GAF (JTLx)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

2005 U.S. Dist. LEXIS 41614

November 18, 2005, Decided
November 21, 2005, Filed

SUBSEQUENT HISTORY: Dismissed without prejudice by, Motion granted by, in part, Motion denied by, in part Kearns v. Ford Motor Co., 2007 U.S. Dist. LEXIS 98529 (C.D. Cal., Mar. 22, 2007)
Decision reached on appeal by Kearns v. Ford Motor Co., 567 F.3d 1120, 2009 U.S. App. LEXIS 12289 (9th Cir. Cal., 2009)

COUNSEL: [*1] For WILLIAM KEARNS, on behalf of Himself and All Others Similarly Situated, Plaintiff: Christopher M Burke, Lerach Coughlin Stoia Geller Rudman and Robbins, San Diego, CA; John H Gomez, McClelland and Gomez, San Diego, CA; Patrick J Coughlin, Patrick J Coughlin Law Offices, Los Angeles, CA; Susan G Taylor, Milberg Weiss Bershad Hynes & Lerach, San Diego, CA.

For FORD MOTOR COMPANY, Claremont Ford, Defendants: Daniel L Alexander, Molly J Magnuson, Thomas M Riordan, O'Melveny & Myers, Los Angeles, CA.

JUDGES: Judge Gary Allen Feess, United States District Court.

OPINION BY: Gary Allen Feess

OPINION

MEMORANDUM AND ORDER REGARDING PLAINTIFF'S MOTION TO REMAND

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 71(d).

I.

INTRODUCTION

Plaintiff William Kearns ("Plaintiff," or "Kearns"), filed a class action lawsuit in the Superior Court of California, Los Angeles, against Ford Motor Company ("Ford"), Claremont Ford (a local Ford dealer), and 350 Doe defendants. Ford filed a timely Notice of Removal with this Court. Ford asserts removal jurisdiction based on the Class Action Fairness Act of 2005 ("CAFA," or "the Act"). Plaintiff **[*2]** has filed a Motion to Remand, arguing that this suit falls under the so-called "Local Controversy Exception" to CAFA jurisdiction.

The motion raises several issues under this recently enacted statute. First, the Court must determine who bears the burden of proof on removal. Traditional removal jurisprudence held that the removing party bore the burden of establishing the federal court's jurisdiction over the removed case. Because CAFA is silent on the burden issue, the Court concludes that Congress must have intended to leave in effect the traditional rule that the party asserting the Court's jurisdiction bears the burden of proving that the exercise of jurisdiction is proper. Thus, the Court concludes that Ford bears the burden of establishing that this case was properly removed to federal court.

Next the Court must determine whether Ford has met that burden by establishing jurisdiction under CAFA. CAFA was enacted on February 17, 2005, and became effective on February 18, 2005. The goal of the Act was to expand significantly the jurisdiction of the federal courts over class action lawsuits as well as to limit what were seen as typical abuses of the class action system at the **[*3]** state level. [1] In the past, federal jurisdiction rarely applied to large class action suits because the presence of class members from all over the country often destroyed diversity, and the individual class members' claims were typically well below the $ 75,000 threshold for diversity jurisdiction. In order to extend federal jurisdiction to these cases, the Act provides for jurisdiction based on minimal diversity and requires the aggregation of claims in determining whether the threshold amount in controversy (now $ 5,000,000) has been met. 28 U.S.C. §§ 1332(d)(2), (6). The Court concludes that these two elements are easily met in this case.

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1 In particular, Congress put significant limits on so-called "coupon settlements" which produce hardly any tangible benefits for the members of the plaintiff class, but generate huge fees for the class attorneys.

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At the same time, however, Congress established exceptions where jurisdiction does not apply, so that "truly local" controversies can **[*4]** continue to be heard in state courts. 28 U.S.C. §§ 1332(d)(3)-(4). The real dispute between the parties focuses on the applicability of these exceptions. In this order the Court reviews those exceptions and concludes that they do not apply because Ford is a "primary defendant" in this case, and because significant relief is not sought from Claremont Ford and the actions of Claremont Ford do not form a significant basis for the relief sought. Indeed, Ford is the defendant whose conduct forms a significant basis for the claims asserted by Plaintiff, and it faces nationwide exposure on theories similar to those alleged in this case. The Court therefore concludes that Plaintiff's class action lawsuit cannot be properly characterized as a "truly local action" under the terms of CAFA.

For these reasons, which are discussed in significantly greater detail below, the motion to remand is **DENIED.**

II.

STATEMENT OF FACTS

The facts set forth below are found in the pending class action complaint filed by Plaintiff.

A. FORD'S CERTIFIED PRE-OWNED PROGRAM

Defendant Ford Motor Company sponsors and markets a "Certified Pre-Owned" ("CPO") **[*5]** program in which Ford dealers select certain late-model pre-owned cars to be put through a rigorous inspection, after which they are marketed and sold to the public with the CPO designation. (Compl. PP 1-2). Ford charges dealers an annual fee of $ 500-1,500 to participate in the program, and earns roughly $ 395 for each certified vehicle sold. (Id. P 20).

The goal of the program is to increase consumer confidence in the vehicles and thus to boost the cars' market value. (Id.). The result is that CPO cars sell at an average of $ 1,080 premium over comparable uncertified vehicles. (Id. P 21).

B. THE ALLEGED MISREPRESENTATIONS REGARDING THE CPO PROGRAM

Kearns purchased a CPO vehicle through Defendant Claremont Ford, a local Ford dealer, on May 25, 2003. (Id. P 9). He alleges that, contrary to the marketing claims, CPO cars are not treated differently from other pre-owned cars sold by Ford dealers. (Id. PP 4-6). He contends, therefore, that the CPO program artificially inflates the price of vehicles through advertising that misleads consumers about the nature of the program and the condition of CPO vehicles. (Id. P 29).

Kearns initiated **[*6]** this class action lawsuit against Ford, Claremont Ford, and 350 Doe Defendants in the Superior Court of the State of California, Los Angeles County, on June 23, 2005 on behalf of himself and a proposed class of plaintiffs including all persons who purchased CPO vehicles from Ford Dealerships within the state of California between June 23, 2001 and the present. (Id.P 22). (Ford states that over 79,000 CPO cars were sold in California during the proposed class period. (Not. of Removal P 6).) Plaintiff alleges violations of California Business and Professions Code §§ 17200, et seq. and California Civil Code §§ 1750, et seq.(Id. P 24(b)). He seeks injunctive and compensatory relief including: (1) restoration of amounts paid as a result of the misrepresentation, plus interest; (2) statutory, and punitive or exemplary, damages; and (3) attorneys fees, costs and expenses. (Id. Prayer for Relief).

C. REMOVAL AND THE MOTION TO REMAND

Ford was served with a copy of the Complaint on July 5, 2005. (Not. of Removal at 1). On August 3, 2005, it timely removed the lawsuit to this Court. (Id.). Ford asserts **[*7]** federal jurisdiction under the new diversity jurisdiction provisions of CAFA. (Not. of Removal P 13); 28 U.S.C. § 1332(d) (2005). Though the Notice of Removal was filed in Ford's name only, and Claremont Ford has not joined in the filing, such single-defendant removal is allowed under CAFA's liberal rules of removal. (Not. of Removal P 12); 28 U.S.C: § 1453(b). Plaintiff has filed a Motion to Remand, arguing that this suit falls under the so-called "Local Controversy Exception" to CAFA jurisdiction.

III.

ANALYSIS

A. UNDER CAFA, THE BURDEN OF PROOF OF FEDERAL JURISDICTION REMAINS WITH THE

DEFENDANT SEEKING REMOVAL

1. The Traditional Rule

Prior to the passage of CAFA, there was a strong presumption against removal jurisdiction in almost all cases. Prize Frize, Inc. v. Matrix, Inc., 167 F.3d 1261, 1265 (9th Cir. 1999). As a result, it was well established that when a defendant sought to remove a case to federal court, the burden was on that defendant to demonstrate that the court had jurisdiction. Gaus v. Miles, 980 F.2d 564, 566-67 (9th Cir. 1992).

2. CAFA Expands [*8] Removal Jurisdiction in Class Action Cases

The expansion of federal jurisdiction under CAFA raises the question whether the burden of proof upon removal has been shifted to the party opposing removal. Ford argues that CAFA created a strong presumption in favor of federal jurisdiction over class action cases, and that the burden has therefore shifted to the plaintiffs seeking remand to demonstrate that an exception to federal jurisdiction applies. (Opp. at 4-6). Ford bases its argument on CAFA's legislative history, which, it argues, may be consulted because the statute itself is ambiguous. (Id.). Indeed, the Judiciary Committee Report on CAFA states that the Act was intended to create a strong presumption in favor of jurisdiction in class action cases, and that the committee therefore intended to shift the burden to the plaintiff seeking remand. See S. Rep. No. 109-14 at 43 ("the named plaintiff(s) should bear the burden of demonstrating that a case should be remanded").

But a real question exists over whether that legislative history should be consulted in the first place. Plaintiff argues that the statute is not ambiguous, that legislative history therefore should **[*9]** not be consulted, and that the statute, which is silent on the issue, should be construed as leaving the existing burden of proof rule intact. (Rpl. at 3). Because the statute is entirely silent on the question of burden, the Court must address whether such silence amounts to ambiguity. If so, then the Court may resort to legislative history for guidance; if not, then the Court should limit its analysis to the text of the statute. Garcia v. United States, 469 U.S. 70, 77, 105 S. Ct. 479, 83 L. Ed. 2d 472 (1984) ("'Resort to legislative history is only justified where the face of the statute is inescapably ambiguous.'") (citation omitted).

3. Silence Is Not Ambiguity

Authority is split on whether CAFA's silence as to burden amounts to an ambiguity which would justify examination of the legislative history. Four decisions, all by district courts from within this circuit, conclude that silence equates to ambiguity and that a court may properly resort to legislative history to construe CAFA's text. See Berry v Am. Express Publ'g Co., 381 F. Supp. 2d 1118, 1121 (C.D. Cal. June 15, 2005); In re Textainer P'ship Sec. Litig., 2005 U.S. Dist. LEXIS 26711, No. C-05-0969 (MMC), 2005 WL 1791559, at *3 (N.D. Cal. July 27, 2005) **[*10]** ; Waitt v. Merck & Co., Inc., 2005 U.S. Dist. LEXIS 38748, No. C 05-0759L, 2005 WL 1799740, at *1-2 (W.D. Wash. July 27, 2005); Lussier, 2005 U.S. Dist. LEXIS 34085, 2005 WL 2211094, at *1. [2] Three decisions from other circuits, including the very recent decision of the Court of Appeals for the Seventh Circuit in Brill, have determined that the statute is clear on its face, and, therefore, no reference to the legislative history is necessary. See Brill, 427 F.3d 446 at 448 (2005) et seq.; Schwartz, 2005 WL 1799414, at *5-7; Judy, 2005 WL 2240088, at *2.

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2 Of these four decisions, Berry is the only one which presents much justification for its use of the legislative history. The others largely take it as a given that it is appropriate to do so.
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Berry, which found ambiguity in the statute, noted that "just as the [answer] to [this question was] not found in the former statutory text, the current amendments do not provide a clear answer." Berry, 381 F. Supp. 2d at 1121. **[*11]** But while it is true that the original removal statute was silent as to burden of proof and that courts applied statutory interpretation to fill that void, those decisions were made in a different historical context. Since the enactment of the original removal statute, case law has developed a clearly established rule allocating the burden of proof upon removal and upon motion to remand to the removing party. Gaus, 980 F.2d at 566-67. In construing legislation enacted in the context of a uniform line of judicial precedent, the Court ordinarily presumes that Congress acted with knowledge of that precedent. Lorillard v. Pons, 434 U.S. 575, 581, 98 S. Ct. 866, 55 L. Ed. 2d 40 (1978) ("Where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."). The presumption suggests that Congress, in enacting CAFA, did so with knowledge that the removing party bears the burden of establishing the propriety of the Court's exercise of removal jurisdiction.

Nevertheless, Berry rejects the notion that **[*12]** the statute's silence regarding burden was either an accident or an explicit attempt to retain the status quo, concluding instead that it "reflects the Legislature's expectation that the clear statements in the Senate Report would be sufficient." Berry, 381 F. Supp. 2d 1118, 1122, 2005 U.S. Dist. LEXIS 15514, at *11. But such reasoning begs the question of whether silence is to be treated as ambiguity and gives committee reports superior weight to the text of statutes themselves. "When the legislative history stands by itself, as a naked expression of 'intent' unconnected to any enacted text, it has no more force than an opinion poll of the legislators - less, really, as it speaks for fewer." Brill, 427 F.3d 446, 448, 2005 U.S. App. LEXIS 22514, at *4-5.

In the end, the reasoning in Brill persuades the Court that CAFA's silence on the burden issue does not equate to ambiguity and that the Court should not resort to legislative history to insert a provision that Congress did not include in CAFA's text. [3]

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3 If the omission was, in fact, an error, the Court is not empowered to repair it of its own accord. Schwartz, 2005 WL 1799414, at *7.
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[*13] ***4. The Removing Party Bears the Burden of Establishing the Court's Jurisdiction***

Because Congress failed to include in CAFA any modification of the well-established burden rule, it must be presumed to have been aware of the existing rule, and the implications of its silence. Lorillard, 434 U.S. at 581. That presumption finds support in the legislative record. Noting that the Judiciary Committee fully understood the existing rule on the burden of proof,

the Court in Schwartz contrasted Congress's adoption of text implementing numerous recommendations regarding the CAFA legislation with its omission of any text changing the burden of proof on removal. Schwartz, 2005 WL 1799414, at *6; id. at *7 ("I can draw only one conclusion from this omission: by making substantive changes with respect to the aggregation rule, but failing to express a concomitant change in the burden of proof, Congress implicitly acknowledged and adopted the longstanding rule . . . ."). Judge Easterbrook's decision in Brill implies a similar view, hinting that the statements in the committee report might represent an attempt by the few to establish a new **[*14]** standard that Congress as a whole rejected. See Brill, 427 F.3d 446, 448, 2005 U.S. App. LEXIS 22514, at *5-6 (analogizing to Pierce v. Underwood, 487 U.S. 552, 566-68, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988)).

For these reasons, the Court concludes that it should not use the Senate Report to engraft a provision in CAFA not present in its text. Indeed, as Judge Easterbrook noted in Brill, allocating the burden of proof to the removing party is consistent with the general rule that the party asserting federal jurisdiction in any case bears the burden of establishing such jurisdiction.

> That the proponent of jurisdiction bears the risk of non-persuasion is well established. Whichever side chooses federal court must establish jurisdiction; it is not enough to file a pleading and leave it to the court or the adverse party to negate jurisdiction.

427 F.3d at 447 (citations omitted). Moreover, the Brill court noted, the practical benefit of such a rule:

> When the defendant has vital knowledge that the plaintiff may lack, a burden that induces the removing party to come forward with the information--so that the choice between state **[*15]** and federal court may be made accurately--is much to be desired.

Id. at 447-48.

Accordingly, the Court concludes that CAFA did not change the rule regarding the burden of proof on removal. As the removing party, Defendant has the burden of establishing that the federal court has jurisdiction over class action lawsuits removed under CAFA.

B. BARRING AN EXCEPTION, THE COURT HAS JURISDICTION UNDER THE CLASS ACTION FAIRNESS ACT OF 2005 (28 U.S.C. § 1332(d))

In order to expand the jurisdiction of the federal courts to encompass a large fraction of class action suits, Congress adopted the following default rule in CAFA:

> (2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $ 5,000,000, exclusive of interest and costs, and is a class action in which -
>
> > (A) any member of a class of plaintiffs is a citizen of a State different from any defendant; ....

28 U.S.C § 1332(d)(2) (2005). [4]

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4 Paragraph 5 of the statute further requires that the class have at least 100 members. 28 U.S.C. § 1332(d)(5). As stated earlier, there are apparently as many as 79,000 possible plaintiffs in the proposed class, so this requirement is not in dispute.

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[*16] ***1. The Amount in Controversy is Over $ 5,000,000***

As stated above, CAFA established a threshold amount in controversy of $ 5,000,000 in a class action suit for federal jurisdiction to attach. 28 U.S.C. § 1332(d)(2). At the same time, the Act also changed the way in which the amount in controversy is computed, so that more cases would reach that threshold. 28 U.S.C. § 1332(d)(6).

Under prior law, the claims of each plaintiff against each defendant were considered separately. Gibson v. Chrysler Corp., 261 F.3d 927, 943 (9th Cir. 2001). In order to find diversity jurisdiction, there had to be at least one such individual claim that exceeded the $ 75,000 threshold. Id. Multiple claims could be combined only if they were joint or common claims. Id. If this rule against aggregation still applied to class action suits, in which the individual claims are often quite small, it would effectively nullify CAFA's attempt to expand jurisdiction.

Therefore, CAFA includes a provision requiring the aggregation of claims in determining jurisdiction over class actions. 28 U.S.C. § 1332(d)(6) **[*17]** ("In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $ 5,000,000, exclusive of interest and costs."). Here, Plaintiff has alleged that Defendants overcharged members of the proposed class an average of $ 1,080 per vehicle, and seeks, among other remedies, reimbursement of the overcharges. (Compl. P 18, Prayer for Relief). [5] Ford has stated that over 79,000 CPO cars were sold in California during the class period. (Not. of RemovalP 6). This makes the potential recovery by class members at least $ 85,320,000, which is well above the threshold. (Id. P 7).

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5 In considering the question of jurisdiction based on diversity, the "sum claimed by plaintiffs controls if the claim is apparently made in good faith." *St. Paul Mercury Indem. Co. v. Red Cab Co.,* 303 U.S. 283, 288, 58 S. Ct. 586, 82 L. Ed. 845 (U.S. 1938). There is some question whether that rule has been superceded by the adoption of 28 U.S.C. § 1367. Shanaghan v. Cahill, 58 F.3d 106, 111 (4th Cir. 1995). But that issue applies only to supplemental jurisdiction.

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[*18] However, it is not clear that this calculation of the aggregate claim is the correct one. Careful reading of the aggregation rule exposes an ambiguity: is the aggregation of class member claims which is specified in the statute computed across the entire set of defendants or per individual defendant? That is, must the Court aggregate all the claims against all the defendants, or must it look at the aggregate of claims against Ford separately from the aggregate of claims against Claremont Ford, and so on? This appears to be an issue of first impression. The decisions that have discussed the issue of aggregation under CAFA have all been single-defendant cases. Based on the ambiguity in the statute, it is appropriate to examine the legislative history for guidance. Garcia, 469 U.S. at 77. When conducting such an examination, "Committee Reports are 'the authoritative source for finding the Legislature's intent.'" Berry, 381 F. Supp. 2d at 1121 (quoting Garcia, 469 U.S. at 76).

The Committee Report does not address this question directly. However in discussing the aggregation provisions generally, it states:

> The Committee intends **[*19]** this subsection to be interpreted expansively. . . . And if a federal court is uncertain about whether 'all matters in controversy' in a purported class action 'do not in the aggregate exceed the sum or value of $ 5,000,000,' the court should err in favor of exercising jurisdiction over the case.

S. Rep. No. 109-14. On this basis, it seems clear that Congress intended aggregation to run across all defendants, in order to capture "all matters in controversy."

2. Minimal Diversity as Required by 1332(d)(2)(A) Exists

CAFA rejects the existing rule of complete diversity and, instead, requires only minimal diversity. In particular, diversity jurisdiction is satisfied simply if "any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(2)(A). In this case, Plaintiff Kearns is a citizen of California. Defendant Ford is a citizen of Delaware and Michigan (but not California). So, minimal diversity of citizenship is established.

Therefore, unless one of the exceptions to jurisdiction enacted as part of CAFA applies, this Court has jurisdiction over the case, and Ford's Notice of Removal was **[*20]** proper.

C. NONE OF THE STATUTORY EXCEPTIONS TO CAFA JURISDICTION APPLIES

While Congress was intent on significantly expanding the jurisdiction of the federal courts over class action suits, it conceded that certain "truly local" actions could be reasonably heard in state courts without the risk of undue bias against the defendants, since they too were local. Three exceptions were provided to CAFA jurisdiction to deal with such situations. [6] The three exceptions are distinguished from one another by two factors: (1) the size of the fraction of class members with citizenship in the state in which the action was originally filed ("greater than one-third but less than two thirds," "two-thirds or more," and "greater than two-thirds"); and (2) which defendants are citizens of that state. 28 U.S.C. §§ 1332(d)(2)-(4). The parties make certain assumptions that lead them to rule out the first two exceptions and to argue only the third, which relates to the situation where more than two-thirds of the class members are citizens of the state of filing. However, the Court questions those assumptions since, given some uncertainty as to the citizenship of as-yet **[*21]** unidentified class members, it is possible that any of the three exceptions could apply. Given the Court's responsibility to determine issues of jurisdiction, it has examined all three, and concludes that none applies.

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6 There are three additional exceptions to CAFA jurisdiction, but they pertain only to cases involving particular securities, or to cases relating to "the internal affairs and governance of a corporation or other form of business enterprise ... that [arise] under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized." 28 U.S.C. § 1332(d)(9). These exceptions do not apply here. They have been addressed in In re Textainer P'ship Sec. Litig., 2005 U.S. Dist. LEXIS 26711, 2005 WL 1791559.

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1. The Exception in 28 U.S.C. § 1332(d)(3) Does Not Apply

CAFA provides that the Court may decline to exercise jurisdiction over some cases, depending on its evaluation of a number of factors. 28 U.S.C. § 1332(d)(3) **[*22]** . Before those factors can be considered, however, the statute

requires that these cases be ones in which "greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed." Id.

In this case, the proposed class is described as "all persons who purchased a vehicle through the CPO program at Claremont Ford and other Ford dealerships located in California from June 23, 2001 through the present." (Compl. P 22). Both Plaintiff and Ford take it for granted that this class is made up almost entirely of citizens of California. (Not. of Removal P 8; P&A at 5). For that reason, neither discusses the possibility that this exception might apply. While they may well be (and likely are) correct, the burden is on Ford to establish that this exception does not apply, and it has not met that burden. Without some evidence provided by Ford (for example, an analysis of the registration records of the 79,000 cars sold through the program), the Court cannot simply assume that one-third of the CPO buyers might not be citizens of other states or countries. [7] This **[*23]** issue may be avoided, however, if the application of the exception can be ruled out based on the other prong. That is, the requirement that the "primary defendants" also be citizens of California.

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7 It could be, for instance, that the CPO cars are particularly popular with Mexican citizens, who purchase them from program dealers in Southern California but transport the cars back to their homes in Mexico. Or perhaps the strict emissions standards on California vehicles makes the program popular with green consumers in neighboring states.

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The term "primary defendants" has no clear, unambiguous meaning and is not an established term of art. Congress has used the term in only one other statute: the Multiparty, Multiforum, Trial Jurisdiction Act of 2002 ("MMTJA"), where it was also undefined. 28 U.S.C. § 1369. Like CAFA, MMTJA was enacted to expand federal jurisdiction. It gave federal courts jurisdiction over litigation arising from disasters that cause the death of more than 75 persons. **[*24]** Id.; see also Passa v. Derderian, 308 F. Supp. 2d 43 (D.R.I. 2004) (concerning the consolidation of claims related to a devastating night club fire in Rhode Island in which pyrotechnics set off by a rock band ignited textured foam and cloth covering the walls, killing 100 people and injuring 200 more). In Passa, which is the only decision to consider the interpretation of the term, the court was concerned with an exception to MMTJA jurisdiction for cases in which "the substantial majority of all plaintiffs are citizens of a single State of which the *primary defendants* are also citizens." See Id. at 58; 28 U.S.C. § 1369(b)(1) (emphasis added). The court ruled that the exception did not apply because an insufficient number of plaintiffs were Rhode Island citizens. The court nevertheless went on to discuss the term "primary defendants." Passa, 308 F. Supp. 2d at 61. Finding the term was facially ambiguous, and noting little guidance in the legislative history, the court went on to examine the use of "primary defendants" in the case law and determined that the term was widely and freely used with **[*25]** different denotations in different contexts. [8] Id. at 61-62.

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8 For example, in RICO actions, primary defendants are often distinguished from "aiders and abettors." Id.; see also Lubin v. Sybedon Corp., 688 F. Supp. 1425, 1443 (S.D. Cal. 1988). In securities litigation the distinction is between the actual participants in an improper stock transaction and those in a secondary role. Passa, 308 F. Supp. 2d at 62; see also In re Equity

Funding Corp. of Am. Sec. Litig., 1976 U.S. Dist. LEXIS 17364, M.D.L. Docket No. 142 (C.D. Cal. Mar. 26, 1976). In tort law, the term was generally used to distinguish those directly liable to plaintiffs from those vicariously liable or those indemnifying the primary defendants. Passa, 308 F. Supp. 2d at 62.

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The Passa court rejected suggestions of the parties that "primary defendants", be defined either as those with the deepest pockets or those with the greatest culpability. Id. at 61-62. **[*26]** Those definitions were seen as being inappropriate and unworkable because they were too fact-based to be evaluated at the procedural point at which they were to be applied. Id. The court concluded that, based on the context, the usage of the term as in tort law was the most appropriate and workable: a "primary defendant" is any with direct liability to the plaintiffs. Id. at 62. This Court is inclined to accept that definition, not least because of the similarity in goals of MMTJA and CAFA. Applying the definition to the case at hand, there is nothing in the pleadings to distinguish among the defendants. Claremont Ford (and any Ford dealer currently named as a Doe defendant) is more directly involved in each CPO certification and sale than Ford. (Compl. P 4). But Ford was responsible for the program's design and creation, advertises and runs the program, and profits from each sale. (Id. PP 1, 3, 20). Therefore, Plaintiff's own allegations establish that both Ford and Claremont Ford are potentially directly liable to the plaintiff class. As such, since Ford is not a citizen of California, it cannot be said that all primary defendants are citizens of the state **[*27]** in which the action was filed. Therefore, the Court concludes that this exception does not apply. [9]

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9 While existing case law was sufficient to define the term, making it unnecessary to refer to legislative history, it happens that such an inquiry would have presented one more alternative definition of "primary defendant." The Committee Report directs that the term include only a defendant "who has substantial exposure to significant portions of the proposed class in the action, particularly any defendant that is allegedly liable to the vast majority of the members of the proposed classes." S. Rep. No. 109-14 at 43. This is essentially the same description used to describe defendants fulfilling subclauses (II)(aa) and (II)(bb) of the Local Controversy Exception discussed below. Since Ford meets those criteria (though the local dealers do not), this alternate definition does not disturb the result here.

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2. The "Home State Controversy" Exception (28 U.S.C. § 1332(d)(4)(B)) Does Not **[*28]** *Apply*

CAFA dictates that a district court shall decline jurisdiction where "two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed." 28 U.S.C. § 1332(d)(4)(B). As discussed above, the fraction of the plaintiff class with California citizenship has not been adequately established." However, the Court has already concluded that Ford *is* a primary defendant, and that it *is not* a citizen of California. Therefore, the Home State Controversy exception does not apply.

3. The "Local Controversy" Exception (28 U.S.C. § 1332(d)(4)(A)) Does Not Apply

The final exception to CAFA jurisdiction is the most complicated, and the one which, according to Plaintiff, controls the outcome of this motion. It provides as follows:

> A district court shall decline to exercise jurisdiction. . .

> (i) over a class action in which--
>
> > (I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;
> >
> > (II) **[*29]** at least 1 defendant is a defendant--
> >
> > (aa) from whom significant relief is sought by members of the plaintiff class;
> >
> > (bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and
> >
> > (cc) who is a citizen of the State in which the action was originally filed; and
> >
> > (III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and
>
> (ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons

28 U.S.C. § 1332(d)(4)(A). At issue is the applicability of clauses (II) and (III), which are the subject of substantial disagreement between the parties.

Defendant Ford argues that it is the "real" defendant, that Claremont Ford is not a party from whom significant relief is sought, and that no such California party exists. (Opp. at 7-8). In particular, Ford asserts that once all relevant parties are joined (presumably **[*30]** all dealers that participated in the CPO program), the relief sought from Ford will dwarf the relief sought from each individual dealer. Therefore, Ford argues, it is the only party from whom *significant* relief is sought, and, since it is not a citizen of California, clause (II) does not apply, and removal should be allowed. (Id.).

Plaintiff, in contrast, argues that both clauses apply. (Rpl. at 1-2). In particular, in regards to clause (II) Kearns asserts (uncontested) that Claremont Ford is a citizen of California, that significant relief is sought from Claremont Ford and other dealers, and that Claremont Ford's behavior (and that of other California dealers) forms a significant basis for the claims asserted. (Id. at 2). This Court disagrees.

a. Claremont Ford Does Not Satisfy Clause (II) Because it is Not a Defendant From Whom "Significant Relief" is Sought or Whose Behavior Forms a "Significant Basis" for the Claims of the Plaintiff Class

In order for clause (II) to be read to include Defendant Claremont Ford, each of the three subclauses, (aa), (bb), and (cc), must be satisfied.

Dealing with the last subclause first, there is no disagreement in regards **[*31]** to subclause (cc), which requires that the defendant in question be a citizen of the state in which the action was originally filed. Claremont Ford is alleged by Plaintiff and acknowledged by Ford to be a corporation established under the laws of California with its principal place of business in California. (Compl. P 11, Not. of Removal P 10). The Court need look no further in regards to subclause (cc).

With regards to subclauses (aa) and (bb), the Court cannot make a determination

without an understanding of the terms "significant relief" and "significant basis." Plaintiff argues, without providing any additional evidence, that the subclauses, and hence the individual terms, are clear on their face. (Rpl. at 4). That is not the case.

i. The Term "Significant Relief" is Ambiguous, and May be Interpreted in Light of Legislative History

The term "significant relief" is not used in any statute aside from CAFA. It has been used in 36 Supreme Court and Ninth Circuit (appeals and district court) cases in a generic sense. These uses seem to cluster around two similar, but subtly different, meanings.

One common usage seems closer to the meaning urged on the court by Plaintiff. **[*32]** [10] Without great specificity, Kearns argues that significant relief is sought from Claremont Ford because the relief sought is not inconsequential. (Rpl. at 5) ("Plaintiff here seeks *actual* restitution or disgorgement of wrongfully inflated sales prices charged at the time of sale.") (emphasis added).

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10 "So long as Congress' failure to provide money damages, *or other significant relief,* has not been inadvertent, courts should defer to its judgment." Kotarski v. Cooper, 866 F.2d 311, 312 (9th Cir. 1989) (emphasis added). A large number of cases either use this quote from Kotarski, or use the term in a similar manner as Kotarski.

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The other common usage seems closer to the interpretation advocated by Ford. [11] It argues that the relief sought from Claremont Ford must be viewed relative to the overall relief "'sought by the class ([as opposed to] just a subset of the class membership).'" (Opp. at 7) (emphasis removed) (quoting S. Rep. No. 109-14 at 40). That is to say, Claremont **[*33]** Ford's share of damages would not largely satisfy the claims of the entire class. [12]

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11 See, e.g., Kamm v. Cal. City Dev. Co., 509 F.2d 205, 212 (9th Cir. 1975) *("Significant relief had been realized* in the state action through (a) restitution to many members of the class; (b) Western Cities' agreement to establish a program to settle future disputes; (c) a permanent injunction; and (d) a letter of credit in the amount of approximately $ 5,000,000 to guarantee funds for off-site improvements.... These factors as a whole support the conclusion of the district court that the class action was not a superior method of resolving the controversy.") (emphasis added); Vacco Indus. v. Van Den Berg, 5 Cal. App. 4th 34, 55, 6 Cal. Rptr. 2d 602 (Ct. App. 1992) ("That the compensatory damages ... were not substantial may only reflect that [the defendants] had not yet been successful in financially injuring the plaintiffs and that the injunctive relief, interposed to prevent such harm, was *the most significant relief which the plaintiffs sought or obtained.")*(emphasis added).

12 Plaintiff attempts to finesse this distinction by stating that "Claremont Ford *and other California Dealers* are California defendants from whom significant class relief is sought. . . .". (Rpl. at 5) (emphasis added). But the statute is clear that for the purposes of this clause there must be a defendant who individually, not as part of a group, satisfies the constraints of the clause. 28 U.S.C. § 1332(d)(4)(A)(i)(II) ("at least *1* defendant is *a* defendant [from whom]...") (emphasis added).

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[*34] Based on the ambiguity of this key term, both facially and as used in existing case law, it is appropriate to examine the legislative history for guidance. Garcia, 469 U.S. at 77.

ii. Claremont Ford is not a Defendant From Whom "Significant Relief" is Sought

The Committee Report does not provide direct guidance as to the proper interpretation of "significant relief." See S. Rep. No. 109-14. However, in discussing the criteria set forth in subclause (aa), the Committee Report provides the following example similar to the one at hand:

> In a consumer fraud case alleging that an insurance company incorporated and based in another state misrepresented its policies, a local agent of the company named as a defendant presumably would not fit this criteria. He or she probably would have had contact with only some of the purported class members and thus would not be a person from whom significant relief would be sought by the plaintiff class viewed as a whole. Obviously, from a relief standpoint, the real demand of the full class in terms of seeking significant relief would be on the insurance company itself.

Id. at 40. [13]

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13 In support of its argument, Ford cites another example from the Committee Report, that of an automobile manufacturer and several in-state dealers sued for products liability over a defective transmission design. (Opp. at 7). However, the example of the alleged insurance fraud scheme more closely approximates the nature of the misconduct alleged in this case, and is therefore the better analogized example.

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[*35] This example suggests that the interpretation of "significant relief" urged by Ford is the correct one because relief must be measured with respect to that sought by the entire class. By that measure Claremont Ford, which sold cars to only a fraction of the class, would not satisfy this criterion. Therefore, subclause (aa) cannot be read to apply to Claremont Ford or any other local dealer.

iii. The Term "Significant Basis" is Ambiguous, and May be Interpreted in Light of Legislative History

Kearns asserts that dealers have an active involvement in the wrongs done the buyers, including "picking vehicles for inclusion in the CPO program, conducting the inspections at issue, and selling CPO vehicles at a fraudulent 'mark up' price." (Rpl. at 4-5). He argues that this significant involvement in each sale amounts to a significant basis for the claims of the class. (Id.).

Ford, in essence, argues that for a party's activities to form a significant basis for the claims, those activities must be at the very heart of the scheme, and (echoing the meaning of "significant relief") relate to the claims of most or all members of the class. (Opp. at 8). Ford asserts that because **[*36]** Claremont Ford did not play "any significant role in the development and implementation of Ford's national CPO program[, its] conduct cannot form a 'significant basis' of the class claims." (Id.).

As with "significant relief," the term "significant basis" is new in CAFA. Of the 19 Supreme Court and Ninth Circuit (appeals and district court) decisions that use the term, essentially all use it in the sense of "reason," as in the commonly occurring phrases "a significant basis for the court's decision," and "a significant basis for the assertion of jurisdiction." These uses are not terribly helpful in understanding the sense in which the term is used in the statute. Because the term "significant basis" is ambiguous, an appeal to the legislative history is appropriate. Garcia, 469 U.S. at 77.

iv. Claremont Ford is not a Defendant Whose Conduct Forms a "Significant Basis" of the Claims Asserted

The insurance scheme example discussed above also sheds light on the meaning of the phrase "significant basis." Specifically, with regard to subclause (bb), the Committee Report goes on to state:

> Similarly, the agent presumably would not be a person **[*37]** whose alleged conduct forms a significant basis for the claims asserted. At most, that agent would have been an isolated role player in the alleged scheme implemented by the insurance company.

S. Rep. No. 109-14. at 40. This comports well with Ford's interpretation of "significant basis."

While Kearns is likely correct that the conduct of dealers *as a group* forms a significant basis for the claims, this is not true of any single dealer like Claremont Ford. Its involvement is no different from that of the imagined insurance agent in the Committee Report, who presumably markets the program to clients, accepts and processes their applications, and handles billing. It is Ford, like the insurance company, that promulgates and oversees the overall alleged fraud. As such, if the Committee Report discounts the insurance agents' conduct as not forming a "significant basis" for the claims of the class members, the definition of that term must similarly exclude the conduct of Claremont Ford and other dealers. Therefore, subclause (bb) cannot be read to apply to Claremont Ford or any other local dealers.

On this basis, because neither subclause (aa) nor (bb) applies to Claremont **[*38]** Ford or any other local dealers, the Local Controversy Exception does not apply.

b. Clause (III) Does Not Apply Because the "Principal Injuries" From Alleged or Related Conduct Are Not Limited to California

At this point, having concluded that clause (II) does not apply, the inquiry is technically over. As the clauses are conjunctively joined, whether clause (III) applies is moot, since clause (II) does not. Having come this far, however, the Court will address the parties' arguments and resolve the remaining question for the sake of completeness.

i. The Term "Principal Injuries" is Ambiguous, and May Be Interpreted in Light of Legislative History

As with the terms discussed above, "principal injuries" is not used in any statute aside from CAFA. The term has been used in 9 Supreme Court and Ninth Circuit decisions. Taken as a group, they do not seem to suggest any particular interpretation helpful in this context.

Ford argues that, since nearly 1.4 million CPO cars were allegedly sold nationwide in 2004, the alleged misconduct would presumably have injured buyers nationwide, not just in California. (Opp. at 9). With so many injured, the injuries suffered **[*39]** only in California cannot be the principal ones. (Id.).

Plaintiff asserts that the fact that the CPO program is a national one is not important, because the proposed class is composed only of Californians because they "have only suffered harm here because of conduct made actionable only under California consumer statutes." (Rpl. at 2 (emphasis removed)). This assertion

has no merit. A comparison of the California codes under which Plaintiff seeks relief with consumer protection statutes in other states quickly turns up several large states with apparently equivalent protections, at least as regards the conduct alleged in this case. See, e.g., N.Y. C.L.S. Gen. Bus. § 349 (2005); 73 P.S. § 201-9.2 (2005).

Nevertheless, the Court must still determine the proper interpretation of "principal injuries." Because the term is facially ambiguous and there is no clearly applicable meaning derivable from the case law, it is, again, appropriate to look at the legislative history, particularly the Committee Report, to determine what Congress intended by this phrase. Garcia, 469 U.S. at 76-77.

ii. Principal Injuries From the Alleged **[*40]** ***Conduct Are Widespread***

In keeping with Congress's asserted goal that the exception be applied narrowly and that jurisdiction apply to all but truly local controversies, the Committee Report states that:

> If the defendants engaged in conduct that could be alleged to have injured consumers throughout the country or broadly throughout several states, the case would not qualify for this exception, even if it were brought only as a single-state class action.... In other words, this provision looks at where the principal injuries were suffered by everyone who was affected by the alleged conduct--not just where the proposed class members were injured.

S. Rep. No. 109-14 at 40-41. This directs the Court to the interpretation suggested by Ford.

Thus, the Court concludes that the principal injuries alleged in this suit are not limited to California, as asserted by Plaintiff. Rather, because the CPO program is marketed nationwide, any injuries would have been suffered by consumers throughout the country. Therefore, clause (III), and thus the Local Controversy Exception, do not apply to the current case.

IV.

CONCLUSION

Having examined the statutes and **[*41]** the case law, the Court concludes that although CAFA did not change the presumption that the removing defendant carries the burden of proving jurisdiction upon a motion to remand, Ford has demonstrated that the case meets the diversity and amount-in-controversy requirements of CAFA jurisdiction and that none of the exceptions to CAFA jurisdiction applies. Therefore, the case was properly removed to this Court, and the Motion to Remand is **DENIED.**

IT IS SO ORDERED.

DATED: November 18, 2005

Judge Gary Allen Feess

United States District Court

1 of 1 DOCUMENT

Sobel v. Hertz Corp.

3:06-CV-00545-LRH-RAM

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

2011 U.S. Dist. LEXIS 68984

June 27, 2011, Decided
June 27, 2011, Filed

SUBSEQUENT HISTORY: Related proceeding at Lee v. Enter. Leasing Company-West, 2012 U.S. Dist. LEXIS 129025 (D. Nev., Sept. 10, 2012)
Partial summary judgment granted by, in part, Partial summary judgment denied by, in part, Class certification granted by, Objection granted by, in part, Objection denied by, in part Sobel v. Hertz Corp., 2013 U.S. Dist. LEXIS 40471 (D. Nev., Mar. 21, 2013)

PRIOR HISTORY: Sobel v. Hertz Corp., 698 F. Supp. 2d 1218, 2010 U.S. Dist. LEXIS 25276 (D. Nev., 2010)

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For Enterprise Leasing Company-West, LLC, Defendant: Dan C. Bowen, Bowen Hall Ohlson & Osborne, Reno, NV; Gregory D Call, Janine L. Scancarelli, Crowell &

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For Vanguard Car Rental USA, LLC, Defendant: Dan C. Bowen, Bowen Hall Ohlson & Osborne, Reno, NV.

For Chris Burke, Claimant: Geoffrey L. Giles, Reno, NV.

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For Scott Schutzman, Intervenor: Haley R Maple, Joel J Ewusiak, Forizs & Dogali, P.A., Tampa, FL; Kenneth R. Bick, Reno, NV.

For William Andrews, Weber Walter, Objectors: Daniel Greenberg, Greenberg Legal Services, Little Rock, AR; Michael Radmilovich, Michael Radmilovich, P.C., Reno, NV.

For Paige Nash, Objector: Thomas L. Cox, Jr., Dallas, TX.

JUDGES: LARRY R. HICKS, UNITED STATES DISTRICT JUDGE.

OPINION BY: LARRY R. HICKS

OPINION

ORDER

Before the court are three motions: (1) Plaintiffs' Motion for Final Approval of the Settlement (#185 [1]); (2) Plaintiffs' Motion for Attorneys' Fees, Expenses, and Incentive Awards (#186); and (3) Objector **[*5]** Scott Schutzman's Motion to Intervene (#199). For the reasons stated on the record during the fairness hearing on May 17, 2011 (#245-246), and for the reasons stated below, the court will deny final approval of the proposed settlement. Accordingly, Plaintiffs' motion for attorneys' fees, expenses and incentive awards will be denied as moot, and Objector's motion to intervene will be denied without prejudice.

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1 Refers to court's docket entry number.
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I. Facts and Procedural History

This is a putative class action filed on behalf of persons who have rented cars at the Reno and Las Vegas international airports from three national rental car companies: Hertz (also d.b.a. Advantage), Enterprise, and Vanguard (d.b.a. National and Alamo). Plaintiffs allege that in return for the right to operate on-site at the Reno and Las Vegas international airports, rental car companies are required to pay a percentage of their gross revenues to the airports as concession fees. As a means of recouping these ordinary operating expenses, the companies pass along the fees to their customers as surcharges labeled "concession recovery fees." [2] At all relevant times, the companies "unbundled" the surcharges from **[*6]** the base rental rate, such that the base rental rate quoted to customers did not include the additional airport "concession recovery fee," which was itemized separately in the rental agreement. Plaintiffs allege this practice violates both NRS § 482.31575 and Nevada's Deceptive Trade Practices Act ("DTPA"). In addition, Plaintiffs allege a claim for unjust enrichment. Defendants deny these claims.

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2 Hertz charged Plaintiff Sobel, who rented her vehicle from the McCarran International Airport in Las Vegas, a concession recovery fee of 10%. Hertz charged Plaintiff Dugan, who rented his vehicle from the Reno-Tahoe International Airport in Reno, a concession recovery fee of 11.54%.
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This case was filed on October 13, 2006, by individual plaintiffs Janet Sobel, Daniel Dugan, Ph.D., and Lydia Lee, and against defendants Hertz and Enterprise. Early on, Lee and Enterprise were voluntarily dismissed without prejudice and entered into a tolling agreement. Following the court's denial of Hertz' motion to dismiss and the Ninth Circuit's denial of interlocutory review, the court approved the parties' stipulation to bifurcation of liability and damages and to defer class certification proceedings. Plaintiffs **[*7]** then completed liability discovery against Hertz, including depositions of both fact and expert witnesses.

On March 17, 2010, this court entered an order (#111) granting in part and denying in part the parties' cross-motions for summary judgment. The court rejected Plaintiffs' DTPA claim, finding that Hertz had violated NRS § 482.31575, and denied both parties' motions on the unjust enrichment claim

because neither party had provided to the court the full terms and conditions of the rental agreements. Given the determination that Hertz had violated NRS § 482.31575, the court permitted discovery to proceed on the issue of damages. But the court rejected plaintiffs' claim for injunctive relief because the challenged practice is no longer illegal given amendments to the statute effective October 1, 2009.

Following the court's ruling, Plaintiffs Sobel and Dugan filed a motion for class certification (#112) on behalf of all Hertz customers who were charged a concession recovery fee at Nevada airports between October 13, 2003 and September 20, 2009. Also, Plaintiff Lee reinstated her action against Enterprise by filing a new complaint, docketed as Case No. 3:10-cv-326-LRH-VPC. That complaint **[*8]** was further amended on July 22, 2010, adding new plaintiff Mark Singer and new defendant Vanguard, an affiliate of Enterprise that rented cars at Nevada airports under the Alamo and National brands. The named plaintiffs thus included four individuals--Sobel, Dugan, Lee, and Singer--while the named defendants included three entities--Hertz (also d.b.a. Advantage), Enterprise, and Vanguard (d.b.a. National and Alamo).

On June 2, 2010, the parties participated in a 12-hour mediation session before the Hon. Ronald Sabraw (retired) of JAMS. Further negotiations, some through the mediator and other directly between opposing counsel, led to a Memorandum of Understanding containing the material terms of a settlement, which was signed by all parties in July 2010. On July 20, 2010, the court approved the parties' stipulation staying all litigation pending further negotiations, documentation and court approval of a class action settlement.

As a result of the parties' successful negotiations, on October 5, 2010, Plaintiffs filed a motion (#123) seeking (1) preliminary approval of the settlement, (2) conditional certification of the settlement class, (3) approval of the form and manner of notice to **[*9]** the settlement class and the procedures for class members to register for settlement benefits, and (4) a schedule for proceedings leading to final approval of the settlement--all stipulated to by the parties for purposes of settlement only. Responsive memoranda in support of Plaintiffs' motion were accordingly filed by Defendant Hertz (#125) and Defendants Enterprise and Vanguard (#127) on October 22, 2010.

Also on October 22, 2010, the parties filed a joint stipulation to consolidate the *Sobel* and *Lee* cases for purposes of settlement, to permit the filing of a consolidated Second Amended Class Action Complaint under Case No. 3:06-cv-545, and to stay all proceedings (except those relating settlement) pending final approval of the proposed settlement. The court approved the stipulation by order of October 29, 2010 (#132), following which Plaintiffs filed their Second Amended Complaint (#133) on November 5, 2010.

On November 9, 2010, the court held a hearing on Plaintiffs' Motion for Preliminary Approval of Settlement, Conditional Certification of the Settlement Class, Approval of the Form of Notice, and Memorandum in Support (#123). Supporting memoranda were also filed by Defendant Hertz **[*10]** (#125) and Defendants Enterprise and Vanguard (#127). At the hearing, the court heard arguments and took the matter under submission (#134). Two weeks later, on November 23, 2010, the court entered two orders granting conditional certification of the settlement class (#135) and granting preliminary approval of the settlement and approving the form of notice (#136). In particular, the court (1) conditionally certified the Settlement Class under Fed. R. Civ. P.

23(b)(3), "in connection with and solely for purposes of settlement"; (2) appointed as Class Representatives the named plaintiffs, Janet Sobel, Daniel Dugan, Ph.D., Lydia Lee and Mark Singer; (3) appointed as Class Counsel the Law Office of David Zlotnick; Berger & Montague, P.C.; and Robertson & Benevento; (4) preliminarily approved the Settlement; (5) entered a scheduling order for Plaintiffs' motions for final approval, attorneys' fees, and incentive awards (March 24, 2011); Defendants' papers in support (April 4, 2011); Opt-outs and Objections (April 8, 2011); replies in support of the settlement (April 28, 2011); the Fairness Hearing (May 17, 2011); and Registration for benefits (60 days after the Fairness Hearing); and (6) **[*11]** approved the form and manner of the Notice to the Settlement Class.

From February 7 to 18, 2011, nearly 2.5 million (exactly 2,497,360) notices were sent to Settlement Class members. Of those, 1,217,894 notices were mailed or emailed to customers of the Hertz and Advantage brands, *see* Doc. #229, p. 3; and 1,279,466 notices were mailed to customers of the Alamo, Enterprise and National brands, *see* Doc. #181, p. 2.

Settlement Class members have been able to register for benefits through the settlement website since the notices were distributed. As of mid-April, nearly 84,000 registrations had been processed through the settlement website--35,482 for Hertz and Advantage, plus 48,446 for Alamo, Enterprise and National. *See* Doc. #229, p. 3; Doc. #226, p. 1. Additionally, 2,068 opt-outs had been processed for Hertz and Advantage. *See* Doc. #229, p. 3. No opt-out figures were provided as to the Alamo, Enterprise and National brands. The deadline for benefits registration is 60 days after the fairness hearing scheduled for May 17, 2011.

Following the distribution of the notices, the court also received several filings from settlement class members in opposition to approval of the settlement. One **[*12]** such objector, Scott Schutzman, also filed a Motion to Intervene (#199), which the class plaintiffs and defendants oppose. The court also received filings from the United States (#243) and the Nevada System of Higher Education (#203) seeking exclusion from the settlement class of the governmental entities and their employees and contractors who were reimbursed for work-related car rentals involving the payment of unbundled concession recovery fees. Plaintiffs have agreed to exclude the governmental entities but oppose the exclusion of their employees and contractors.

On May 17, 2011, the court held a fairness hearing on Plaintiffs' Motion for Final Approval of the Settlement (#185). After hearing arguments from the class plaintiffs, defendants, and appearing objectors, the court indicated that the motion for final approval would be denied, with a written order addressing all pending motions to follow. *See* Doc. #245; Doc. #246, pp. 78-85.

II. Settlement Agreement

A. Settlement Class

The Settlement Class includes "all renters who were charged one or more Airport Concession Recovery Fee(s)" for car rentals at the Reno-Tahoe and McCarran International Airports by (1) Hertz from October 13, **[*13]** 2003 through September 30, 2009 [3]; (2) Hertz/Advantage from July 1, 2009 [4] through September 30, 2009; (3) Enterprise from June 3, 2004 through September 30, 2009; (4) Vanguard (d.b.a. Alamo or National) from June 3, 2007 through September 30, 2009. Doc. #135, p. 2 Excluded are Defendants and their affiliates, Plaintiffs'

counsel, and "all judicial officers responsible for any decisions in this matter." *Id.* at 2-3. Following the objections of the United States and the Nevada System of Higher Education, Plaintiffs now propose to also exclude any governmental entities, while including government employees and contractors. *See* Doc. #223.

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3 The cut-off is September 30, 2009 with respect to all Defendants, because the statutory amendment legalizing Defendants' conduct was made effective October 1, 2009.

4 Hertz acquired Advantage on July 1, 2009.

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B. Settlement Relief

This is strictly a coupon settlement. There is no settlement fund or any provision for cash payments to the Settlement Class (except incentive awards to the Class Representatives). Instead, each Defendant would issue a coupon to each of their respective customers for a discount on a future car rental. Class members with one or two **[*14]** rentals during the class period would receive a $10 coupon from the company they rented from, and customers with three or more rentals would receive a $20 coupon. For example, a customer of National who rented twice during the class period and was charged an airport concession fee would receive one $10 coupon from Defendant Vanguard toward a future rental from its National brand. *See* Doc. #123-1, pp. 9-11.

The coupons would be redeemable only with the issuing company but at any of its U.S. locations, subject to availability and standard rental qualifications. Also, the coupons would be redeemable with all other discounts, valid for 18 months from the date of issuance, non-transferrable except to immediate family members, and would have no cash value. *Id.* at 11.

Defendants have administered the notification and registration process for class members. Putative class members have been identified and notified based on the Defendants' rental records. Notification has occurred by email and by U.S. mail where email is impossible or undeliverable. All notified customers who have not withdraw from the class are considered members of the settlement class and would be bound by the settlement; however, **[*15]** to receive settlement benefits those members must register at a dedicated website within 60 days following the fairness hearing. Subject to certain restrictions, Defendants shall bear the costs of providing notice to the class and administering the Settlement Agreement. *Id.* at 12.

C. Attorneys' Fees and Costs

The Settlement Agreement includes a so-called "clear sailing" provision, whereby Defendants have agreed not to oppose Class Counsel's request for fees and costs, so long as the request does not exceed $1.44 million, of which costs are capped at $150,000. *See* Doc. #123-1, pp.12-13. Accordingly, Class Counsel have moved for the maximum $150,000 in costs and $1.29 million in attorney's fees, based on a lodestar calculation method under 28 U.S.C. § 1712(b). Doc. #186. Class Counsel claim that based on present time expended and costs incurred, they have a combined lodestar of $1,409,967.50 in fees based on 3,158.65 hours of work performed (averaging $446.38 per hour), plus $150,838.63 in costs, for a total

of over $1.56 million. Thus, based on Class Counsel's calculations, as of the filing of their motion three months ago, they had already exceeded the $1.44 million cap on attorneys' **[*16]** fees and costs by over $120,000.

D. Incentive Awards to the Class Representatives

The Settlement Agreement provides that, "subject to Court approval, Defendants shall collectively pay a single incentive award of an amount not to exceed $20,000. Such award shall be allocated among the Representative Plaintiffs by Plaintiffs' Counsel as directed by the Court." Doc. #123-1, p. 13. Accordingly, Plaintiffs have moved for the maximum $20,000 incentive award, with a proposed allocation to the Class Representatives as follows: $7,500 each to plaintiffs Sobel and Dugan, $3,000 to plaintiff Lee, and $2,000 to plaintiff Singer. Doc. #186, p. 7.

III. Final Approval of Class Settlement

A. Legal Standard

Rule 23 of the Federal Rules of Civil Procedure mandates judicial review of any settlement of the "claims, issues, or defenses of a certified class." Fed. R. Civ. P. 23(e). Determining whether to approve a proposed class action settlement is generally a two-step process. *See* Fed. Judicial Center, *Manual for Complex Litig.* § 21.632 (4th ed. 2004). First, the court conducts a preliminary fairness evaluation. *Id.* In doing so, where the parties seek class certification and settlement approval at the same **[*17]** time, the court makes a "preliminary determination that the proposed class satisfies the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b)." *Id.* The court then makes a "preliminary determination of the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing." *Id.*

Once the court is satisfied as to the certifiability of the class and the fairness, reasonableness, and adequacy of the proposed settlement, notice of a formal Rule 23(e) fairness hearing is given to the class members. *Id.* at § 21.633. The notice should let the class members know that the hearing will permit them the opportunity to voice their opinions on the proposed settlement. *Id.* It should also inform them that they may file written objections to the settlement and that those who do so may appear at the hearing. *Id.*

At the final fairness hearing, the proponents of the settlement must demonstrate that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The parties may present witnesses, experts, and affidavits or declarations, and class **[*18]** members may also appear and testify. *Manual for Complex Litig.* § 21.634. Regardless of the amount of opposition to the settlement agreement, the court must make an independent analysis of the settlement terms and examine whether the interests of the class are better served by the proposed settlement than by further litigation. *Id.* § 21.61.

To determine whether the settlement is fair, adequate, and reasonable, the court considers several factors, including (1) the strength of plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed, and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the

proposed settlement. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993). These factors are not exclusive, and some may warrant more weight than others depending on the circumstances. *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

Plaintiffs **[*19]** argue that a presumption of fairness should apply here because "the settlement agreement was reached in arm's length negotiations after relevant discovery [has] taken place." *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1171 (S.D. Cal. 2007). Plaintiffs fail to acknowledge, however, that when settlement negotiations were pursued, discovery had only just begun as to damages--the very issue that the parties tout as presenting the greatest weakness in Plaintiffs' case, thereby diminishing the case's value and necessitating settlement. Because highly relevant discovery had not in fact taken place, it is highly doubtful that a presumption of fairness should apply here.

Further undermining the appropriateness of a presumption of fairness is the fact that this settlement was negotiated prior to the court certifying the class. Indeed, because of "the special difficulties the court encounters with its duties under Rule 23(e)" in approving pre-certification settlements, "many courts have required the parties to make a *higher* showing of fairness to sustain these settlements." *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 805 (3d Cir. 1995) **[*20]** (hereinafter *In re GMC*) (emphasis added). Courts must be "even more scrupulous than usual in approving settlements where no class has yet been formally certified." *Id.*

Finally, special considerations arise in cases involving coupon settlements. The Class Action Fairness Act of 2005 (CAFA) includes an express requirement that "the court may approve the proposed [coupon] settlement only after hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members." 28 U.S.C. § 1712(e). Although this "fair, reasonable, and adequate" standard is identical to that contained in Rule 23(e)(2), "several courts have interpreted section 1712(e) as imposing a heightened level of scrutiny in reviewing such [coupon] settlements." *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1069 (C.D. Cal. 2010) (citing *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 654 (7th Cir. 2006); *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1321 (S.D. Fla. 2007)); *see also* S. Rep. No. 109-14, at 27 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 27 (stating that Section 5 of CAFA "requires greater scrutiny of coupon settlements"). Likewise, **[*21]** Rule 23 itself may require closer scrutiny of coupon settlements. *See* Fed. R. Civ. P. 23(h), 2003 Advisory Committee Notes ("Settlements involving non-monetary provisions for class members also deserve careful scrutiny to ensure that these provisions have actual value to the class."). Coupon settlements are "generally disfavored" due to three common problems: (1) they often do not provide meaningful compensation to class members; (2) they often fail to disgorge ill-gotten gains from the defendant; and (3) they often require class members to do future business with the defendant in order to receive compensation. *True*, 749 F. Supp. 2d at 1069. Accordingly, before granting final approval, the court "must discern if the value of a specific coupon settlement is reasonable in relation to the value of the claims surrendered." *Id.; see also* 28 U.S.C. § 1712(d) (authorizing the court to receive expert testimony "on the actual value to the class members of the coupons that are redeemed").

B. Fairness, Reasonableness, and Adequacy of the Settlement

1. Strength of Plaintiffs' Case

Although not stated explicitly, the essential position of the settlement parties is that the weakness of Plaintiffs' **[*22]** case going forward alone justifies approval settlement, seemingly regardless of the value of the relief obtained. Little regard is given to this court's ruling that Hertz violated NRS § 482.31575 by unbundling concession recovery fees from the base rate. The parties instead argue that, notwithstanding the court's ruling, Plaintiffs face a substantial risk that they would be unable to obtain any monetary recovery were the litigation to continue. They cite several reasons.

First, Enterprise and Vanguard note that the court's ruling on summary judgment applied only to Hertz, and they claim to have strong arguments for why no violation of NRS § 482.31575 occurred notwithstanding the court's contrary ruling. Doc. #194, p. 3. Enterprise and Vanguard appear to rely on the same arguments the court already rejected, however. The only argument that appears new is that the statute should be interpreted in light of the failure of proposed legislation that would have prohibited more expressly the unbundling of airport concession recovery fees. *Id.* at 3 & n.4. The court is skeptical, however, that such an argument would compel a different result, particularly in light of the court's determination **[*23]** on summary judgment that the Nevada Legislature intended to change, not clarify, existing law with the 2009 amendment to § 482.31575 legalizing the practice of unbundling airport concession recovery fees. *See* Doc. #111, pp. 8-11. The failure of other proposed legislation is unlikely to change that analysis.

Second, the parties note that the court's interpretation of former § 482.31575 as prohibiting the unbundling of concession recovery fees would be subject to de novo review on appeal. Reversal on appeal is an ever-present litigation risk that negatively affects the probable value of Plaintiffs' claims. Adding to that effect is the court's recognition in its prior rulings that the statute in question is "ambiguous and poorly-drafted" and the fact that resolution of the statute's "several" ambiguities involved substantial analysis of the statutory text and legislative history. Doc. #22, p. 3. Nonetheless, to say that appellate reversal is possible is not to say that it is likely or that the claims are weak or of negligible value. *See True*, 749 F. Supp. 2d at 1073; *Figueroa*, 517 F. Supp. 2d at 1324. While Plaintiffs may wish to avoid the risk of reversal on appeal, Defendants face an **[*24]** equal if not greater risk this court's rulings would be affirmed, and at greater expense. Having won partial summary judgment as to liability under § 482.31575, Plaintiffs are in a position of strength, not weakness.

Third, the court's ruling on summary judgment was not entirely in Plaintiff's favor. Although the court granted partial summary judgment to Plaintiffs as to Hertz' violation of NRS § 482.31575, the court simultaneously granted partial summary judgment to Hertz as to Plaintiffs' DTPA claim and denied summary judgment to either party as to Plaintiffs' unjust enrichment claim. *See* Doc. #111. The status of Plaintiffs' claims is thus a mixed bag. They have lost the DTPA as a potential avenue for monetary recovery, their unjust enrichment claim is alive but of uncertain status, and they have obtained a determination that Hertz violated NRS § 482.31575--a determination that would likely be extended to defendants Enterprise and Vanguard.

Fourth, given the court's finding of a violation of NRS § 482.31575, the parties not surprisingly place great emphasis on the argument that it would be

difficult, if not impossible, for Plaintiffs to prove actual injury and proximate causation in **[*25]** order to obtain monetary damages under NRS § 482.31585 (granting a private right of action "for the recovery of damages and appropriate equitable relief for any violation" of § 482.31575). Defendants argue that to recover damages, "Plaintiffs would have to show that if the airport concession recovery fee had been included in the base rate, they would not have rented a vehicle or would have rented it at a lower price." Doc. #194, p. 4.

The court is not so quick to accept Defendants' argument. To begin, the court has not been presented with any substantial, balanced analysis on the issue of damages; the one-sided presentation in the papers supporting settlement approval hardly qualifies. Given the court's independent duty to ensure the fairness, reasonableness, and adequacy of a class settlement, the court will not accept on suggestion alone the notion that Plaintiffs' claims are weak simply because the Defendants have identified a colorable defense. "That the claims are contested . . . is not to say the claims are weak." *Figueroa*, 517 F. Supp. 2d at 1324. Furthermore, even considering the parties' limited and one-sided briefing the court has received regarding Defendants' damages theory, **[*26]** the court is not convinced it would carry the day. Defendants argue they could have simply bundled the concession recovery fee and advertised, quoted and charged a higher base rate without affecting rentals or total rental rates. But there are obvious problems with this theory.

For instance, Defendants essentially argue that the sheer pervasiveness of the unlawful conduct precludes any damages award. That is, Plaintiffs cannot show that they could have obtained a better rate elsewhere because every rental car company was violating NRS § 482.31575. Yet the court has been presented with no evidence establishing that every on-site rental car company at the Reno-Tahoe and Las Vegas airports was engaged in the same unlawful practice of unbundling airport concession recovery fees. It might instead be the case that one or more on-site rental car companies did not engage in the same unbundling practices, and Defendants were unbundling their airport concession recovery fees to attract customers with the false appearance of competitive base rates.

But even if it were the case that "everyone was doing it," the court is skeptical of that argument as a viable damages defense. Surely the Defendants **[*27]** are not suggesting that so long as everyone is violating consumer protection laws in the same manner, all are immune from paying damages because the consumers would have encountered the same unlawful conduct had they gone elsewhere. Such a rule would render the law toothless and negate its purpose of consumer protection. Furthermore, the court views as somewhat unrealistic Defendants' assertion that the uniformity of the practice in the industry would have allowed them to charge the same airport concession recovery fee and total rental rate even if they had complied with the statute's bundling requirement. Quoting a higher, bundled base rate would potentially result in the loss of customers to non-compliant competitors still unlawfully advertising a lower, unbundled base rate, or to off-airport competitors who do not charge any airport concession recovery fee. To remain competitive in a price-sensitive industry, the compliant company would therefore be forced to reduce its advertised base rate and, by extension, the bundled concession recovery fee it charged.

Defendants' argument also ignores a significant portion of the relevant competition--off-site car rental companies not charging **[*28]** airport concession recovery fees. While some consumers are surely willing to pay an

extra surcharge for the convenience of renting at the airport, other more price-conscious consumers might avoid such surcharges if they can obtain a lower rate elsewhere. By advertising an unbundled base rate, Defendants' base rates would have appeared comparable to rates charged at off-site locations, when in fact Defendants were illegally adding unbundled airport concession recovery fees to the total rental rate. Seeking to obtain the best of both worlds--a comparable base rate and the convenience of renting at the airport--the price-conscious consumer might have rented from one of the Defendants under the mistaken belief that the total rental rate was truly comparable based on the advertised base rate.

Finally, Defendants maintain that proof of damages is the only avenue for obtaining monetary recovery because equitable relief, such as restitution or disgorgement, is not recoverable. [5] *See* Doc. #231, pp. 3-5. The court's rejection of Plaintiffs' DTPA claim does not foreclose the availability of equitable relief, however. Quite apart from the court's holding that Hertz' unbundling did not constitute **[*29]** a violation of Nevada's DTPA, the court also held that such practices did constitute a violation of NRS § 482.31575, for which NRS § 482.31585 expressly authorizes "the recovery of damages and appropriate equitable relief." While Defendants may contest the Plaintiffs' claims for equitable relief under § 482.31585, that does not render the claims weak or negate their settlement value. *See True*, 749 F. Supp. 2d at 1073; *Figueroa*, 517 F. Supp. 2d at 1324. "A colorable claim may have considerable settlement value (and not merely nuisance settlement value) because the defendant may no more want to assume a nontrivial risk of losing than the plaintiff does." *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 783 (7th Cir. 2004). The court has never addressed the asserted unavailability of restitution or disgorgement as a remedy in this case, and the unavailability of which is hardly a forgone conclusion.

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5 The court has previously held that injunctive relief is unavailable due to the 2009 amendments to NRS § 482.31575 legalizing Defendants' unbundling practices. However, the unavailability of such relief is irrelevant to the potential monetary value of Plaintiffs' claims or the reasonableness **[*30]** of the settlement. As the settlement contains no provisions requiring Defendants to alter their business practices, there is no advantage or disadvantage to settling insofar as injunctive relief is concerned.

- - - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

2. Risk, Expense, Complexity, and Likely Duration of Further Litigation

Notwithstanding the relatively advanced stage of these proceedings, *see* Part 5 *infra*, extensive further litigation would remain to be conducted if the settlement were to be rejected, including re-certification of the class, discovery and litigation on the issue of damages, and an inevitable appeal. Further litigation would, in all probability, be highly contested, risky, lengthy, and expensive to both sides, with any recovery further delayed by any appeals. By contrast, the proposed settlement would provide for immediate recovery, thereby efficiently and quickly resolving the dispute while guaranteeing some recovery to the class. This factor therefore weighs in favor of approval.

3. Risk of Gaining Class Certification and Maintaining Class Action Status Throughout the Trial

The class has been conditionally certified for settlement purposes only, and if the settlement is not approved certification of a litigation **[*31]** class would be contested. The fact that class certification and maintaining class status is "not a foregone conclusion" weighs somewhat in favor of approval of the settlement. *Staton v. Boeing Co.*, 327 F.3d 938, 962 (9th Cir. 2003). At the same time, however, the parties have not presented any compelling reasons to significantly doubt the likelihood that Plaintiffs would be unable to satisfy the requirements for certification of the class under Rule 23(a) and (b), particularly given the court's existing findings supporting certification of the settlement class. "It is true that settlement can reduce the differences among class members. But . . . the standard for certification is the same for settlement classes as for conventional classes." *In re GMC*, 55 F.3d at 818. Plaintiffs specifically note that Defendants may challenge certification on the grounds that reliance on Defendants' quoted base prices and calculation of damages presented individualized issues. Doc. #185, p. 12. However, individualized issues of causation, reliance, and damages do not ordinarily preclude class certification. *In re GMC*, 55 F.3d at 817. Furthermore, if the litigation class were certified, there do not appear **[*32]** to be any issues that would undermine maintenance of the class action throughout trial. The court therefore finds that the risks of achieving and maintaining class certification are not so substantial as to weigh in favor of settlement.

4. Amount Offered in Settlement

As noted above, in order to determine that a coupon settlement is fair, reasonable, and adequate for class members under Rule 23(e)(2) and § 1712(e) of CAFA, the court "must discern if the value of a specific coupon settlement is reasonable in relation to the value of the claims surrendered." *True*, 749 F. Supp. 2d at 1069. "In ascertaining the fairness of a coupon settlement, the Court is to 'consider, among other things, the real monetary value and likely utilization rate of the coupons provided by the settlement.'" *Id.* at 1073 (quoting S.Rep. No. 109-14, at 31, *reprinted in* 2005 U.S.C.C.A.N. 3, 31). To that end, CAFA provides that "the court may, in its discretion upon the motion of a party, receive expert testimony . . . on the actual value to the class members of the coupons that are redeemed." 28 U.S.C. § 1712(d).

Here, the parties have provided no evidence that would allow this court to make any reasoned assessment **[*33]** of the actual value of the settlement to the class members or of the value of the claims to be surrendered. Such lack of evidence is alone grounds for denying final approval, as the court is simply unable to fulfill its duty to the settlement class under Rule 23 and CAFA.

Regarding the estimated value of Plaintiffs' claims, it need not be determined with precision. *See Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). "In reality, parties, counsel, mediators, and district judges naturally arrive at a reasonable range for settlement by considering the likelihood of a plaintiffs' or defense verdict, the potential recovery, and the chances of obtaining it, discounted to present value." *Id.* Nonetheless, in this case the court cannot even begin this inquiry, for the parties have failed to provide the court with evidence of even the total amount of airport concession recovery fees that were charged to the class members, let alone potential ranges of recovery and the chances of obtaining it. Although there is a reference to $70 million in Plaintiffs' motion for final approval, Plaintiffs are silent on the evidence or methodology behind that figure. Doc. #185, p. 12. Without **[*34]** evidence of the actual amount of damages at stake, the court is unable to make

any reasoned assessment of the value of the claims.

As for the actual value of the coupon settlement to the class members, the record is only slightly more developed and still woefully deficient. The face value of the coupons ($10 and $20, depending on number of rentals) is evident from the settlement terms. Also, Defendants have provided figures from the claims administrators regarding the numbers of registrations and opt-outs received prior to the fairness hearing (as of mid-April, nearly 84,000, or 3.36% of the nearly 2.5 million member class). From that number, it is possible to make some reasoned prediction as to the total number of registrations likely to be received by the deadline, sixty days following the fairness hearing. Class Counsel reasonably estimates at least 100,000 (or 4% of the class). Doc. #233-1, p. 2.

No figures have been provided, however, as to the breakdown of registrants entitled to $10 or $20 coupons, despite the likely availability of such figures from the claims administrators and the necessity of such figures for estimating the total face value of all coupons to be distributed. **[*35]** Instead, when questioned at the fairness hearing, Defendants could offer only that roughly 90-95% of the class consists of members with one or two rentals, making them eligible for $10 coupons, with the remainder eligible for $20 coupons. Doc. #246, pp. 25, 39. Assuming the registration percentages numbers correlate to the makeup of the class, approximately 90 to 95 thousand class members would receive $10 coupons, and 5 to 10 thousand would receive $20 coupons. Thus, the total face value of coupons issued to 100,000 registrants would be approximately $1.05 million to $1.10 million.

But that is only the coupons' face value, not their actual value to the class. Coupons are inherently worth less than cash, particularly where as here the coupons have no cash value, transferability is substantially restricted, and redemption rates can vary widely and may be particularly low in cases involving low-value coupons. *See True*, 749 F. Supp. 2d at 1075. The parties argue that these coupons may be redeemed at significant rates because the coupons are valid for 18 months, may be redeemed not just in Nevada but at any of the issuer's domestic locations, and may be redeemed in conjunction with other **[*36]** discounts. That may well be correct. However, the court has been presented with no evidence whatsoever as to what those redemption rates might actually be. Because redemption rates have a direct and potentially devastating impact on the actual value received by the class, such lack of evidence prevents any reasoned assessment of the settlement's actual value to the class.

The fact that these coupons are redeemable along with all other discounts does factor positively into the value of these coupons. But they are still coupons and therefore cannot be legitimately taken at face value. *See Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 390 (C.D. Cal. 2007). "[C]ompensation in kind is worth less than cash of the same nominal value." *In re Mexico Money Transfer Litig.*, 267 F.3d 743, 748 (7th Cir. 2001). "Since rebates and coupons aim to facilitate a sale to a purchaser who would not otherwise purchase a product at a higher price, the Court cannot . . . assume that every sale to a class member 'would have happened anyway.'" *True*, 749 F. Supp. 2d at 1075. Class members may redeem their coupons with the issuing defendants "only 'because they fe[el] beholden to use the certificates,' not because **[*37]** they would have otherwise. *Id.* (quoting *In re GMC*, 55 F.3d at 808). In this way "coupons serve as a form of advertising for the defendants, and their effect can be offset (in whole or in part) by raising prices during the period before the coupons expire." *In re*

Mexico Money, 267 F.3d at 748. Moreover, as for these coupons in particular, the court seriously questions the value of $10 or $20 on a car rental in light of the fact that consumers can readily find similar discounts in tour magazines that proliferate in tourist destinations like Reno and Las Vegas--and without surrendering potentially valuable legal claims.

For many of the same reasons, the coupons are also less costly than cash to the Defendants. *See True*, 749 F. Supp. 2d at 1075. Indeed, "[r]ather than resulting in [the] Defendant[s] disgorging any wrongfully obtained gains, the result will likely be increased [business] . . . ." *Figueroa*, 517 F. Supp. 2d at 1327. The coupons here are non-transferrable, non-sellable, and may only be redeemed with the issuing defendant. Thus, in order to obtain the benefit of the settlement coupons, the individual class members would be forced to do additional business with the very defendants **[*38]** that wronged them. For each class member who rents another car from the coupon issuer who would not have done so absent the coupon, that Defendant "will experience a net benefit." *True*, 749 F. Supp. 2d at 1075. "Thus, rather than providing substantial value to the class, the certificate settlement might be little more than a sales promotion . . . ." *In re GMC*, 55 F.3d at 768.

Defendants have taken the express position that they would rather litigate than agree to a cash settlement. *See* Doc. #246, p. 64. Of course, that is their right to do. It is also their right to assert that the claims against them are weak and unworthy of compensation. But in the absence of probative evidence regarding the actual value of the coupons offered in settlement, Defendants' position is telling. If Defendants are not willing to agree to any cash settlement but they are willing to issue $10 and $20 coupons, perhaps the actual value of the coupons is nothing at all.

Of course, Defendants have agreed to cash outlays in other forms, including payment of costs of notice and administration and, subject to court approval, attorneys' fees, litigation expenses, and incentive awards. While the value of such items **[*39]** may accrue to the class' benefit only indirectly, it is nevertheless appropriate to consider all provisions in the settlement to fulfill the court's duties in assessing the fairness of the proposal and protecting the interests of the class. *See True*, 749 F. Supp. 2d at 1077. The court has not been provided with figures on the costs of notice and administration, aside from Class Counsel's "understand[ing]" that such costs to date "exceed $750,000." The other figures are known. Defendants have agreed to pay, uncontested, up to $1.44 million cash in the form of attorneys' fees and costs to Class Counsel, and $20,000 in incentive awards to the Class Representatives. In turn, Plaintiffs have requested the maximum. *See* Doc. #186.

Putting aside for a moment the court's concerns expressed above and valuing the coupons at face value (as calculated above, approximately $1.1 million) with an unrealistic 100 percent redemption rate, the total cost to Defendants would total approximately $3.31 million. Based on nearly 2.5 million class members, that equates to approximately $1.324 in costs per class member, not including revenues from repeat business. By comparison, Plaintiffs' unverified figure **[*40]** of $70 million in concession recovery fees collected divided by 2.5 million class members averages to $28 per class member. Based on these figures the discount on Plaintiffs' claims is 95 percent. Considering that this figure was arrived at by taking all facts and assumptions in the light most favorable to the settlement, disregarding basic economics, and assuming that Defendants' costs equate to the class members' benefit, the real discount is likely greater.

By comparison, under the clear sailing provision, Class Counsel's fees request has been discounted by less than 8 percent, and even then results in an hourly rate exceeding $400.

As in *True*, 749 F. Supp. 2d at 1078, of all of the components of the settlement, the only components with any determinate--or on this record, determinable--value are the attorneys' fees, incentive payments, and to some extent the costs of notice and administration. Furthermore, to the extent the value of the settlement to the class can be assessed, it is heavily discounted, if not altogether nominal, whereas Class Counsel is seeking, uncontested, $1.44 million in fees and costs under a "clear sailing" provision, regardless of how many class members register **[*41]** or redeem coupons. Faced with similar circumstances, the *True* court held that "to award three million dollars to class counsel who may have achieved no financial recovery for the class would be unconscionable." *Id.* Here, the requested award is not quite half that amount; however, the same concerns apply.

For the foregoing reasons, the court concludes that there is no basis upon which the court might find that this settlement produces "real value" for the class, as Class Counsel has urged. On this sparse record, the settlement appears to have real value only for Class Counsel, the Class Representatives, the claims administrators, and the Defendants.

5. Extent of Discovery Completed, and Stage of the Proceedings

At the time of settlement, the court had entered partial summary judgment as to Hertz, but not as to Enterprise and Vanguard. Plaintiffs had also moved for class certification against Hertz, but the motion had not been fully briefed and was stayed pending settlement. Finally, discovery on damages had only just begun between Plaintiffs and Hertz, and apparently no discovery on damages had begun with any other defendants.

Plaintiffs tout the advanced stage of the proceedings as weighing **[*42]** in favor or settlement. Plaintiffs note that, *inter alia*, discovery has been completed as to liability, and the court has ruled on a motion to dismiss and cross-motions for summary judgment. *See* Doc. #185, pp. 13-14. Conspicuously absent from Plaintiffs' assessment, however, are the facts that the court ruled in Plaintiffs' favor as to liability under NRS § 482.31575, and virtually no discovery has been conducted as to damages. Yet the damages issue is central to the parties' arguments regarding the reasonableness of the settlement based on the purported weakness of Plaintiffs' case, despite having won partial summary judgment on liability.

Because discovery on damages was in its infancy at the time of settlement, it is highly questionable whether Plaintiffs have sufficient information to make a fully-informed assessment of the strengths, weaknesses and value of their case going forward. Indeed, as discussed above, given the parties' failure to present evidence regarding the value of the claims Plaintiffs would be giving up if the settlement were to be approved, the court itself is unable to determine whether the value of the settlement is reasonable in relation to the value of the **[*43]** claims surrendered. Thus, notwithstanding the advanced stage of these proceedings--and in some sense, because of it, given Plaintiffs' success on the only issue for which discovery has been conducted--the court finds this factor weighs against approval. *See Figueroa*, 517 F. Supp. 2d at 1328 (reaching the same conclusion where the settlement had been negotiated before class

certification and while the plaintiffs had been denied merits discovery, leaving them with "insufficient information . . . to adequately evaluate the merits of the case and weigh the benefits of settlement against further litigation").

6. Experience and Views of Counsel

Class Counsel represent that they have extensive experience in complex class actions, and that Defendants are also represented by counsel with extensive experience. Furthermore, the settlement was achieved in part with the assistance of an experienced mediator and former judge, who has issued a declaration stating that "[t]he mediation involved many complex and difficult issues," that "counsel for all parties vigorously represented their clients interest," that the settlement "is the result of arm's-length negotiations," and that he believes the "innovative" **[*44]** settlement package "is well-tailored to the strengths and weaknesses of all parties' positions." Doc. #233-1, pp. 1-2. Such factors weigh in favor of settlement approval.

Some objectors assert, however, that the settlement appears to be a so-called "lawyer's bargain," whereby Class Counsel has agreed to a coupon settlement of nominal value to ensure recovery of their own fees and expenses. Lending some credence to that accusation is the fact that Class Counsel have advocated for approval of the settlement based on the purported weakness of the claims and the substantial risks of further litigation, yet the class members alone would bear virtually all of the attendant discount on their settlement recovery. While the class members receive coupons of questionable actual value, Class Counsel has requested for itself an uncontested cash award of $1.44 million in attorneys' fees in costs based on a lodestar, rather than on the value of the class recovery, with only a modest discount from the claimed lodestar amount. In other words, the class is being asked to "settle," yet Class Counsel has applied for fees as if it had won the case outright.

Seeking to rebut the accusation of a lawyer's bargain, **[*45]** Class Counsel assert they insisted on negotiating the settlement terms for the class prior to negotiating their recovery of fees and expenses. *See* Doc. #233, pp. 5-6. Generally, the separate negotiation of the class recovery and attorneys' fees does tend to mitigate the potential conflict of interest between counsel and the class. In this case, however, that principle is undermined by the settlement's inclusion of a clear sailing provision on attorneys' fees and by Class Counsel's position that fees should be calculated and awarded without regard to the value of the class recovery. This restores to at least some degree the conflict of interest that separate negotiation of the class recovery and attorneys' fees is supposed to achieve. If counsel could count on attorneys' fees being awarded without regard to the value obtained for the class, it would diminish class counsel's incentive to maximize the class' recovery and instead incentivize a quick settlement with minimal recovery to the class. Moreover, in light of the fact that defendants are concerned only with the total expense of the settlement, rather than where the recovery goes, class counsel's acceptance of a lower settlement **[*46]** amount increases the chances of negotiating a clear sailing provision with a higher cap on attorneys' fees and costs.

Ultimately, the best evidence for rebutting the accusation of a lawyer's bargain is to show that actual value has been obtained for the class relative to the strength and value of the claims surrendered. As already discussed, however, such evidence has not been presented in this case.

7. Presence of a Governmental Participant

No governmental entity has filed any objection to the settlement terms or sought to participate. The two governmental entities that have responded--the United States, and the Nevada System of Higher Education--have sought to exclude themselves and their employees and contractors on statutory and constitutional grounds without expressing any opinion on the reasonableness of the settlement terms.

8. Reaction of Class Members to the Proposed Settlement

According to the Defendants' submissions prior to the Fairness Hearing, responses to the nearly 2.5 million notices sent out have been as follows: (a) objections number approximately 66, or 0.003% of the Class; (b) opt-outs number less than 5,000, or 0.2%; and (c) registrations total nearly 84,000, or 3.36%. **[*47]** The settlement parties argue this suggests minimal opposition and widespread support for the settlement.

Several observations cut the other way, however. First, the parties avoid mentioning the substantial rate of non-responsiveness by the class--over 96%, or 2.411 million people. Second, the negative responses are touted by the parties as indicating minimal opposition in relation to the size of the entire class. In relation to the number of total responders, however, 5.6% of 89,000 responders opted out. Third, in assessing the Class' reaction, courts look not only to the number but also the "vociferousness of the objectors," *In re GMC*, 55 F.3d at 812, which in this case has been strong. Fourth, given the practical realities of class settlements, courts should be more cautious about inferring support from a small number of objectors. This is particularly true where the settlement benefits are small, and where notice of the action and the settlement occur simultaneously, giving the appearance of a *fait accompli. See id.*

The settlement parties attempt to dismiss many of the objectors arguments on the basis that they are confused about what the settlement does and does not provide, and that **[*48]** they fail to consider or address the purported weakness of the Plaintiffs' case. To the extent the objectors rely on objectively erroneous arguments (e.g., whether the attorneys' fees would reduce the award to the class), the objections are not entitled to weight. However, as already discussed, the court also finds that some objectors have raised legitimate and serious concerns about the value of the settlement to the class relative to the value of the claims surrendered. Given the settlement parties' failure to provide such evidence in support of the settlement, their dismissal of the objectors' arguments rings hollow.

At bottom, the court concludes that the absence of evidence as to the actual value to the class of the coupons offered in settlement and the value of the claims surrendered precludes any finding that the settlement is fair, reasonable, and adequate under either Rule 23(e) or 28 U.S.C. § 1712(e). The court further rejects the notion that the claims are so weak as to render the settlement fair, reasonable, and adequate notwithstanding the lack of evidence as to the value of the settlement. Plaintiffs' Motion for Final Approval of the Settlement (#185) will therefore be **[*49]** denied.

IV. Motion for Attorneys' Fees, Expenses and Incentive Awards

Given the court's denial of final approval of the settlement, Plaintiffs' Motion for Attorneys' Fees, Expenses, and Incentive Awards to the Class Representatives

(#186) will be denied as premature.

V. Exclusion of Governmental Entities and Employees

The United States and the Nevada System of Higher Education ("NSHE") have each requested exclusion from the settlement class of the governmental entities and their employees and contractors who were reimbursed for work-related car rentals involving the payment of unbundled concession recovery fees. The United States essentially asserts that 28 U.S.C. §§ 516-19 precludes its participation as a member of a class represented by private counsel, and that any claims for damages for fees unlawfully charged to its employees and contractors for work-related activities would accrue to the government upon reimbursement. *See* Doc. #243. By comparison, NSHE objects to this court's jurisdiction and requests exclusion for itself and its employees on the ground that, absent an express waiver, Eleventh Amendment sovereign immunity bars involuntary joinder of the state or its employees in **[*50]** their official capacities, whether as plaintiffs or defendants. *See* Doc. #203; Doc. #237; *Thomas v. FAG Bearings Corp.*, 50 F.3d 502, 505-06 (8th Cir. 1995); *Walker v. Liggett Grp., Inc.*, 982 F. Supp. 1208, 1210-11 (S.D. W.Va. 1997). Plaintiffs have agreed to exclude the governmental entities but oppose the exclusion of their employees and contractors. *See* Doc. #223, p. 2 & n.2.

Given the court's denial of final approval of the settlement, it is unnecessary at this time to determine the propriety of including individual employees of NSHE and the United States in the settlement class. Pursuant to the court's order granting Plaintiffs' motion for conditional class certification, "certification of the Settlement Class is contingent on and for the purposes of settlement only. If the Settlement does not become final for any reason, Plaintiffs and Defendants shall be restored to their respective positions as if no settlement had been reached." Doc. #135, p. 4. In other words, absent final approval of the settlement, there is no Settlement Class from which anyone might be excluded. Should the plaintiffs file a renewed motion for approval of the Settlement Agreement or file a separate motion **[*51]** for class certification, the parties shall address these issues at that time.

VI. Objector's Motion to Intervene

Among the Settlement Class members who have filed written objections to the proposed settlement, objector Scott Schutzman also has moved to intervene. Essentially, Schutzman finds the coupon settlement inadequate, and he contends that intervention is necessary to protect his interest because approval of the settlement would leave him without any satisfactory remedy.

Given the court's denial of final approval of the settlement, the primary basis upon which Schutzman seeks intervention--opposition to the settlement--has now been resolved in his favor. Furthermore, that disapproval has materially altered the procedural posture and course of this litigation, and Schutzman's briefing does not address his interest in or the grounds for intervening in these circumstances. For these reasons, the Motion to Intervene (#199) will be denied without prejudice.

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Final Approval of the Settlement (#185) is DENIED.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Attorneys' Fees, Expenses, and Incentive Awards (#186) is DENIED as moot.

IT IS FURTHER **[*52]** ORDERED that Objector Scott Schutzman's Motion to Intervene (#199) is DENIED without prejudice.

IT IS FURTHER ORDERED that notice of the court's denial of settlement approval and a copy of this order shall be posted on the settlement website. Defendants shall also provide notice of the court's denial of settlement approval, as well as instructions on how to obtain a copy of the court's decision from the settlement website, to all class members who have responded, including registrants, opt-outs, and objectors.

IT IS SO ORDERED.

DATED this 27th day of June, 2011.

/s/ Larry R. Hicks

LARRY R. HICKS

UNITED STATES DISTRICT JUDGE

1 of 1 DOCUMENT

Wilson v. DirectBuy, Inc.

CIVIL ACTION NO. 3:09-CV-590 (JCH)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

2011 U.S. Dist. LEXIS 51874

May 16, 2011, Decided
May 16, 2011, Filed

SUBSEQUENT HISTORY: Motion granted by, Transferred by Wilson v. DirectBuy, Inc., 2011 U.S. Dist. LEXIS 124251 (D. Conn., Oct. 26, 2011)

COUNSEL: **[*1]** For Christopher Wilson, Ind & o/b/o of a class of persons similarly situated, Regina Ingram, Ind & o/b/o of a class of persons similarly situated, Gary Ingram, Ind & o/b/o of a class of persons similarly situated, Christian Kalled, Ind & o/b/o of a class of persons similarly situated, Keith Walker, Ind & o/b/o of a class of persons similarly situated, Mabyn Morgan, Ind & o/b/o of a class of persons similarly situated, Daniel Morgan, Ind & o/b/o of a class of persons similarly situated, Raymond Bailey, Ind & o/b/o of a class of persons similarly situated, Shery Bailey, Ind & o/b/o of a class of persons similarly situated, Robin Varghese, Ind & o/b/o of a class of persons similarly situated, Plaintiffs: Jeffrey S. Nobel, Seth R. Klein, LEAD ATTORNEYS, Izard Nobel PC-Htfd, Hartford, CT; Mark P. Kindall, LEAD ATTORNEY, Izard Nobel, LLP, West Hartford, CT.

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JUDGES: Janet C. Hall, United States District Judge.

OPINION BY: Janet C. Hall

OPINION

RULING RE: PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT (Doc. No. 134) AND RELATED MOTIONS (Doc. Nos. 135, 136)

I. INTRODUCTION

On March 29, 2011, plaintiffs in this matter filed a Motion for Final Approval of Class Settlement (Doc. No. 134), as well as Motions for Attorneys' Fees and for Awards to the class representatives (Doc. Nos. 135, 136). On May 10, 2011, this court conducted a fairness hearing, offering plaintiffs, defendants, and various objectors **[*8]** the opportunity to speak in support of or in opposition to the court's final approval of the class settlement agreement. For the reasons articulated below, the court denies plaintiffs' Motions.

II. PROCEDURAL AND FACTUAL BACKGROUND

DirectBuy, Inc. ("DirectBuy") is a franchise members-only discount shopping club. It has shopping centers throughout the United States and currently has over 400,000 members. See Powell Aff. ¶¶ 2, 9, Mar. 28, 2011 (Doc. No. 137-2). DirectBuy purports to offer its members products at manufacturer's or supplier's prices, resulting in major savings for its members by cutting out the retail markup. See Compl. ¶ 34 (Doc. No. 1). These products include a variety of furniture, home improvement products, and appliances. Id. ¶ 24. However, in order to receive this benefit, a customer must pay a sign-up fee of several thousand dollars and an annual renewal fee of around $200. Powell Aff. ¶¶ 3, 5. Doubtless members expect to recoup these fees in savings over the life of their membership. See, e.g., P. Pelsinger Obj. (Doc. No. 70) ("I thought [the membership fee] was a lot but they convinced [me] I would make that money back through savings on our purchases.").

Within **[*9]** the last several years, a number of lawsuits have been filed in addition to this one, accusing DirectBuy of misrepresentation, fraud, and coercion. See Compl., Vance v. DirectBuy, Inc., No. 1:09-cv-1360 (S.D. Ind. filed Jan 15, 2010) ("Vance Compl.") (Doc. No. 86-9); Compl., Swift v. Direct Buy, Inc., No. 1:09-cv-4067 (E.D.N.Y. filed Jan. 19, 2010) ("Swift Compl.") (Doc. No. 86-6); Compl., Ganezer v. DirectBuy, Inc., No. BC403076 (Cal. Super. Ct. filed Dec. 2, 2008) ("Ganezer Compl.") (Doc. No. 86-8); Compl., Randall v. Evamor, Inc., No. 09SL-CC03852 (Mo. Cir. Ct. filed Oct. 29, 2009) ("Randall Compl.") (Doc. No. 86-7).[1] While each of these actions take a somewhat different approach, they are similar in substance.

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1 All but the Ganezer action were filed after the instant case. Plaintiffs' counsel were also involved in a case, Ponzi v. DirectBuy, Inc., No. 3:08-cv-1274 (D. Conn. filed Aug. 20, 2008), that was filed before the Ganezer action, but which was settled as an individual action.

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A. The Settled Causes of Actions

The instant lawsuit was brought by Christopher Wilson and nine other current and former DirectBuy members purportedly on behalf of a class of all current and former members **[*10]** of the club. Compl. ¶¶ 2-8. Plaintiffs allege that DirectBuy engaged in fraud by purporting to offer its members products "at the manufacturer's or supplier's price." Id. at ¶ 48. According to plaintiffs, DirectBuy failed to disclose "rebates, discounts, and other payments from manufacturers and suppliers," which plaintiffs claim amounted to approximately $8 million during the fiscal year ending in 2007, id. at ¶ 49 and a total of $53 million during the eight year class period, Klotzbach Aff. ¶¶ 3-5, Mar. 29, 2011

(Doc. No. 137-2).

Plaintiffs assert claims pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO"), averring that DirectBuy acted in collusion with its franchisees to engage in the alleged fraud. Compl. ¶¶ 40-69. Plaintiffs also assert a claim of unjust enrichment. Id. at ¶¶ 70-78.

The Settlement Agreement purports to settle four additional class action lawsuits brought throughout the country. See Settlement Agreement at 4-5, 12 (Doc. No. 64-1). These cases each bring claims that rely on facts nearly identical to those alleged in the instant action. See Vance Compl. ¶¶ 46-70; Swift Compl. ¶¶ 79-86, 93-96; Ganezer Compl. ¶¶ 12-15; Randall Compl. ¶ 54. Additionally, **[*11]** these other four cases allege that DirectBuy acted in violation of the law by charging excessive freight and handling fees. See Vance Compl. ¶¶ 66-68; Swift Compl. ¶¶ 68-78, 87-92, 94-96; Ganezer Compl. ¶¶ 16-17; Randall Compl. ¶¶ 54-55.

As the court understands it, none of these cases have had a class certified.[2] Unlike plaintiffs in this case, the other plaintiffs do not allege violations of RICO. Rather, two of the cases allege fraud, Vance Compl. ¶¶ 52-63, Swift Compl. ¶¶ 79-96; one case alleges breach of contract, Swift Compl. ¶¶ 68-78; and another includes an unjust enrichment claim, Vance Compl. ¶¶ 64-70. Additionally, three of the other cases allege violations of their states' consumer protection laws. Vance Compl. ¶¶ 46-51; Ganezer Compl. ¶¶ 25-45; Randall Compl. ¶¶ 51-57.

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2 At least three of the cases have been stayed since 2010 based on DirectBuy's representation to those courts of a settlement in this case. See J. Randall & T. Randall Obj. 4 (Doc. No. 157) (Randall case stayed August 23, 2010); J. Swift, et al. Obj. 1 (Doc. No. 213) (Swift case stayed April 19, 2010); B. Vance Obj. 6 (Doc. No. 163) (Vance case stayed April 21, 2010).

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B. The Procedural History of the Instant [*12] Case

The instant lawsuit was brought in this court in April 2009. See Doc. No. 1. Shortly after the suit was filed, the parties jointly requested a stay of all deadlines pending settlement negotiations, to be mediated by Magistrate Judge Garfinkel. See Doc. No. 14. This court granted that request, see Doc. No. 16, and, for nearly a year and a half, the parties engaged in settlement negotiations.

In December 2009, plaintiffs in one of the several parallel actions moved to intervene in this case in order to stay the settlement proceedings. See Doc No. 28. The interveners had filed a motion to the Judicial Panel on Mutltidistrict Litigation ("the MDL Panel"), seeking consolidation of four lawsuits pending against DirectBuy, including the instant case. Id. In February 2010, this motion was rejected by the MDL Panel. See Doc. No. 41.

Settlement negotiations continued in this case until, on December 9, 2010, plaintiffs and defendants filed a Joint Motion for Preliminary Approval of Class Settlement (Doc. No. 64). In light of the court's prior referral of the settlement proceedings to Judge Garfinkel, and given his familiarity with the case, the court verbally requested Judge Garfinkel to handle **[*13]** the preliminary approval.[3] On December 14, 2011, Judge Garfinkel granted the Motion

for Preliminary Approval. See Doc. No. 65.

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3 In retrospect, the court was mistaken in not making a written referral to Judge Garfinkel for a Report and Recommendation on the Preliminary Approval.

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From January through April 2011, the court received a number of objections, filed pro se and represented, to the terms of the Settlement Agreement, as well as an amicus brief filed by the attorneys general of thirty-seven states,[4] the District of Columbia, and Puerto Rico. See Doc. No. 161. A Hearing took place on May 10, 2011, where parties and objectors were given an opportunity to express their views as to the fairness, adequacy, and reasonableness of the settlement. See Doc. No. 239.

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4 These states include, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, and West Virginia.

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C. The Terms of the Settlement [*14] Agreement

The settlement class is defined to include current and former DirectBuy members during the time period from October 11, 2002, until the date the Settlement Agreement was preliminarily approved, December 14, 2010. See Settlement Agreement at 5. This definition includes approximately 410,000 current members and 430,000 former members. See Powell Aff. ¶ 9.

The Settlement Agreement purports to settle:

> all claims, demands, rights, causes of action, judgments, executions, damages, liabilities, and costs or expenses of any kind relating to the Actions (including attorney's fees and court costs), in law or equity, known or unknown, suspected or unsuspected, fixed or contingent, arising out of or related to claims based on events, transactions, or occurrences taking place at any time before the Final Settlement Date, that were brought, or could have been brought, in the Actions.

Settlement Agreement at 12. "Actions" is defined to include the instant case and each of the four cases discussed, supra. Id. at 4-5.

In exchange for this release, the class will receive, at minimum, two free months of membership. See id. at 10-11. Current members will automatically receive this benefit, whereas **[*15]** former members need to contact DirectBuy to obtain any benefit. Id. Additionally, current members have the option to purchase renewals in advance and receive additional months free. Id. at 10 (offering four free months with the purchase of a two year renewal, and offering one free month with the purchase of a one year renewal).

IV. STANDARD OF REVIEW

A district court must review the terms of a proposed class action settlement to ensure that it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); McReynolds v. Richards-Cantave, 588 F.3d 790, 803 (2d Cir. 2009). This analysis

is usually divided into two steps. First, a court will analyze the procedural aspects of the settlement to determine whether the nature of the settlement proceedings give rise to concerns of procedural unfairness. Id. at 803-04. A presumption of fairness will arise, where "'a class settlement [is] reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" Id. at 803 (quoting Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96, 116 (2d Cir. 2005)) (alteration in original).

Second, a court will consider the substantive fairness of a settlement agreement, utilizing **[*16]** the nine factors articulated by the Second Circuit in City of Detroit v. Grinnell Corp., 495 F.2d 448, 454 (2d Cir. 1974), abrogated on other grounds by Goldberger v. Integrated Res., 209 F.3d 43 (2d Cir. 2000). These factors include:

> "(1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation."

McReynolds, 588 F.3d at 804 (2d Cir. 2009) (quoting Grinnell, 495 F.2d at 463). "When a settlement is negotiated prior to class certification, as is the case here, it is subject to a higher degree of scrutiny in assessing its fairness." D'Amato v. Deutsche Bank, 236 F.3d 78, 85 (2d Cir. 2001).

The attorneys general, in their amicus brief, argue **[*17]** that the Class Action Fairness Act ("CAFA") requires an even higher degree of scrutiny in the event of a coupon settlement. See Synfuel Techs., Inc. v. DHL Express (USA), Inc., 463 F.3d 646, 651 (7th Cir. 2006) ("CAFA . . . require[s] heightened judicial scrutiny of coupon-based settlements based on [the] concern that in many case 'counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value.'" (quoting Pub. L. 109-2, § 2(a)(3)(A), 119 Stat. 4, 4)). However, although CAFA added a number of different procedural requirements with respect to coupon settlements, see 28 U.S.C. § 1712 (placing limitations on class fee awards, and requiring court to make a finding of fairness in writing), the language used to describe the standard of a court's review is the same as that found in Rule 23, compare id. § 1712(e) (requiring finding that the settlement be "fair, reasonable, and adequate" for class members), with Fed. R. Civ. P. 23(e)(2) (requiring the same).

The court agrees that this in-kind settlement does indeed resemble a coupon settlement. However, the court is already required to carefully scrutinize the proposed settlement under D'Amato v. **[*18]** Deutsche Bank, because this settlement precedes class certification. 236 F.3d at 85. Therefore, the court does not need to reach the question of whether CAFA altered the standard of review found in Rule 23 for such a settlement.

V. DISCUSSION

A. Procedural Fairness

As an initial matter, the court must determine whether the process of settling the case was such that a presumption of fairness would be appropriate in this case. See McReynolds, 588 F.3d at 803. Such a presumption "may attach to a class

settlement reached in arm's length negotiations between experienced, capable counsel after meaningful discovery." Wal-Mart Stores, 396 F.3d at 116. This case involves facts that, on the one hand, might suggest procedural fairness. On the other hand, in light of the early stage of the litigation and no formal discovery, a presumption of substantive fairness does not appear appropriate at this point.

The parties in this case did engage in what appears to be intensive negotiations. See Mem. to Counsel from Magistrate Judge Garfinkel (Doc. No. 137-3). The settlement process took well over a year. Further, Judge Garfinkel mediated much of the negotiations and reports that they were hard fought. See **[*19]** id. at 1 ("DirectBuy has been a tough adversary and, at times, a difficult negotiation partner."). Judge Garfinkel, in his Memorandum recommending attorneys' fees, notes that the plaintiffs are represented here by highly capable and assertive counsel, suggesting that any settlement terms were the product of a truly adversarial process. See id. at 2 ("The quality of the representation Class Counsel provided to their nationwide clients was at the highest level. They brought great ability, experience, and diligence to their work."); see also D'Amato, 236 F.3d at 85 (noting that the involvement of a Special Master during the negotiation process "help[ed] to ensure that the proceedings were free of collusion and undue pressure").

Nonetheless, the court is concerned with the limited amount of discovery conducted prior to settlement, and the nature of the discovery that has been conducted. See McReynolds, 588 F.3d at 803 (requiring "meaningful discovery" for presumption of fairness to apply). While plaintiffs report having conducted interviews and reviewed thousands of documents, none of this is before the court, nor do the interviews nor the responses to discovery appear to have been conducted **[*20]** under oath. See Plummer v. Chem. Bank, 668 F.2d 654, 658 (2d Cir. 1982) (noting that, due to the lack of formal pretrial discovery, the district court was required to carefully analyze the proposed settlement). Although plaintiffs produced a number of sworn affidavits by DirectBuy employees in support of their Motion, see Doc No. 137-2, these affidavits are short and carefully worded and do not include any supporting documentation.

In light of this limited discovery, the court will not grant this Settlement Agreement the presumption of fairness that might normally adhere when settlement comes later in a case. While an early settlement can certainly produce fair results for class plaintiffs, there are serious risks to absent class members that their released claims have been undervalued when class counsel accepts an early payout. See Plummer, 668 F.2d at 658 ("Although negotiations in the instant case were conducted by undesignated class representatives without formal pretrial discovery, this, standing alone, did not preclude judicial approval. However, the district judge was bound to withhold such approval until he had closely and carefully scrutinized the joint settlement proposal **[*21]** to make sure that it was fair, adequate and reasonable, and not influenced in any way by fraud or collusion.").

B. Substantive Fairness

1. Scope of Release

As an initial matter, the court must address the scope of the release. Plaintiffs and defendants sharply disagree about what claims are and are not released by the Settlement Agreement. Defendants argue that the release extends

to all claims based on any facts alleged in the instant Complaint or any of the four complaints settled by the Agreement. See generally Defs.' Mem. Re: Scope of Release (Doc. No. 204). Plaintiffs, however, urge a narrower construction of the release as reaching only claims that were brought or could have been brought as class actions in the five relevant lawsuits. Pls.' Mem. in Support of Final Approval at 38 (Doc. No. 137); Pls.' Reply to Obj. 16-28 (Doc. No. 206). Plaintiffs further argue that Rule 23 acts to bar the release of claims that could not be brought as part of a cohesive class action lawsuit. Id. at 4-5.

In analyzing the fairness of the Settlement Agreement below, the court will assume the narrower reading of the release is the correct one. Even under plaintiffs' reading of the Agreement, a substantial **[*22]** number of claims are foreclosed by this settlement. Specifically, any claim, whether brought pursuant to state or federal law--based on the same factual predicate as the operative claims in the five complaints[5]--is to be released. See Settlement Agreement at 23 (releasing all claims that "were brought, or could have been brought, in the Actions"); see also Wal-Mart Stores, 396 F.3d at 107 ("The law is well established in this Circuit and others that class action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the 'identical factual predicate' as the settled conduct." (quoting TBK Partners, Ltd. v. W. Union Corp., 675 F.2d 456, 460 (2d Cir. 1982)). These claims include, at minimum, any claims relying on allegations that DirectBuy failed to disclose various rebates and discounts received from manufactures and suppliers and allegations that DirectBuy failed to disclose the nature and size of its freight and handling fees. See, e.g., Compl. ¶ 48 (alleging defendants engaged in fraud by purporting to offer its members products "at the manufacturer's or supplier's price"); Vance Compl. ¶¶ 66-68 (alleging **[*23]** that DirectBuy was unjustly enriched by "charging and collecting unreasonable and exorbitant shipping and handling fees").

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5 While a couple of the complaints allege facts regarding DirectBuy's high pressure sales tactics, see Ganezer Compl. ¶ 16; Randall Compl. ¶¶ 12-23, plaintiffs argue that these facts are extraneous to the actual claims brought by the five complaints--namely, claims that DirectBuy failed to disclose and disseminate various rebates and discounts received from manufacturers, see, e.g., Compl. ¶ 48, and claims that DirectBuy utilized freight and handling fees to overcharge its members, see, e.g., Vance Compl. ¶ 66-68.

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2. Nature of Benefit

There is also sharp disagreement about the nature of the benefit received by the class pursuant to the Settlement Agreement. Plaintiffs argue that the court should treat the settlement as being equivalent to the approximate cash value of the two months membership offered to class members. See Pls.' Mem. in Support at 24-26. They estimate that, on the low end, this settlement can be valued at around $19.5 million and, on the high end, worth $55 million. Id. Objectors contend, however, that the settlement resembles a coupon settlement which **[*24]** provides little or no value to class members. See State Attorneys General Brief Amicus Curiae at 6-7 ("AGs' Amicus") (Doc. No. 161). The court agrees with objectors.

The instant Settlement Agreement shares many characteristics with the infamous "coupon" settlement. See Nat'l Ass'n of Consumer Advocates, Standards and Guidelines for Litigation and Settling Consumer Class Actions (2d ed. 2006), 255

F.R.D. 215, 235 ("[T]he considered view today is that unless a coupon settlement provides increased benefits to class members and possesses certain safeguards, they should generally be avoided . . . .").[6] Instead of a cash payout, DirectBuy offers class members an in-kind benefit--continued or renewed membership. See Synfuel Techs., 463 F.3d at 654 (noting that in-kind compensations are generally cause for scrutiny). As with most in-kind benefits, the dollar amount ascribed to the benefit does not represent its actual cost to DirectBuy. See, e.g., Clement v. Am. Honda Finance Corp., 176 F.R.D. 15, 26-27 (D. Conn. 1997) (disapproving settlement, and noting that coupons operated as "a sophisticated . . . marketing program" for defendant). DirectBuy receives a clear benefit by maintaining its members **[*25]** for as long as possible, and this settlement might well result in an increase in DirectBuy's membership base. The company might, for example, within the two free months, convince a wavering member to sign up for another year with the club. An even greater benefit might be had as a result of former members temporarily returning to DirectBuy. DirectBuy could reap further gain as a result of any purchases made, by way of handling fees and some freight charges.

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6 The National Association of Consumer Advocates Guidelines list a number of circumstances where coupon settlements may be appropriate, including:

> (1) if the primary goal of the litigation is injunctive and the defendant agrees to an injunction, or the certificates are good for the purchase of small ticket consumable items which class members are likely to purchase, or the certificates represent true discounts that would not otherwise be available, (2) where the certificates are freely transferable, (3) where the coupons are in addition to and can be added to any already-existing coupons or sales incentives, (4) where the coupons should be stackable (i.e., a consumer can use more than one in a transaction); and (5) where there is a **[*26]** market-maker to insure a secondary transfer market.

Nat'l Ass'n of Consumer Advocates, supra, 255 F.R.D. at 236. Needless to say, none of these circumstances is present here.

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Additionally, the value to the class is often overstated when an in-kind award is made. See Synfuel Techs., 463 F.3d at 654 ("'[C]ompensation in kind is worth less than cash of the same nominal value . . . .'" (quoting In re Mex. Money Transfer Litig., 267 F.3d 743, 748 (7th Cir. 2001) (first alteration in original)). Two months free membership is only of value if a member has an interest in retaining her membership and actually purchases something. Seventy-five percent of DirectBuy members renew every year. Powell Aff. ¶ 8. This means that a full twenty-five percent of current class members will receive no benefit from the settlement in question. See, e.g., J. Camillieri Obj. (Doc. No. 77) ("I object to the settlement terms because I no longer require the services of DirectBuy. Receiving a free two month membership does not provide me with any remuneration."). Further, assuming that nearly all former members have no interest in continued membership--which could be inferred from the fact that only five percent of **[*27]** former members are seeking to participate--more than half the class appears to be without a benefit.[7] See, e.g., R. Merillat Obj. (Doc. No. 78) ("I am objecting to the settlement for the same reason that I discontinued participating with DirectBuy as a consumer. . . . As I have decided long ago not to buy from DirectBuy, I believe that the two months of free membership is ludicrous.").

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7 This settlement might have had some value to these class members, had the benefit been transferrable. See Clement, 176 F.R.D. at 28 ("The value of these coupons is too speculative. Absent a transfer option or other guaranty of some minimal case payment, there is a strong danger that the settlement will have absolutely no value to the class.").
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Even for the seventy-five percent of current members who are likely to renew, based on historical experience, plaintiffs' estimation of the valuation is not entirely reasonable. The court lacks any information about the purchasing patterns of DirectBuy members throughout the year. The fact that one year's worth of membership may be reasonably valued at $200 does not necessarily mean that a monthly membership is worth $17. If members tend to purchase infrequently, **[*28]** as opposed to regular monthly purchases, many class members would receive no value from the settlement because their purchasing habits may be such that the two free months will result in no savings.

For these reasons, the court is of the view that, at a theoretical best, the settlement might have a value of between $15 million and $27 million, to some fraction of current and former members, and may well be worth much less even to them. The $15 million estimation is based on the assumption that seventy-five percent of current members (around 300,000 members) value their membership at $16.67 per month and would be interested in renewing for one year, receiving a total of three free months of membership.[8] The $27 million number additionally assumes that seventy-five percent of the original seventy-five percent (around 225,000 members) would be interested in renewing for two years, receiving six months free membership instead of three, and assumes that the 22,636 former members who wished to partake in the settlement also valued their membership at $16.67. These numbers are obviously very rough, and very likely inflated, but will serve as a guide to the court when it considers the adequacy **[*29]** of the settlement below.

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8 As discussed above, this is not the only reasonable assumption, nor is it in the court's view the most reasonable assumption.
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3. Grinnell Factors

A district court must consider a number of factors when determining whether a particular settlement is substantively fair. See Grinnell, 495 F.2d at 463. As discussed in detail below, each factor is either neutral or weighs against a finding of fairness in this case.

a. Complexity, Expense, and Likely Duration of Litigation.

This does not strike the court as a particularly complex case. Rather, claims are based on relatively straightforward contract claims and derivative claims in various consumer protection statutes and, in the instant case, RICO. Based on the description of the conduct in question, discovery should be relatively straightforward, as class actions go.

Plaintiffs' contention that RICO is a difficult claim to pursue is a bit of a red herring. Although plaintiffs in this particular case opted to pursue claims under that statute--likely due to the treble damages available to a prevailing party and a potential national class--none of the other four cases chose that

route. Instead, these cases were brought pursuant **[*30]** to well-known common law causes of actions, such as breach of contract, fraud, and unjust enrichment, as well as various state consumer protection statutes. See, e.g., Vance Compl. ¶¶ 46-63. Had the parties here sought only to settle claims under RICO, the consideration of the difficulty of bringing such claims, as plaintiffs and defendants suggest, would be reasonable. Here, however, parties ask for approval to settle all of the aforementioned common law and consumer protection claims. Therefore, the nature and complexity of these claims must be considered by this court prior to any such approval.

The court does note that this case has been pending for nearly two years. However, the parties have been in settlement negotiations the entire time. Managed well, the court does not expect this litigation to last an inordinately long time as compared to other class actions which the court has overseen. While this view of the litigation does not necessarily weigh against a denial of any settlement agreement, it does argue against discounting the value of plaintiffs' claims, based on a view of this litigation as a complicated and expensive lawsuit to bring.

b. [*31] Reaction of the Class to Settlement.

The Second Circuit has generally been of the view that a low objection rate by absent class members is supportive of a settlement agreement. See Wal-Mart Stores, 396 F.3d at 118 ("'If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.'" (quoting 4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 11.41, at 108 (4th ed. 2002)) However, the Circuit has also stated that a low response rate is the norm and should not be over-construed. See In re Traffic Exec. Ass'n--E. R.Rs., 627 F.2d 631 (2d Cir. 1980) ("A substantial lack of response from absentee class members appears to be the norm rather than the exception."). Although the number of objectors is quite low relative to the size of the class--well under one percent of the total class--the court does not believe that an inference of approval by way of silence is warranted, in light of the fact, inter alia, that notice of class action was sent simultaneously with notice of settlement. See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig., 55 F.3d 768, 812-13 (3d Cir. 1995).[9]

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9 An argument was made by West **[*32]** Virginia, and a couple of the represented objectors, that the notice sent to the class was insufficient. See B. Hebert Obj. 24-26 (Doc. No. 167); L. Sohl & P. Ganezer Obj. 12-13 (Doc. No. 149); W. Va. Obj. 10-14 (Doc. No. 107-9). If this is the case, it might account for the low objection rate. However, while the court has significant concerns about the Notice, for the purposes of this Ruling, the court will assume that notice was proper. See discussion, infra, at 31.

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Those who have objected to the settlement do so vociferously. They view the settlement as entirely too small--indeed to some of no value--to resolve claims that they believe to be worth substantially more than the value to them of two months membership. See, e.g., D. Crockett & S. Crockett Obj. (Doc. No. 73) ("Receiving a two month free membership with a $200/year membership fee is hardly a settlement for the cost we have incurred."). Many of the objectors view their claims to be worth at least the value of their membership initiation fees, which cost them thousands of dollars.[10] See, e.g., L. Minton Obj. (Doc. No. 75) ("The Settlement is inadequate. I would like a full refund of the initial membership fee of $5,000+.").

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10 The **[*33]** court does not view the fact that a little over two thousand former members have sought to receive the benefit of the class action as indicating a favorable view of the settlement by them. These class members might rationally accept the benefit of the settlement, while not viewing it as very valuable or even a reasonable settlement.

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In further support of these dissenters, thirty-nine attorneys general have filed a brief in amicus curiae opposing the settlement. See Doc. No. 161. The attorneys general forcefully argue that the settlement is both overstated and undervalued. Id. The court finds their Memorandum to be especially helpful and views it as a placeholder for many absent class members' objections.[11] See Figueroa v. Sharper Image Corp., 517 F. Supp. 2d 1292, 1328 (S.D. Fla. 2007) (noting that objection to settlement agreement by thirty-five state attorneys general--"representing hundreds of thousands, if not millions, of eligible class members"--counseled against a finding of fairness).

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11 In fact, in light of the media coverage of this Objection, an absent class member in one of these thirty-seven states, the District of Columbia, or Puerto Rico might reasonably assume that her interests **[*34]** are being protected by the involvement of her state's attorney general. See, e.g., Michelle Singletary, Class-Action Coupon Settlements Are a No-Win for Consumers, Wash. Post, Apr. 28, 2011, at A14 (reporting that thirty-nine attorneys general oppose the instant settlement).

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Plaintiffs emphasize that a number of the objectors discuss facts, such as DirectBuy's aggressive sales tactics, which did not form the basis of the settled claims and would not be released. Pls.' Mem. in Support at 53-58; see, e.g., P. Herter & C. Herter Obj. (Doc. No. 168) (discussing aggressive sales tactics and promise of "once in a life time opportunity"); Santucci Obj. 125 (Doc. No. 125) ("I was told after sitting in on a Direct Buy sales pitch for 3 hours that if I didn't sign the contract right then in there I would never be able to come back and get a membership. . . . I was so afraid I was missing out on a good deal that I signed on the dotted line."). As the court discussed, supra, for the purposes of this Ruling, it will construe the release narrowly. This narrow construction does not, however, completely address these objectors' arguments.

First, the objectors' "misconception" (in plaintiffs' view) of **[*35]** the breadth of the Settlement Agreement is not necessarily unreasonable. Rather, it resulted from a release that was poorly written by the parties, and it is a reading consistent with that championed by defendants. See discussion, infra, at 29-31. The court will, therefore, not dismiss the arguments as to the substantive unfairness of the Agreement out of hand, simply because they do not argue directly to the narrow view of the release in question.

Further, although some objectors focused on the sales tactics used to induce their membership, the court imagines that any number of these objectors would not be complaining, had they received the benefit of the bargain they believed they were making with DirectBuy. Even under plaintiffs' narrow construction of the release, then, these objecting class members might be giving up a substantial portion of any fraud claim they might otherwise have, by releasing any claim that DirectBuy failed to deliver on its promise to sell to its members at the manufacturer's and supplier's price.

For all these reasons, this second Grinnell factor does not support approval of the Settlement Agreement. Even if the number of objectors is quantitatively low as **[*36]** a percentage of the entire class, the reaction of those who did object and the forceful brief filed by the thirty-nine attorneys general strongly recommend denial.

c. The Stage of the Proceedings and Discovery Conducted.

As discussed, supra, this case has not progressed substantially. Although plaintiffs have conducted some confirmatory discovery, given the relatively early stage of the proceedings, the parties, the objectors, and the court are not in a good position to evaluate the strength of the claims released and the value of the settlement to the class. Again, the lack of formal discovery does not necessarily prevent this court from approving settlement. See Plummer, 668 F.2d at 658. However, it does not weigh in favor of this court's approval.

d. Risks to the Class Associated with Proceeding to Trial.[12]

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12 The court here is combining three factors from Grinnell. See Wal-Mart Stores, 396 F.3d at 118-19 (combining the fourth, fifth, and sixth Grinnell factors into one).

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This next factor is essentially an evaluation of the strength of plaintiffs' claims. The court must consider the risks concomitant with pursuing this case, including the risk of plaintiffs' being unable to prove liability, **[*37]** to prove damages, and to maintain their class action through trial. See Wal-Mart Stores, 396 F.3d at 118. Unsurprisingly, both plaintiffs and defendants play up these risks and suggest that plaintiffs' claims are too weak to garner a substantial settlement award. The court disagrees with this assessment, at least in part.

Plaintiffs engage in a detailed analysis of the claims underlying this action and the other settled actions. See Pls.' Mem. in Support at 9-19. They argue, and the court agrees, that there is a risk that plaintiffs will not be able to establish liability or damages. Id. However, plaintiffs appear to overstate these risks. Further, plaintiffs fail to account for the myriad of state consumer protection statutes that are available to class members and their impact on plaintiffs' risk assessment.

The claims purported to be settled by the Agreement can be placed into two categories: (1) claims that DirectBuy failed to disclose and disseminate various rebates and discounts received from manufacturers, see, e.g., Compl. ¶ 48; and (2) claims that DirectBuy utilized freight and handling fees to overcharge its members, see, e.g., Vance Compl. ¶¶ 66-68. As to the first, plaintiffs **[*38]** argue that there will be serious difficulties proving both liability and damages, see Pls.' Mem. in Support at 9-15, and as to the second, plaintiffs contend that there were some factual problems uncovered in the confirmatory discovery that might well eliminate these claims, id. at 16-20. The court recognizes that claims as to freight and handling may be weak, in light of the fact that these fees have always been disclosed to members. See Powell Aff. ¶ 15-17. However, it is the court's view that plaintiffs overstate the weaknesses with respect to the claims based on DirectBuy's receipt of rebates and discounts from manufacturers and suppliers.

Plaintiffs first argue that there are factual limitations to their claim of fraud. Pls.' Mem. in Support at 10-13. With respect to the money received from cooperative advertising and other promotional allowances, DirectBuy claims that it did not "profit" from this money, but that, instead, it used the funds to cover costs and create items important to serving its customers, such as catalogs. See Klotzbach Aff. ¶ 2; Powell Aff. ¶ 10; Steinberg Aff. ¶ 2, Mar. 28, 2011 (Doc. No. 137-2). Additionally, with respect to DirectBuy's "prompt-pay" discounts, **[*39]** DirectBuy appears to insist that it has a right to do what it wished with the payments made by its members toward products, including generate additional funds via these prompt-pay discounts, provided it supplied the customer with the product purchased. Pls.' Mem. in Support at 12-13.

These arguments, however, are specious. DirectBuy does not have the right to expend its customers' money in whatever way it desired if doing so would be inconsistent with a representation made to its customers. As for how DirectBuy spent the money it received from manufacturers and suppliers, this argument appears to be little more than clever accounting. Presumably these expenses would come out of DirectBuy's own assets if these discounts and allowances were required to be passed on to its members to reflect the "manufacturer's price."

Plaintiffs argue next that it would be difficult for them to establish fraudulent intent, as required by RICO. Pls.' Mem. in Support at 13-14. According to plaintiffs, DirectBuy's General Counsel, C. Joseph Yast, had advised DirectBuy that its practices with respect to rebates and discounts were entirely legal. Id. Of course, a jury or court does not have to agree with Yast's **[*40]** analysis. However, even so, plaintiffs will face a hurdle proving that DirectBuy acted with fraudulent intent in light of Yast's advice.

Finally, plaintiffs argue that their claims are weak because plaintiffs may not be able to prove that the misrepresentations were material. See id. at 14-15. The size of these rebates and discounts are claimed to have amounted to no more than $53 million during the class period. Klotzbach Aff. ¶¶ 3-6. In light of the over $4 billion in products purchased by DirectBuy members during that period, id. at ¶ 6, these rebates and discounts amount to a markup of a little more than one percent. Further, as of 2009, DirectBuy has been disclosing the existence of the rebates and discounts to its customers and claims that its membership numbers have not substantially changed, Powell Aff. ¶ 14, suggesting that the failure to disclose was not, in fact, material.

Although the court agrees that these facts relating to intent and materiality tend to support the parties' argument that the claims in this case are weak, the court does not believe that full account has been taken of the impact of state consumer protection laws on the risks associated with the claims being **[*41]** released. As discussed, supra, as part of the settlement, class members would be giving up any state claims based on the same factual predicate as those underlying the claims in this case. A proper consideration of the standards of proof under these consumer protection statutes is, therefore, required before the risk to the class of recovering can be assessed. See, e.g., In re Mex. Money Transfer Litig., 164 F. Supp. 2d 1002, 1022-27 (N.D. Ill. 2000) (approving settlement after careful consideration of the strength of released state law claims); Clement, 176 F.R.D. at 29 (rejecting settlement, in part, because of failure to account for strength of state consumer protection claims).

Unlike RICO, many, if not most, state consumer protection statutes do not require consumers to prove that defendants acted with intent to violate the law.

See, e.g., Associated Inv. Co. Ltd. P'ship v. Williams Assocs. IV, 230 Conn. 148, 158, 645 A.2d 505 (1994) (holding that a claim under the Connecticut Unfair Trade Practices Act ("CUTPA") does not require proof of intent); Hewlett v. Squaw Valley Ski Corp., 54 Cal. App. 4th 499, 520, 63 Cal. Rptr. 2d 118 (1997) (holding that a claim under Cal. Bus. & Prof. Code § 17200--alleged in the Ganezer **[*42]** Complaint--does not require proof of intent); Huch v. Charter Commc'ns, Inc., 290 S.W.3d 721 (Mo. 2009) (holding that a claim under Mo. Rev. Stat. § 407.020--alleged in the Randall Complaint--does not require proof of intent); Stutman v. Chem. Bank, 95 N.Y.2d 24, 29, 731 N.E.2d 608, 709 N.Y.S.2d 892 (2000) (holding that a claim under N.Y. Gen. Bus Law § 349 does not require proof of intent).[13] The parties' arguments with respect to materiality are similarly called into question by state consumer protection laws. These statutes often do not require proof of individual reliance and have lower standards of proof for materiality than common law fraud. See, e.g., Aurigemma v. Arco Petroleum Prods. Co., 734 F. Supp. 1025, 1029 (D. Conn. 1990) ("Plaintiffs need not prove reliance [under CUTPA] or that the alleged unfair or deceptive representation became part of the basis of the bargain."); In re Tobacco II Cases, 46 Cal. 4th 298, 326-27, 93 Cal. Rptr. 3d 559, 207 P.3d 20 (2009) (holding that Cal. Bus. & Prof. Code § 17200 does not require proof of individual reliance, and holding that a plaintiff need not prove that misrepresentation was the "sole or even the predominant or decisive factor influencing his conduct"); Hess v. Chase Manhattan Bank, USA, N.A., 220 S.W.3d 758, 773-74 (Mo. 2007) **[*43]** (holding that Mo. Rev. Stat. § 407.020 does not require proof of individual reliance, and defining "material fact" as "any fact which a reasonable consumer would likely consider to be important").

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13 The attorneys general, in their amicus brief, cite to more than a dozen different state consumer protection laws that also appear to no require proof of intent. See AGs' Amicus at 26 n.19.

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The court notes that these state consumer protection statutes may not be suitable for litigation on a nationwide class action basis. See, e.g., In re Grand Theft Auto Video Game Consumer Litig., 251 F.R.D. 139, 154-161 (S.D.N.Y. 2008) (denying certification of nationwide settlement class involving state consumer protection statute). However, it appears to the court that they may be well suited for statewide class actions, especially within the states with broadly written consumer protection statutes. This attempt is already being made in California and Missouri. See generally Ganezer Compl.; Randall Compl. Further, investigations by state attorneys general are under way in at least a couple states, and, in some states, consumer protection actions can be brought on behalf of consumers. See, e.g., Compl., **[*44]** State ex rel. McGraw v. DirectBuy, Inc., No. 11-C-140 (W. Va. Cir Ct. filed Jan. 26, 2011) ("McGraw Compl.") (Doc. No. 107-2) (West Virginia enforcement lawsuit); Fairness Hr'g Tr. 46-49 (counsel on behalf of New York Attorney General discussing New York State investigation).

Therefore, in light of these statutes and the evidence that public and private attorneys are prepared to enforce them, class members appear to have substantially stronger claims than the RICO claims alleged in this case. Because the parties seek to release these state claims via the Settlement Agreement, the strength of these claims must be accounted for in this court's analysis of the fairness, adequacy, and reasonableness of the Agreement. See Clement, 176 F.R.D. at 29.

e. Ability of Defendants to Withstand Greater Judgment.

This factor is not argued by the parties. The court assumes, therefore, that defendants can withstand a greater judgment.

f. Range of Reasonableness of Settlement.[14]

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14 The court here is combining two factors from Grinnell. See Wal-Mart Stores, 396 F.3d at 119 (combining the eighth and ninth Grinnell factors into one).

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Finally, the court must attempt to determine the range of reasonableness for **[*45]** a settlement in this case, in light of the best possible recovery and the attendant risks of litigation already discussed. See Wal-Mart Stores, 396 F.3d at 119. Once the court has done so, it can examine whether the instant Settlement Agreement falls within this range. Id.

Plaintiffs argue that the best possible recovery for the class is approximately $53 million, or the total amount defendants received from manufacturers and suppliers as discounts, rebates, or promotional allowances during the eight year class period. See Pls.' Mem. in Support at 40-41. This is, of course, a good reference point. However, the court notes that class members expended several thousands of dollars to become members. See Powell Aff. ¶ 3; see also, e.g., D. Crockett & S. Crockett ($4,000 sign-up fee); L. Minton Obj. ($5,000+ sign-up fee); P. Pelsinger Obj. ($3,000 sign-up fee). Many objectors have argued for the recision of their contracts and the return of their initiation fees. See, e.g., D. Crockett & S. Crockett Obj.; L. Minton Obj.; see also Compl. ¶ 48(a) (accusing defendants of making false representations to induce membership and in exchange for membership fees). In instances of fraud in the inducement, **[*46]** such recisionary relief may be wholly appropriate. See, e.g., Restatement (Second) of Contracts § 164(1) ("If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient."); Munroe v. Great Am. Ins. Co., 234 Conn. 182, 188 n.4, 661 A.2d 581 (1995) ("As a matter of common law, a party to a contract . . . may rescind that contract . . . if that party's consent to the contract was procured either by the other party's fraudulent misrepresentations, or by the other party's nonfraudulent material misrepresentations."). Therefore, the best possible recovery for the class may amount to well over $2 billion ($3,000 membership x 800,000 members).[15]

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15 Indeed, defendants represented to the District Court for the Eastern District of Missouri that the damages which could be received against Missouri clubs were over $20 million. See Defs.' Notice of Removal (Doc. No. 157-2). There are currently 120 separate clubs in 35 different states. See Powell Aff. ¶ 2.

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In light of this best possible recovery, the Settlement Agreement--which the court has calculated as being worth, **[*47]** at most, between $15 million and $27 million--appears quite small. Nonetheless, the Second Circuit has long held that even settlements which represent a fraction of the best possible result may be appropriate in light of the risks associated with bringing such claims. See

Grinnell, 495 F.2d at 455 n.2 ("[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery."). The final Agreement might well be reasonable then, if, as plaintiffs argue, their likelihood of success is very low.

However, as previously discussed, the court believes that plaintiffs in this case have substantially undervalued the strength of the settled claims by failing to account for the lower standards of proof required by state consumer protection statutes. The court does not view these claims as so weak that it would be reasonable to settle claims arguably worth over $2 billion for, at most, only a hundredth of this amount.

Additionally, as discussed, supra, the settlement is valueless to more than half the class. Twenty-five percent of current DirectBuy members will likely opt not to renew their membership, **[*48]** Powell Aff. ¶ 8, suggesting that they would not view this settlement as any award at all. Further, every class member that has chosen to leave DirectBuy will be required to settle their claims in exchange for returning to a company that they presumably no longer want to be a part of. This right to rejoin is not of a "value" that falls within the range of reasonable settlements, particularly in light of the class members' apparently viable claims under state consumer protection laws.

g. Conclusion.

Having considered the Grinnell factors, and for the reasons discussed, the court cannot conclude that this settlement falls within the range of reasonableness. The parties' failure to account for nontrivial state consumer protection claims, their overstatement of the risks of success, and their relatively meager settlement in light of the best possible recovery, lead this court to the conclusion that this settlement does not satisfy the requirements of Rule 23, even under the narrow view of the release urged by plaintiffs.[16] Plaintiffs' Motion for Final Approval is, therefore, denied.

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16 Needless to say, under defendants' view of the scope of the release, the settlement is plainly not reasonable.

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C. [*49] Issues the Court Does Not Address

In light of this court's Ruling denying plaintiffs' Motion for Final Approval, the court does not need to address a number of issues raised by the parties and various objectors.

1. Scope of Settlement Agreement

Plaintiffs and defendants seriously dispute the breadth of the release in the instant Settlement Agreement. As discussed, supra, the court does not need to resolve this dispute and assumes, for the sake of this Ruling, that plaintiffs are correct as to the scope of the release.

The court notes that both parties make arguments in support of their view of the scope of the release. Defendants point out that the Second Circuit appears to

both allow broad settlement releases and to interpret such releases broadly, in recognition of a defendants' frequent desire for the repose resulting from a global settlement. See, e.g., Wal-Mart Stores, 396 F.3d at 107 ("The law is well established in this Circuit and others that class action releases may include claims not presented and even those which could not have been presented . . . ."). Plaintiffs are correct, however, that the scope of the release in the present case can reasonably be read to include only **[*50]** claims of the nature of those alleged in the actions, and that the instant release does not purport to settle claims that could not have been brought in any of the settled actions, because they would not be suitable as class actions. See Settlement Agreement at 12 (purporting to settle claims "that were brought, or could have been brought, in the Actions").

Regardless of which party makes the better case, the court cannot but help notice that the efficiency of the judicial process loses either way. Ambiguity within the release of a class action settlement agreement all but requires future litigation. The court does not need to decide whether this disagreement over scope could affect the court's ability to review the Agreement. However, the court finds the fact that the parties cannot agree on the meaning of such an important aspect of the Agreement incomprehensible, and the court does not intend to approve any future settlement agreements between the parties absent a more clearly written release.

2. Sufficiency of Class Notice

Several objectors, including the State of West Virginia, have taken issue with the class notice that was utilized in this case. See B. Hebert Obj. 24-26; L. Sohl **[*51]** & P. Ganezer Obj. 12-13; W. Va. Obj. 10-14. Again, the court does not need to address this issue. The court notes that, while email notice may not, on its own, be cause for concern, see, e.g., Radosti v. Envision EMI, LLC, 717 F. Supp. 2d 37, 48 (D.D.C. 2001), the court has serious concerns with the initial email that was sent to the class without prior approval from Judge Garfinkel or this court. Particularly, the court is concerned that the fact that the email did not come directly from a DirectBuy email account would lead class members to ignore or delete the email, assuming that it was some sort of spam.[17]

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17 Indeed, at least one objector explains his late objection because the email was delivered to his spam file. See K. Pielak Obj. (Doc. No. 140).

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3. West Virginia's Objection

Shortly after the Preliminary Approval was entered, the Attorney General for the State of West Virginia filed a lawsuit against DirectBuy, alleging claims arguably related to those in the present action. See McGraw Compl. Defendants filed a Motion asking Judge Garfinkel to enjoin the West Virginia action, which they argued would interfere with the instant Settlement Agreement. See Doc. No. 86. Judge Garfinkel **[*52]** signed the Proposed Order, see Doc. No. 89, and West Virginia subsequently filed an Objection, asking this court to vacate this Order, see Doc. No. 107.

The court does not need to address this Objection, which challenges, inter alia, Judge Garfinkel's order of injunction. It does appear that the Magistrate Judge

did not have the authority to issue the injunction; at most it was a recommended ruling, and thus no injunction issued.[18] See 28 U.S.C. § 636 (prohibiting magistrate judge from acting on motion for injunctive relief or "to dismiss or permit maintenance of a class action," absent a referral from the district court); see also United States v. Erwin, 155 F.3d 818, 825 (6th Cir. 1998) (treating a magistrate judge's order that was outside the scope of his authority as void). However, this issue is rendered moot by the court's instant Ruling.

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18 The court appreciates the West Virginia Attorney General's voluntary suspension of its case in anticipation of the court's ruling on West Virginia's Objection or the court's denial of final approval of the Settlement Agreement.

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VI. CONCLUSION

For all these reasons, the court denies plaintiffs' Motion to Approve the Final Settlement (Doc. No. 134). **[*53]** The court further terminates as moot plaintiffs' Motions for Attorneys Fees and Class Representative Awards (Doc. No. 135, 136).

SO ORDERED.

Dated at Bridgeport, Connecticut this 16th day of May, 2011.

/s/ Janet C. Hall

Janet C. Hall

United States District Judge

EXHIBIT C

COUPON SETTLEMENTS: *THE EMPEROR'S CLOTHES OF CLASS ACTIONS*

Steven B. Hantler*
Robert E. Norton**

Class actions can allow for the convenient and efficient grouping of plaintiffs sharing a common complaint to link up in a single lawsuit. Such suits have deep roots in English common law. When used correctly, class actions allow courts to resolve in one action many smaller, similar claims that might otherwise remain unheard because the cost of any particular suit would exceed the possible benefit to the claimant. Class actions also can allow defendants to focus their energies on resolving all claims in one lawsuit, and prevent courts from being flooded with duplicative claims.

Over time, class action litigation has strayed from its usefulness as an efficient means of dispensing justice and has become, for the most part, the epitome of injustice. Class action litigation has become warped by the seduction of gargantuan contingency fees combined with a change in the court rules that allows people to be dragooned as plaintiffs in a class action lawsuit unless they affirmatively notify the plaintiffs' attorneys they want out.[1] Rule 23 was changed by jurists in 1966, reversing an "opt-in" provision to an "opt out" provision. As a result, countless thousands of plaintiffs have been conscripted into class actions, often unknowingly.

So-called "coupon settlements" are the unhealthy offspring of this combination. Instead of cash awards, plaintiffs receive coupons or other promises for products or services, while their lawyers receive cash fees in many times the amount recovered by an individual plaintiff. As we have learned over the past decade, coupon settlements are subject to abuse and should be carefully scrutinized.

At first, coupon settlements appeared to be a win-win situation. Plaintiffs would receive a benefit, and an incentive would be created to correct whatever defects may have existed, if any, in the product, service or pricing mechanism at issue. Defendants then could resolve the litigation and focus on the business of business.

But something happened on the way to the courthouse. Some plaintiffs' lawyers structured coupon settlements so their fees would consume a greater percentage of the money the defendants were willing to spend on the settlement. They inflated the apparent value of the coupons by overstating the number of anticipated class members so that the accumulative value of the settlement would be artificially high when it was used as the basis for the plaintiffs' lawyers fees. And, in some cases, it appears that the process of redeeming coupons was so cumbersome that only a few would be redeemed.

One such case involved price-fixing claims in the early 1990s by consumers against the airline industry arising out of the use of a computerized clearinghouse for ticket prices jointly owned by the airlines.[2] While the claims apparently were of questionable merit,[3] the settlement provided the class members a total of $408 million in discount airline ticket coupons and more than $50 million in attorneys' fees and administrative costs.[4] The discount coupons were heavily

restricted, as they were subject to black-out dates, could not be combined or used with other discounts, and were good only for up to 10 percent off a flight. Critics charged that the settlement was primarily "a promotional scheme to induce travelers to fly" during off-peak travel periods and "a deal" worked out so class counsel could reap their fees, calculated at between $500 and $1,400 an hour.[5]

Rather than being a way to settle honest disputes between a company and its customers, most coupon settlements degenerated into another get-rich-quick scheme for plaintiffs' lawyers.

Behind the Litigation Veneer

In many coupon settlement cases, the factual dispute and elements of the cause of action can be illusory, leading to significant potential for fraud or abuse. They differ from the traditional class action where people who believe they were injured by others seek lawyers, expand the suits into class actions upon finding out that others are in the same situation and, if successful, are compensated for their loss. Here is how:

First, in coupon settlement cases, the litigation is usually generated by the lawyers.[6] As a *Wall Street Journal* editorial writer explained, "[t]he typical case begins with a lawyer scanning the press for some business miscue so small that no single consumer would bother to complain about it. When thousands of consumers are aggregated in a class action, however, the prospect of a big fee begins to loom."[7] Once plaintiffs' lawyers identify the miscue, they typically find a friend or colleague to be the representative plaintiff.[8] Often, there are no real plaintiffs, nobody has been injured, and the trial lawyers just represent themselves. As class action lawyer Bill Lerach candidly admitted: "I have the greatest practice of law in the world . . . I have no clients."[9]

For many plaintiffs' lawyers, this indeed is clientless law. Certainly many of the lawsuits go unnoticed by the plaintiffs. Pinellas County, Florida Circuit Judge W. Douglas Baird wrote of one action that it "appears to be the class litigation equivalent of the 'squeegee boys' who used to frequent major urban intersections and who would run up to a stopped car, splash soapy water on its perfectly clean windshield and expect payment for the uninvited service of wiping it off."[10]

Second, until recently, the legitimacy of the lawsuits and merits of the settlements were rarely scrutinized. Now, many judges are aggressive in their rejection of these suits and their aims. But because class actions are by definition concentrated, they can thrive by clustering in a relatively small number of jurisdictions – many of them small, rural and remote from the social consequences of coupon settlements or another result of unwarranted class action litigation, bankrupting verdicts. Trial lawyers know that many companies are likely to settle once class actions are certified. Instead of facing a judge who might exert discretion and deny class certification or strike down coupon settlements as unfair, trial lawyers seek to bring their cases in jurisdictions known to support this type of litigation.[11]

Such jurisdictions have been termed "judicial hellholes" by the American Tort Reform Association[12] and "magic jurisdictions"[13] by prominent plaintiffs' attorney Dick Scruggs (who is

voicing growing skepticism of some recent practices). What are magic jurisdictions? They are venues, Scruggs says, "where the judiciary is elected with verdict money"[14] and "[t]he trial lawyers have established relationships with the judges."[15] In these courts, "it's almost impossible to get a fair trial if you're a defendant"[16] and [a]ny lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or the law is."[17] These venues are critical to the class action coupon settlement industry.

Third, as noted above, the allegedly injured class members often do not receive real compensation.[18] The coupons come with so many restrictions that the realization percentage is predictably low.[19] In one case involving ITT Financial Corporation, only 2 coupons out of 96,754 were ever redeemed.[20] Consider a number of examples of this kind of abusive litigation:

- A coupon suit against the maker of Cheerios alleged that certain pesticides approved for other grains, but not oats, came into contact with the cereal's oat grains.[21] The plaintiffs' lawyers conceded that no consumers were injured.[22] Nevertheless, the lawyers received $1.75 million and the consumers received coupons for a free box of Cheerios, but only if they had kept their grocery receipt to prove their previous purchase.[23]

- Poland Springs was sued for selling bottled water that allegedly was not "pure." The plaintiffs' lawyer constructed the settlement so they would take $1.35 million; the "injured" class received more of the bottled water.[24]

- The settlement of a class action against Carnival Cruise Lines, for the alleged inflation of port charges, awarded former passengers with coupons worth $25 to $55 to be used for a future cruise, or redeemed for cash at 15 percent to 20 percent of face value. The class action plaintiffs' counsel were to receive up to $5 million in attorney fees as part of the settlement.[25]

- Ralph Lauren settled class action allegations that it inflated the suggested retail price on its Polo line at outlet stores. The take? Plaintiffs' lawyers walked away with $675,000 in fees. Their clients – the actual customers – can apply for 10 percent-off coupons (assuming they still have receipts from purchases made between July 15, 1991, and January 10, 2000).[26]

The Coupons Are Not About Compensating for Alleged Injuries

As the cases outlined above suggest, the value of the coupons generally has no relationship to the alleged injury. In the Cheerios case, if the pesticide actually harmed someone, what solace would a free box of Cheerios provide? The $4 or $5 value of the coupons would hardly compare to the cost of any necessary medical care.

In the past few years, the Federal Trade Commission ("FTC") has begun fighting coupon settlements of this nature. It has filed *amicus curiae* briefs in courts urging the judges to reject them.[27] As former FTC Chairman Timothy Muris observed, "If … the result for the consumers is largely valueless … then the result for the attorneys who produced it should be largely

valueless."[28] One such lawsuit involved H&R Block, where the company allegedly received kickbacks from a bank that issued loans to H&R Block's tax-preparation customers.[29] The settlement gave the plaintiffs a maximum $45 per year in coupons for tax software and planning books, while the plaintiffs' lawyers received $49 million in fees.[30]

In its response to this settlement, the FTC reasoned that if H&R Block owed a fiduciary duty to plaintiffs and its violation was intentional, willful and deliberate, then the plaintiffs would be entitled to the license fees H&R Block received as well as the fees the plaintiffs paid to H&R Block.[31] In that instance, the FTC said, the coupons were woefully inadequate.[32] If not, the FTC continued, the value of the coupons may be adequate, but attorneys fees are "even more unreasonable."[33]

Another characteristic of coupon settlements is that they often require plaintiffs to spend a significant amount of money on products they do not need or want in order to realize the "benefit." In the H&R Block case, for example, to receive the benefit of a $20 coupon towards the cost of one year's tax returns, the typical plaintiff would have to spend $102.[34] Another such settlement involved Blockbuster, where the company was charged with unfair fees for overdue video rentals. As part of the settlement, the plaintiffs received $1 off coupons for additional rentals.[35] And in a suit regarding potential misrepresentations made about the size of computer monitors, the class received $13 rebates on new computers and monitors.[36] Plaintiffs wanting cash would have their awards reduced to $6.[37]

There also have been a number of class action lawsuits that were unnecessary, as the defendants took appropriate remedial action on their own. There was no need for additional compensation, and the resulting settlements provided no additional value to class members. For example, Intel Corporation noticed a minor flaw in a chip that would arise once in every nine billion random division operations.[38] Intel created a program consumers could run to see if their chip was flawed, expanded its toll-free user hotline for inquiries and offered a free lifetime replacement. As soon as it widely publicized the problem and solution, 13 class actions were filed.[39] In the settlement, the plaintiffs' lawyers took $4.3 million and the plaintiffs received nothing more than for the company to continue its existing solutions.[40]

Secondary or Derivative Users Provide No Value To Plaintiffs

Plaintiffs' lawyers have tried to make coupon settlements more palatable by suggesting that plaintiffs could sell their coupons to receive some cash value or allow unused coupons to be donated to charity. The secondary market for coupons was created in 1993, just two years after the first coupon settlements. When BMW was charged with overselling a "limited edition" model, it offered customers a $4,000 coupon toward the future purchase or lease of a BMW.[41] James Tharin of Chicago formed the Chicago Clearing Corporation to buy and sell these certificates.[42] He bought about 750 certificates for an average of $2,600.[43]

Transaction costs, though, significantly reduce the face value of a coupon. According to those who have looked into this market, a coupon can only have value in a secondary market if its face value is more than $250.[44] Most of the coupons in these settlements are only for a

handful of dollars. Therefore, relying on the secondary market to make coupon settlements more fair is impractical.

Plaintiffs' lawyers also have begun naming charities as beneficiaries for unclaimed coupons. In a lawsuit involving Microsoft where the plaintiffs' lawyers received $30 million, the plaintiffs were given coupons for $5 to $12 towards the cost of computer products.[45] Fifty percent of all unclaimed coupons would go to the Florida public school system.[46] While giving coupons to charities and government agencies certainly makes one "feel better" about coupon settlements, it does not change the inherent legal problems with lawyer-generated suits where there are no real plaintiffs or injuries to be redressed. Allowing part of a jury award to benefit the public purse also creates the incentive for courts to certify more class actions and for juries to find for the class.[47]

Solutions

There are several avenues for stopping these settlements. The United States Congress is considering the Class Action Fairness Act, which, among other things, provides that a court would only be able to approve coupon settlements after a hearing and making a written finding that the settlement is fair, reasonable and adequate for class members.[48] The bill also would prohibit charitable contributions and base lawyer fees on the number of hours spent on the case or on the value of coupons their clients receive.[49]

The Texas legislature has taken more pointed action. In June 2003, it enacted legislation stating that "if any portion of the benefits recovered for the class are in the form of coupons or other noncash common benefits, the attorney fees awarded in the action must be in cash and noncash amounts in the same proportion as they recover for the class."[50]

Companies also can take matters into their own hands. They can discourage class action abuse by taking frivolous cases to trial, thereby reducing the incentives for plaintiffs' lawyers to file them in the first place. Our company has been successful in doing so. For example, DaimlerChrysler successfully defended a class action suit in Cook County, Illinois alleging excessive engine noise at idle in certain Jeep Cherokees and Grand Cherokees.[51] The suit started after one of the three named plaintiffs had buyer's remorse after a vehicle purchase and demanded, unsuccessfully, that his engine be upgraded to a V-8 engine. Another named plaintiff had 135,000 miles on his vehicle. Another named plaintiff was just worried that her engine would develop a problem. While the suit was certified as a nationwide class action, the trial court found the plaintiffs failed to prove their case and entered judgment for DaimlerChrysler. The judgment was upheld on appeal.

Companies also can structure non-cash settlements so they truly serve the public's interest, rather than that of the plaintiffs' bar. DaimlerChrysler recently settled class litigation alleging that the company should have put a park-brake interlock into its vehicles so children left unattended in a running car (contrary to applicable state law) could not set the vehicle in motion.[52] DaimlerChrysler agreed in the settlement to sponsor public service announcements featuring Sterling Marlin, the popular Tennessee NASCAR driver, emphasizing that it is unsafe to leave children unattended in a vehicle. Finally, companies should not agree to excessive

plaintiffs' attorney's fees in class action litigation. This is DaimlerChrysler's policy. In fact, we generally insist that judges determine the attorneys fees only after the final settlement is presented to the court.[53]

Conclusion

As avid golfers, we'll conclude by recounting our favorite class action coupon settlement. In 1999, a company was sued because during a promotion in which it gave away golf gloves, the company ran out of gloves and gave away sleeves of golf balls.[54] When the case settled, the lawyers netted $100,000 in cash and the people who were "injured" by receiving free golf balls were awarded with, you guessed it, more free golf balls.

These anecdotes may be humorous, but they are also serious. Through civil justice reform efforts, a number of groups have been working to restore fairness and predictability to the American legal system in a way that enables people with legitimate claims to have access to courts. Laws and procedures that offer a perverse incentive to the trial bar to seek dollars over justice frustrate that purpose. They also degrade the requirement that plaintiffs' attorneys must be ethical and capable to represent the interests of the class as a whole and not themselves.[55]

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[1] Fed. R. Civ. P. 23(c)(2).

[2] *See*, *e.g.*, Editorial, *Unsettling Lawsuits; Lawyers Get Their Fees, Consumers Get Stuck with Coupons, Not Cash*, Grand Rapids (Mich.) Press, June 19, 2001, at A8, *available at* 2001 WL 19175445 (discussing *In re* Domestic Air Transp. Antitrust Litig., 137 F.R.D. 677 (N.D. Ga. 1991)).

[3] The federal district judge overseeing the price-fixing claims reportedly stated at a hearing on the proposed settlement that "I would assess the chances of plaintiffs recovering as not good. … I think the case would have a hard time surviving a motion for summary judgment." David Johnson, *Settlement of airline suit draws critics; Coupons may bring carriers more business*, Hous. Chron., Jan. 2, 1993, at 1 (Business), *available at* 1993 WL 9528039 [hereinafter "Settlement of airline suit"].

[4] *See In re* Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297 (N.D. Ga. 1993) (approving settlement agreement).

[5] *See Settlement of airline suit*, *supra* note 3.

[6] *See* Editorial, *Class War,* Wall St. J., Mar. 25, 2002, at A18, *available at* 2002 WL-WSJ 3389642.

[7] *See id*.

[8] *See* Edward F. Sherman, *Consumer Class Actions: Who Are The Real Winners?*, 56 Me. L. Rev. 223, 230 (2004).

[9] William P. Barrett, *I Have No Clients (Attorney William Lerach Sues Public Corporations When Their Stock Prices Collapse*), Forbes, Oct. 11, 1993, at 52 (Lerach practices with Milberg Weiss Bershad Hynes & Lerach, LLP).

[10] Jason Hoppin, *Florida Judge Compares Milberg to Squeegee Boy*, The Recorder, Apr. 16, 2002, <http://www.law.com/jsp/statearchive.jsp?type=Article&oldid=ZZZU1WV940D>.

[11] Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 Harv. J. on Legis. 483 (2000).

[12] *See* American Tort Reform Association, Bringing Justice to Judicial Hellholes 1 (2002).

[13] Richard Scruggs, Asbestos for Lunch, Panel Discussion at the Prudential Securities Financial Research and Regulatory Conference (May 9, 2002), *in* Industry Commentary (Prudential Securities, Inc., N.Y., New York) June 11, 2002, at 5 [hereinafter "Asbestos for Lunch"]. Mr. Scruggs also has described these jurisdictions as "areas where what happens in court is irrelevant because the jury will return a verdict in favor of the plaintiff." *Medical Monitoring and Asbestos Litigation – A Discussion With Richard Scruggs and Victor Schwartz*, 17 Mealey's Litig. Rep.: Asbestos, Mar. 1, 2002, at 1, 6.

[14] *Asbestos for Lunch*, *supra* note 13, at 5.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *See* Patti Waldmeir, *Time to End This Class Action Craziness*, Fin. Times, June 7, 2004, at 10, *available at* 2004 WL 80061781 [hereinafter "Waldmeir"].

[19] *See*, *e.g.*, Caroline Mayer, *FTC Seeks to Limit Attorney Fees in Class Action Suits*, Wash. Post, Sept. 30, 2002, at A17, *available at* 2002 WL 101064782 (reporting that coupons generally can be redeemed only for a limited time and only if the consumers buys a more expensive product or service).

[20] *See* Barry Meier, *Math of a Class-Action Suit: "Winning" $2.19 Costs $91.33*, N.Y. Times, Nov. 21, 1995, at A1.

[21] *See* Ameet Sachdev, *Coupon Awards Reward Whom*?, Chi. Trib., Feb. 29, 2004, at 1 (Business), *available at* 2004 WL 71394918 [hereinafter "Sachdev"]; David Izzo, *Lawsuit Can Mean Big Bucks for Tiny Tort*, Daily Oklahoman, Sept. 17, 1995, at 1.

[22] *See Sachdev*, *supra* n. 21.

[23] *See id.*

[24] *See* Marguerite Higgins, *Class Members Get Little in Suits*, Wash. Times, July 2, 2004, at A12, *available at* 2004 WL 64161424 [hereinafter "Higgins"].

[25] *See* Jim Burke, *Carnival Settles Lawsuit*, Boston Herald, Apr. 1, 2001, at 43, *available at* 2001 WL 3797114.

[26] *See* Susan Tompor, *Polo Has a Deal for Buyers of Overpriced Ralph Lauren Outlet Goods*, Detroit Free Press, Feb. 9, 2000.

[27] *See* <http://www.ftc.gov/opa/2004/07/classaction.htm> (identifying six cases since 2002 in which the FTC has filed *amicus curiae* briefs regarding the proposed settlement relief afforded class members or size of the proposed attorneys' fee).

[28] *See Waldmeir*, *supra* note 18.

[29] Haese v. H&R Block, Inc., Cause No. CV-96-423 (Tex. Dist. Ct., Kleberg County, FTC *amicus curiae* brief filed June 4, 2003); *see also* Joseph T. Hallinan, *H&R Block Accord Draws Fire*, Wall St. J., Dec. 24, 2002, *available at* 2002 WL-WSJ 103129562 [hereinafter "Hallinan"].

[30] *See id.*

[31] FTC Press Release, *Announced Actions for June 6, 2003*, *available at* 2003 WL 21301160 (F.T.C.).

[32] *See id.*

[33] *See id.*

[34] *See Hallinan*, *supra* note 29.

[35] Johnson v. Scott, 113 S.W.3d 366 (Tex. App. – Beaumont 2003), *pet. dismissed*, 2004 Tex. LEXIS 674 (Tex. Oct. 3, 2003); *see also Higgins*, *supra* note 24 (reporting that the plaintiffs' lawyers took $9.25 million and the plaintiffs received two movie-rental coupons and a $1 coupon for an additional rental).

[36] *See*, *e.g.*, *Class Action Plaintiffs Deserve More Than Coupons*, USA Today, Oct. 9, 2002, at A12, *available at* 2002 WL 4735074.

[37] *See id.*

[38] *See Rights for Participants in Class Action Suits: Hearing on H.R. 2341 Before the House Comm. on the Judiciary*, 107th Cong., 2nd Sess. (Feb. 6, 2002), *available at* 2002 WL 25098596 (statement of Peter Detkin, vice president and assistant general counsel at Intel Corp.) (reporting that there was only one confirmed instance by a math professor that he noticed reduced precision at the 9th place to the right of the decimal).

[39] *See id.*

[40] *See id*.

[41] *See id.*

[42] *See* id.

[43] *See id.*

[44] *See id.*

[45] *See* Dan Christensen, *Consumers to Get $202M in Coupons from Microsoft Class Action*, Broward Cty. Bus. Rep., Vol. 25, No. 5, Dec. 15, 2003, at 11.

[46] *See id.*

[47] *See* Victor E. Schwartz, Mark A. Behrens & Cary Silverman, *I'll Take That: Legal and Policy Problems Raised by Statutes That Require Punitive Damages Awards To Be Shared With The State*, 68 Mo. L. Rev. 525 (2003) (discussing similar problems that arise when punitive damages awards are to be shared with the state).

[48] *See* Robert T. Horts et al., *The Class Action Fairness Act and the Revisions to Rule 23: Fixing a Broken System – Part I*, Metro. Corp. Couns., Vol. 11, No. 11, Nov. 2003, at 45.

[49] *See Higgins*, *supra* note 24.

[50] *See If Class Action Plaintiffs are Paid in Coupons, Their Lawyers Will Be, Too, Says New Law*, 2 No. 26 A.B.A. J. E-Rep. 4 (June 2003).

[51] Hasek v. DaimlerChrysler Corp., 745 N.E.2d 627 (Ill. App.), *appeal denied*, 755 N.E.2d 477 (Ill. 2001).

[52] Bell v. DaimlerChrysler Corp., CV 003457 (Tenn. Cir. Ct. Cumberland Cty., complaint filed 2001).

[53] *See*, *e.g.*, *Hanlon*, 150 F.3d 1011.

[54] *See* Martha Johanek, *Caddies or Cads? Lawyers Find the Green in Golf*, Cincinnati Enquirer, Sept. 15, 1999, at A12.

[55] *See* Fed. R. Civ. P. 23(a)(4) ("the named class members and their lawyers must be ethical and capable to represent the interests of the class as a whole").

EXHIBIT D

Ford-Explorer settlement stresses shortfalls of class actions

Only 75 of 1 million consumers bothered to redeem coupon they got in settlement

The Associated Press Posted: Aug 03, 2009 11:57 AM ET Last Updated: Aug 03, 2009 11:52 AM ET

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- Ford warns of defect on 2002 Explorers

The practice of settling class action lawsuits by doling out discount coupons rather than cash has come under fire in light of a recent settlement with Ford Motor Co. in which lawyers were paid millions of dollars but the consumers in whose name the suit was filed got only coupons toward new Ford purchases.

In the Ford case, which lawyers argued could be worth as much as $500 million to people who owned Ford Explorers during the 1990s that experienced rollover problems, everyone seemingly got some tangible benefit from the settlement authorized by Sacramento County Superior Court Judge David De Alba except the 1 million consumers covered by the class action.

The lawyers got a large payout; Ford Motor Co. put behind it a costly lawsuit connected to the Explorer rollover scandal of the 1990s; and the judge closed out a complex case that clogged the court's overburdened calendar for more than seven years.

None of the consumers, however, got money — only discount coupons for Ford vehicles. Few used them.

Tort reform activists and others complain that such lawsuits mainly benefit the lawyers — and even the companies being sued — at the expense of their clients.

> 'This coupon is valueless to me'
>
> *—1998 Explorer owner Stephen Webber*

In exchange for dropping the lawsuit, which alleged rollover problems unfairly diminished the resale value of Explorers, Ford customers could receive a $500 discount coupon toward the purchase of a new SUV or a $300 coupon to buy another Ford vehicle. Consumers had until April 29, 2008, to apply for the coupons.

De Alba awarded the lawyers $25 million US in fees and expenses after presiding over a 50-day trial without a jury in 2007. The case settled before the judge reached a verdict.

De Alba declined comment.

A report filed with the court in June showed just 75 coupons have been redeemed for a combined $37,500.

"This coupon is valueless to me," said Stephen Webber, a Glendale lawyer who owns a 1998 Explorer and qualified for the discounts. "It did nothing to improve the safety of my vehicle, and I have no intentions of buying a new one."

The lawyers who represented Webber and the million other SUV owners argue that they did the best they could with a complicated case vigorously fought by Ford's phalanx of high-priced attorneys. They said that in the fall of 2007 when the case settled, there was a chance Ford would file for bankruptcy, wiping out the case and leaving consumers with nothing.

In a statement emailed to The Associated Press by the class action firm Lieff, Cabraser, Heimann, & Bernstein on behalf of the five firms who sued Ford, the lawyers noted that they also forced Ford to stop touting the Explorer's safety features and make a $950,000 donation to non-profit auto-safety groups, which they said benefits their clients.

They said they spent $6 million of their own money and thousands of hours fighting Ford.

"Class counsel were surprised and, of course, disappointed by the low redemption rate, which undoubtedly was affected by the near-collapse of the economy just as the period to redeem vouchers began," the lawyers said. "The real story here is Ford's failure to take responsibility for producing a vehicle, the 1991-2001 model year Explorer, that has killed hundreds of consumers over the past 18 years."

Ford spokeswoman Kristen Kinley said the settlement prevented the company from discussing the case.

"We are pleased to have finally settled this case with the plaintiffs and to finally put this behind us," Kinley said. "We are also pleased to hear that some people took advantage of the vouchers to purchase a new Ford Explorer."

Lawyers, judges and legal scholars have long wrangled with how to fairly compensate large numbers of people who suffered harm that is worth very little individually but adds up in the aggregate.

Earlier this year, for instance, a Los Angeles Superior Court judge ordered that a class action lawyer receive 12,500 gift certificates worth $10 for winning the discount for the roughly 43,000 customers of clothing retailer Windsor Fashions, which solicited personal information during credit card purchases. The judge later reversed himself and ordered the lawyer be paid in cash.

Typically, the rate of redemption of such coupon settlements is not tracked, and judges are only presented with anecdotal evidence of how fair such agreements are when considering approval.

But the judge in the Ford case, at the urging of several lawyers objecting to the original settlement, required the class action attorneys to file a report this year detailing the redemption rates. That report, which highlighted the dismal consumer participation, is expected to be considered by other judges pondering coupon settlements across the country.

The Ford case stands out even against the backdrop of endless debate over class action litigation where lawyers get multi-million-dollar paydays for settlements that have minimal value for most of their clients.

The Ralph Nader-founded Center for Auto Safety in Washington, D.C., expressed outrage and tried to stop the settlement last year. Several others also urged the judge to withhold approval before dropping their opposition in exchange for the donation to auto safety nonprofits and the requirement that coupon redemptions be reported.

"The reality is that class members are almost totally irrelevant, and the lawyers are in charge," said McGeorge Law School professor John Sims, who worked for Nader's Public Citizen Litigation Group. "But this was a stupid case that included a requirement to buy a new car within a year."

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EXHIBIT E

THE WALL STREET JOURNAL.
WSJ.com

August 3, 2009, 12:19 PM ET

The Ford Rollover Litigation: The Scoop On the Coupons

By Ashby Jones

It's been a while since we heard tale of a controversial consumer class-action lawsuit, and, from our vantage point, that's not necessarily a good thing. Nothing stirs up the tort-reformers like a good class-action settlement in which plaintiffs lawyers get money and class-members get coupons.

The AP has a story out Monday taking a sort of retrospective snapshot on the Ford Explorer rollover class-action litigation. As part of a settlement reached last year, the nearly 1 million class members covered by the lawsuit each received the opportunity to claim a coupon worth either $300 or $500 toward the purchase of a new Ford vehicle. As of June 2009, according to the piece, only 75 people had used the coupons, at a cost to Ford of $37,500. The plaintiffs' lawyers, meanwhile, took home $25 million in fees and expenses.

Let us take a quick step back here. This rollover litigation wasn't filed by people who were physically injured in accidents due to the Explorer's alleged propensity to rollover, but people who claimed the resale values of their Explorers were hurt by news of the rollover problems and high-profile accidents.

Last year, Sacramento County Superior Court Judge David De Alba authorized the settlement of a class action that lawyers argued could be worth as much as $500 million to people who owned Ford Explorers during the 1990s. As part of the settlement, Ford customers could receive a $500 discount coupon toward the purchase of a new SUV or a $300 coupon to buy another Ford vehicle.

But a report filed with the court in June showed just 75 coupons had been redeemed.

"This coupon is valueless to me," said Stephen Webber, a Glendale, Calif., lawyer who owns a 1998 Explorer, to the AP. "It did nothing to improve the safety of my vehicle, and I have no intentions of buying a new one."

The lawyers from the five firms who represented Webber and the million other SUV owners argue that they did the best they could, adding that in 2007 when the case settled, there was a chance Ford would file for bankruptcy, which would have left the litigation largely moot.

A statement from Lieff, Cabraser, Heimann, & Bernstein on behalf of the plaintiffs' firms, noted that, in addition to winning coupons for class members, they also forced Ford to stop touting the Explorer's safety features and make a $950,000 donation to nonprofit auto-safety groups.

That said, they were still unhappy with the low redemption rate on the coupons. "Class counsel were surprised and, of course, disappointed by the low redemption rate which undoubtedly was affected by the near-collapse of the economy just as the period to redeem vouchers began," the lawyers said.

Ford spokeswoman Kristen Kinley told the AP: "We are pleased to have finally settled this case with the plaintiffs and to finally put this behind us," Kinley said. "We are also pleased to hear that some people took advantage of the vouchers to purchase a new Ford Explorer."

EXHIBIT F

CONSUMER CLASS ACTIONS AND COUPON SETTLEMENTS:

ARE CONSUMERS BEING SHORTCHANGED?

Originally Published In *Advancing The Consumer Interest*, Vol. 12, No. 2, Fall/Winter 2000 And May Not Be Reproduced Without The Permission Of Thomas A. Dickerson.
By Judge Thomas A. Dickerson and Brenda V. Mechmann[1]

Class actions brought in both Federal and State Courts on behalf of consumers victimized by defective or misrepresented goods and services can generate substantial cash or product recoveries. These benefits may be rendered illusory, however, by settling a consumer class action with the issuance of coupons, credits or certificates for the purchase of goods or services from the defendants. The stark reality of coupon settlements is that they may only benefit the attorneys representing the class, who are paid in cash, and the defendants who are relying on a coupon design and redemption process which guarantees that very few coupons will ever be redeemed. The telltale sign of this lawyer's " bargain " is that very few coupon settlement agreements provide for coupon tracking or promise to continue issuing coupons until a specific dollar amount is redeemed. Under these circumstances neither the attorneys for the class nor the defendants may have any interest in making known to the class or the general public the actual redemption rate of settlement coupons.

Low coupon redemption rates make a mockery of the concept that class members should receive value for settling their claims. This is especially true when class attorneys are paid in cash while class members receive only coupons of dubious value. In *In re Domestic Air Transportation Antitrust Litigation*[2] a class action alleging a price fixing conspiracy[3] between nine domestic airlines, the settlement provided for over $400 million in flight coupons and $50 million in cash for attorneys fees and administrative costs. Objectors[4] criticized the proposed settlement as being nearly worthless because of numerous use restrictions, e.g.,

- (1) although transferable to a designated person the coupons could not be sold to coupon brokers or others willing to purchase them,
- (2) the coupons were useable only in small units so that claimants would simply forget about or not bother to use the coupons,
- (3) one way flights were excluded,
- (4) black out periods such as Thanksgiving/Christmas/New Years were excluded, and
- (5) tickets purchased with other coupons/awards were excluded. Notwithstanding these objections of the limited value of the flight coupons[5] the settlement was approved.[6]

How To Make Coupon Settlements Real

An offer of cash allows the Court and the class to more accurately evaluate the settlement's true value.[7] However, there are occasions when a non–cash settlement of coupons for the purchase of goods or services from the defendant is appropriate and necessary.[8]. First, an individual class member's cash recovery may be so small that it is exceeded by the costs of distribution. This reality, known as *de minimus* damages, may justify the denial of class action status. In *Maffei v. Alert Cable TV of North Carolina*[9] class certification was denied because each class member's recovery of $.29 " would conceivably not even cover the cost of postage and stationary for a claimant to notify the court of his inclusion in the class ". Second, because of the nature of the underlying transaction, e.g., most low end retail sales, the names and addresses of class members may never be known. Some courts have responded to both*de minimus* damages and an unidentifiable class by approving of the use of a fluid recovery plan for damages distribution. Fluid recovery[10] seeks to put recovered monies to " the(ir) next best use"[11] by rewarding the next best class. Fluid recovery plans may involve a rollback of defendant's prices, escheat to a governmental body, establishment of a consumer trust fund, funding of educational funds or the issuance of coupons to regular customers on theory that they were members of the victimized class. In *Feldman v. Quick Quality Restaurants, Inc.*[12] nearly sixteen million consumers of Burger King fast food products were overcharged $.01 on each purchase. The settlement provided for the issuance of $.50 coupons for the purchase of food to future customers on the theory some, if not all, were repeat customers and, hence, members of the class. Third, the defendant may be impoverished and unable to pay cash to the class. Naturally, as a threshold matter, the defendant must be willing to establish it's financial inability to pay cash.[13]

Transferability

The distribution of coupons, typically, requires the purchase of specific goods or services which the class member may not want. Consumers would be far better served if the coupons were convertible into cash either by redemption or by being transferable to persons or entities, e.g., coupon brokers, willing to pay cash for them. In*Charles v. Goodyear Tire & Rubber Co*[14] the credit vouchers were freely transferable as they were in *In re Cuisinart Food Processor Antitrust Litigation*[15] *Willmann v. GTE Corp.*[16] and *Buchet v. ITT Consumer Finance Corp.*[17] Cash convertibility, even at a discount, would be preferable to non-cash redeemable ones. In *Langford v. Bombay Palace Restaurants*[18] the settlement coupons could be redeemed for cash at 30% of their face value while in *Weiss v. Mercedes-Benz*[19] the certificates for the purchase of a new Mercedes were redeemable at one half face value after three years.

Redemption Rate

For the defendants, of course, the most attractive feature of a coupon settlement is that not all of the issued coupons will be redeemed. In fact, the average redemption rates on food and beverage coupons have consistently been between 2% and 6%.[20] In evaluating the merit of a coupon settlement, the only proper means of measuring true value is by estimating the actual redemption rate of the offered coupon. Often experts will be enlisted by plaintiffs' or defendants' counsel to speculate upon potential redemption rates. Such dubious predictions may be challenged by discovery of the effectiveness of similar coupon programs. In *In Re Domestic Air Transportation Antitrust Litigation*[21] objectors took the position that the true value of the flight coupons could only be established by estimating the actual redemption rate after discovery of the redemption rates of the airlines' prior frequent flyer, certificate and coupon programs.

In *Dunk v. Ford Motor Company*[22] a settlement of coupons redeemable for $400 for the purchase of a new vehicle provided for an estimated redemption, unrebutted by objectors, of 65,000 coupons creating a settlement value of $26 million. On the other hand in *Dollar v. General Motors Corp.*[23] a settlement of $1000 coupons for the purchase of new vehicles with an estimated 10% to 45% redemption rate was rejected as providing little benefit to the class.

Coupon Tracking

A coupon settlement should require post settlement tracking of how many class members actually redeem the coupons. In *In re General Mills Oat Cereal Consumer Litigation*[24] the defendant issued certificates for free boxes of cereal and agreed to submit quarterly reports to insure that $10 million of cereal products were actually distributed. Notwithstanding rare exceptions such as the reported 94% coupon redemption rate in *In re Sears Automotive Center Consumer Litigation*[25] coupon redemption rates can be very low, indeed. In *Perish v. Intel Corp.*[26] 500,000 coupons offering a $50 rebate off of the purchase of a new microprocessor only generated 150 requests from class members for the coupons. And in *In re Cuisinart Food Processor Antitrust Litigation*[27] the claim rate was only 0.54% while the subsequent coupon redemption rate was even lower.

Keep On Issuing

To prevent this emasculation of the settlement concept there should be a 100% redemption of the offered coupons or credits. This means not only that the coupons must be transferable and cash convertible, but the defendant must continue to issue coupons until the agreed upon cash face value of the settlement is reached. In *Feldman v. Quick Quality Restaurants*[28] the settlement provided for the issuance of food coupons with a minimum value of $.50, which defendants were required to keep issuing and distributing to consumers until the agreed upon face value of the settlement was reached. This concept has been used in *The Coca-Cola Co. Apple Juice Consumer Litigation* (coupons issued until $5,250,000 redeemed)[29] *Tepper v.Tropicana Products, Inc* ($.50 coupons issued until $1,150,000 redeemed)[30] and *Muller v. Cadbury Schweppes PLC* (coupons

issued until $1,100,000 redeemed)[31] Alternatively, defendants should agree to make up the difference between the actual value of redeemed coupons and the proposed settlement fund by making donations in cash[32] , coupons[33] , goods[34] or services to charitable organizations.

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Time & Method Of Redemption

Equally important in measuring the actual value of a coupon settlement is the time during which redemption must take place and the manner in which the coupons must be redeemed. As for the duration of the redemption the longer the time period the better. Redemption periods of three years [*Donley v. Marshall*[35]], two years [*Charles v. Goodyear Tire & Rubber Co.*[36]] and one year [*Dunk v. Ford Motor Company*[37]] are acceptable. As for the method of redemption the consumer should not be required to reveal his or her intention to use the coupon or credit until the price is agreed upon. For example, if the retailer is aware that the consumer intends to use a coupon or credit he may increase the sale price to compensate for the reduced payment. This potential problem was circumvented in *Branch v. Crabtree*[38] in which the settlement provided for the issuance of $1,000 certificates towards the purchase of a new or used car. The certificates could be withheld by the consumer until he or she had negotiated the best price. At that point the certificate could be produced for a further reduction in the vehicle price.

The Problem Of Attorneys Fees

Coupon settlements may provide class counsel with an opportunity for substantial self–dealing. Considering the low redemption rate of coupon settlements, defendants may be willing to pay inordinately high cash fees to class counsel in return for support in promoting a non–cash settlement in which the class receives near worthless coupons. In *In re General Motors Corp. Pickup Truck Fuel Tank Products Liability Litigation*[39] a proposed settlement which provided $1000 coupons for the purchase of a new truck and $4 million in legal fees was rejected as being of little value to class members. And in *In re Ford Motor Co. Bronco Products Liability Litigation*[40] a settlement providing class members with a " free " inspection, a road atlas and a lantern was rejected as inadequate. Certainly, fee awards should not be based on a percentage of an estimated settlement value which itself is based upon an estimated redemption rate. In *Dunk v. Ford Motor Company*[41] the Court rejected a fee application of $985,000 based upon a percentage of an estimated value of redeemed coupons. The Court held that the percentage method of awarding fees should only be used when the common fund value is certain or an easily calculable sum of money.

To prevent this opportunity for abuse, the court may wish to consider requiring that class counsel accept a portion of their fees in the same non–cash consideration being offered in settlement. In *Aburime v. Northwest Airlines, Inc.*[42] class counsel accepted cash and $200,000 in non-transferable credit for travel. The rationale for requiring class counsel to share and share alike with class members is that this ensures value for the non–cash component on the theory that class counsel would not accept as a fee something that is relatively worthless. In the alternative and, at the very least, counsel fees should be based upon the actual recovery to the class. And this requires cash convertibility, transferability, extended redemption periods, post settlement tracking and continued coupon issuance until the amount redeemed equals the promised cash value of the settlement.

Class Action Policies May Be Defeated

Coupon settlements may be little more than shams when the attorneys for the plaintiff class and the defendants are the only real beneficiaries. The salutary purpose of class actions may be defeated when attorneys consider their own economic interests before those of the class. As noted recently by the Court in *In Re Auction Houses Antitrust Litigation*[43] " Class action lawsuits protect plaintiffs' rights and promote accountability...At the same time, however, the relationship between a plaintiff class and its attorney may suffer from a...divergence of economic interests. The class action mechanism can redound more to the benefit of the attorney...as counsel has an incentive to act in its own best interest...the class action mechanism on occasion has proved to be Janus-faced ".

The settlement of consumer class actions with coupons for the purchase of goods or services can be good for defendants' business and good for the consumer class. Coupon settlements, however, must be carefully designed so that consumers actually receive something of value in return for releasing their claims against defendants. The attorneys for the plaintiff class should be adequately compensated, to be sure, but not at the expense of the persons on whose behalf the class action was brought.

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FOOTNOTES

[1]. Thomas A. Dickerson is a Westchester County Court Judge with a Web Page at **http://members.aol.com/judgetad/index.html**. Judge Dickerson is the author of *Class Actions: The Law of 50 States*, Law Journal Press, New York, 1981-2000, updated annually, Web Page at **http://members.aol.com/class50/index.html** and *Travel Law*, Law Journal Press, New York, 1981-2000, updated biannually, Web Page at **http://members.aol.com/travellaw/index.html** and other articles concerned with consumer law, many of which are available at **http://www.classactionlitigation.com/library/ca_articles.html** Ms. Brenda V. Mechmann is Judge Dickerson's Principal Law Clerk.

[2].*In re Domestic Air Transportation Antitrust Litigation*, 137 F.R.D. 677 (N.D. Ga. 1991)(class certification granted).

[3].See also In re North Atlantic Air Travel Antitrust Litigation, No. 84-1013 (D.C. Cir. Dec. 11, 1985)($30 million in nontransferable air fare reduction coupons worth $50 per transatlantic round trip flight for two year period).

[4]. See *In Re Domestic Air Transportation Antitrust Litigation*, MDL No. 861, U.S.D.C., N.D. Ga., Reply Of Objectors [Andrew Hudders et al] To Plaintiffs' And Defendants' Responses To Objections, November 5, 1992, pp. 24-30.

[5].*In re Domestic Air Transportation Antitrust Litigation*, 144F.R.D. 421 (N.D. Ga. 1992)(objectors to proposed settlement granted limited discovery).

[6].*In re Domestic Air Transportation Antitrust Litigation*, 148 F.R.D. 297 (N.D. Ga. 1993).

[7].In *Kahn v. Bell Atlantic NYNEX Mobile*, New York Law Journal, June 4, 1998, p. 29, col. 4 (N.Y. Sup.) the Court rejected a proposed settlement offering class members " free airtime " because it could not " make an independent assessment of the value of the airtime ".

[8].See e.g.,*State of New York v. Nintendo of America, Inc.*, 775 F. Supp. 676, 681-682 (S.D.N.Y. 1991)(coupons for purchase of Nintendo software); *Weiss v. Mercedes-Benz of North America*, 1995 WL 592273 (D.N.J. 1995)(certificates towards the purchase of new Mercedes); *Willmann v. GTE Corp.*, No. 96-492 (S.D. Ill. June 11, 1996)($5.00 debit cards for long distance calls); *Buchet v. ITT Consumer Fin. Corp.*, 845 F. Supp. 684 (D. Minn. 1994)(certificates for reduced cost of life insurancepolicies).

[9]. *Maffei v. Alert Cable TV of North Carolina*, 342 S.E. 2d 867, 872 (N.C. Sup. 1986).

[10].See e.g., *Gordon v. Boden*, 586 N.E. 2d 461 (Ill. App. 1991) (adulterated orange juice; certification granted; fluid recovery approved).

[11]. *State v. Levi Strauss & Co.*, 41 Cal. 3d 460, 224 Cal. Rptr. 605, 714 P. 2d 564 (1986).

[12]. *Feldman v. Quick Quality Restaurants, Inc.*, New York Law Journal, July 22, 1983, p. 12, col. 4 (N.Y. Sup.).

[13].See e.g., In *re Montgomery County Real Estate Antitrust Litigation*, 1979-2 CCH Trade Cas. 62,860 (D. Md. 1979) (defendants affirmatively established inability to pay cash).

[14]. *Charles v. Goodyear Tire & Rubber Co.*, No. 94-5626 (D.N.J. Dec. 13, 1996).

[15].*In re Cuisinart Food Processor Antitrust Litigation*, 1983-2 CCH Trade Cas. 65,680 (D. Conn. 1983).

[16].*Willmann v. GTE Corp.*, No. 96-492 (S.D. Ill. June 11, 1996).

[17].*Buchet v. ITT Consumer Finance Corp.*, 845 F. Supp. 684 (D. Minn. 1994).

[18].*Langford v. Bombay Palace Restaurants*, 1991 US Dist LEXIS 4730 (S.D.N.Y. 1991).

[19].*Weiss v. Mercedes-Benz of North America,* 1995 WL 592273 (D.N.J. 1995).

[20].See Weinstein, " The Love/Hate Dynamics: Coupons Issued By Manufacturers " 71 Progressive Grocer 117 (May 1992).

[21]. *In re Domestic Air Transportation Antitrust Litigation,* 144 F.R.D. 421 (N.D. Ga. 1992)(objectors to proposed settlement granted limited discovery).

[22]. *Dunk v. Ford Motor Company,* 48 Cal. App. 4th 1794, 56 Cal. Rptr. 2d 483 (1996).

[23].*Bloyed v. General Motors Corp.*, No. 06-93-00113-CV (Tex. 71st Jud. Dist. Harrison Co. Nov. 3, 1993), *rev'd sub nom*. 881 S.W. 2d 422 (Tex. App. 1994), *aff'd on other grounds* 916 S.w. 2D 949 (Tex. 1996).

[24].*In re General Mills Oat Cereal Consumer Litigation,* No. 94 CH 06208 (Ill. Cir. Ct. Cook Co. July 29, 1994).

[25].*In re Sears Automotive Center Consumer Litigation,* No. 92-2227 (N.D. Cal. Oct. 29, 1992).

[26].*Perish v. Intel Corp.,* No. CV-75-51-01 (Cal. Super. Ct. Santa Clara Co. June 22, 1998).

[27].*In re Cuisinart Food Processor Antitrust Litigation,* 1983-2-CCH Trade Cas. 65,680 (D. Conn. 1983).

[28].*Feldman v. Quick Quality Restaurants,* Inc., New York Law Journal, July 22, 1983, p. 12, col. 4 (N.Y. Sup.).

[29].*In re The Coca-Cola Co. Apple Juice Consumer Litigation,* No. E-47054 (Ga. Super. Ct. Fulton Co. May 4, 1998).

[30].*Tepper v. Tropicana Products, Inc.*, No. 96-000846 (Fla. Cir. Ct. Manatee Co. Nov. 13, 1998).

[31].*Muller v. Cadbury Schweppes PLC,* No. 96-0148788 (Conn. Super. Ct. Waterbury Jud. Dist. June 29, 1999).

[32].See *Ohio Public Interest Campaign v. Fisher Foods*, 546 F. Supp. 1 (N.D. Ohio 1982)(contributions in cash or food to charitable organizations that give away food to the needy).

[33].See *Duboff v. SmithKline Beechum* (Pa. Ct. C.P. Philadelphia Co. Sept. 23, 1993)(coupon booklets for purchase of 18 SmithKline products; unclaimed booklets to be distributed to charitable organization).

[34].See *Gordon v. Boden*, No. 89 CH 6531 (Ill. Cir. Ct. Cook Co. July 14, 1995)(if redemptions of orange juice vouchers do not exceed $1 million defendant will fund consumer oriented research and make orange juice donations to schools).

[35].*Donley v. Marshall,* No. 93 CH 1610 (Ill. Cir. Ct. Cook. Co. Mar. 31, 1998).

[36].*Charles v. Goodyear Tire & Rubber Co.* No 94-5626 (D.N.J. Dec. 13, 1996).

[37].*Dunk v. Ford Motor Company,* 48 Cal. App. 4th 1794, 56 Cal. Rptr. 2d 483 (1996).

[38].*Branch v. Crabtree,* Index No. 15822/89, N.Y. Sup. West. Cty. Oct. 31, 1995.

[39]. *In re General Motors Corp. Pickup Truck Fuel Tank Products Liability Litigation,* 55 F. 3d 768 (3d Cir. 1995), *cert. denied* 516 U.S. 824 (1996).

[40].*In re Ford Motor Co. Bronco II Products Liability Litigation,*1995 WL 222177 (E.D. La. Apr. 12, 1995).

[41].See N. 33, *supra.*

[42].*Aburime v. Northwest Airlines, Inc.*, No. 3-89-402 (D. Minn. Aug. 16, 1991).

[43].*In Re Auction Houses Antitrust Litigation,* New York Law Journal, October 2, 2000.

EXHIBIT G

The New York Times

Technology

Intel Settles Suit by Offering Rebates to Some Customers

By JOHN MARKOFF
Published: July 21, 1997

The Intel Corporation has settled a class action suit brought in the wake of the disclosure last year that an error in a testing process had led the company to overstate the speed of some of its microprocessor chips by about 10 percent.

Under terms of a preliminary agreement reached earlier this month, the chip maker will offer rebates on the purchase of new processors for some customers and add new language warning computer users to carefully assess comparisons of processor speed.

The plaintiffs in the suit had charged that Intel had cheated on the results of its tests, which rate the chips against a set of industry benchmarks.

"The moral of the story is caveat emptor," said Linley Gwennap, editor-in-chief of Microprocessor Report, a computer industry newsletter. "Intel is trying to do a good job with these benchmarks, but in this one case they pushed too hard and then found out later they made a mistake."

In the settlement, Intel denied that the company ever disseminated any false or misleading information. But the company has agreed to provide a $50 rebate on the purchase of Intel Overdrive processors, which are used for computer upgrades, to customers who purchased a personal computer containing a 120 MHz or a 133 Mhz Pentium processor between Oct. 23, 1995 and Jan. 5, 1996.

The suit was unrelated to the much ballyhooed discovery in 1994 of a math error in the then-new Pentium processor. After initially playing down the significance of that flaw, Intel ultimately made an unconditional offer to replace customers' chips.

A spokesman for Intel said that the agreement reached this month was preliminary and would be completed in October if there were no appeals. Consumers would then be able to obtain rebates on the purchase of the new Overdrive processors early next year.

"We settled the suit, but we don't think it made a significant difference," Chuck Malloy, a spokesman for Intel, said of the error. "Data wasn't corrupted; you won't notice diminished performance."

It is not certain how many customers will qualify for the rebate offer under the terms of the settlement. Dataquest researchers estimated that fewer than 500,000 of the two processors were sold during the last quarter of 1995.

"Clearly it was a complex case that would have taken a long time," said Terry Gross, a San Francisco lawyer who represented the plaintiffs, who were customers who had bought personal computers during the time covered by the settlement. "However, the main import for consumers is to be able to obtain accurate information."

The agreement specifies that in future advertisements of Intel products referring to industry benchmarks of performance such as SPEC95 and iCOMP, the company will note that the results may not reflect the relative performance of Intel microprocessors in systems with different hardware or software designs or configurations.

The SPEC benchmark series was originally compiled by an industry consortium in an effort to put an end to wildly conflicting performance claims made by different computer companies in the late 1980's. The measure is administered by the Standard Performance Evaluation Corporation, a nonprofit group that is sponsored by 24 computer makers.

The tests are an effort to put a computer through a series of exercises that closely mirror real-world computing problems. The problem at Intel involved an error in a software program known as a compiler that is used in the tests.

The SPEC benchmarks are generally used by technical and scientific customers in performance evaluations of competing computer systems, rather than by consumers evaluating individual personal computers. For example, a big company or a Government agency might review the SPEC numbers when deciding which work stations to purchase.

As part of the settlement, Intel also agreed to pay the plaintiff's lawyers $1.5 million, approximately one-half of their fees and expenses.

EXHIBIT H

The Science Behind Sonicare AirFloss

PHILIPS
sonicare
sense and simplicity

Table of Contents

Introduction from Dr. Joerg Strate

Vice President, Philips Oral Healthcare,
Clinical & Scientific Affairs

Philips Sonicare AirFloss

The name of our latest innovation is ambitious: Sonicare AirFloss. For decades, floss was the only widely recommended way to manage interdental oral hygiene in addition to the regular use of a toothbrush. Floss may be considered to be a functional solution, but patients find it difficult to use, resulting in infrequent use or complete omission.

Sonicare AirFloss replaces traditional flossing with micro bursts of water and air. Since the technological breakthrough of the first Sonicare power toothbrush, we have learned a lot about fluid forces and their ability to remove plaque biofilm. Sonicare AirFloss is a new technology chapter in the field of oral healthcare. It uses a unique spray of micro bubbles and a small dose of fluid to generate a gentle and convenient, yet highly effective, interdental cleaning action. Not only does it disrupt plaque biofilm structures in critical and hard-to-reach areas, it promotes healthy gums with the targeted release of water/air spray.

Sonicare AirFloss continues the Sonicare legacy of technology leadership within the oral healthcare segment. And while everything about Sonicare AirFloss seems quite different from the design and function of Sonicare toothbrushes, there is one area where AirFloss was submitted to the same rigorous criteria established for all Sonicare products: the meticulous clinical validation and verification of performance and safety requirements. The design and the concept are intriguing in themselves – but our clinical data are extremely convincing. With Sonciare AirFloss, interdental cleaning has just been reinvented.

Safety

in vitro study

Evaluation of surface wear by Philips Sonicare AirFloss and Waterpik Water Flosser on dental restorative materials

Yapp R, Powers JM, Jain V, de Jager M. Data on file, 2010

Objective

To investigate potential surface wear caused by Philips Sonicare AirFloss and the Waterpik Water Flosser on a dental restorative material with a relatively low surface hardness.

Methodology

To make this study a worst-case scenario for evaluating erosion of dental materials caused by pressurized water sprays, Durelon polycarboxylate cement (3M ESPE) was chosen because it is a popular luting cement and one of the softest (Vickers hardness of 20).

The Durelon specimens were flat discs, 10 mm in diameter and 3 mm thick, lightly polished to create flat surfaces and cleaned in an ultrasonic bath to remove any loose particles. Specimens were capped with soft impression material except in their center, where a round opening 2 mm in diameter allowed exposure to the sprays, such that the unexposed areas would serve as a control.

Eight Durelon test specimens were exposed to a total of 2,000 spray pulses with either Sonicare AirFloss or Waterpik Water Flosser (at pressure setting 5). Specimens were positioned at 1 mm distance from the nozzle and perpendicular to the spray, in such a way that water would run off the specimens to avoid interference with successive sprays.

Environmental scanning electron microscope (ESEM) inspection was used to determine if there was any visual evidence of erosion.

Results

Visual analysis with ESEM at 8X and 50X magnification did not disclose any difference between the erosion zones and non-erosion zones of any of the specimens, suggesting that neither the Sonicare AirFloss nor the Waterpik Water Flosser produced any obvious surface damage to the Durelon specimens, through 2,000 spray pulses.

Conclusion

Sonicare AirFloss is safe to use with dental restorative materials.

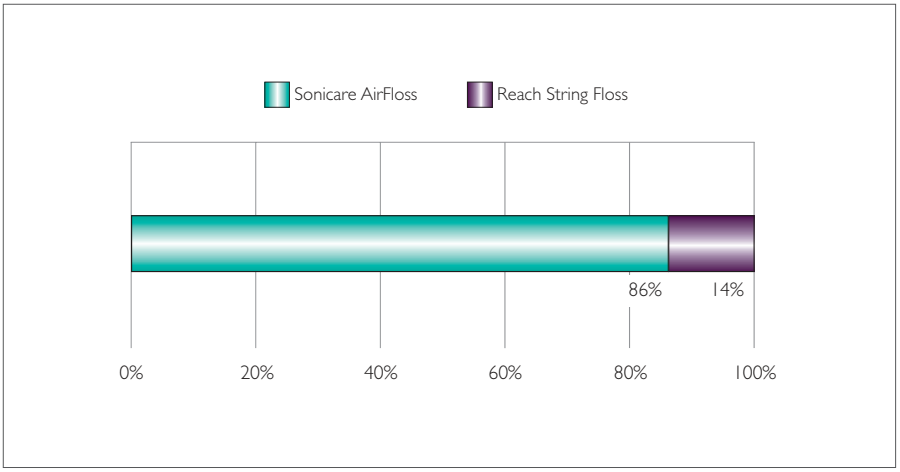
Preference

In-home use test to evaluate ease of use for Philips Sonicare AirFloss versus Reach string floss and Waterpik Ultra Water Flosser

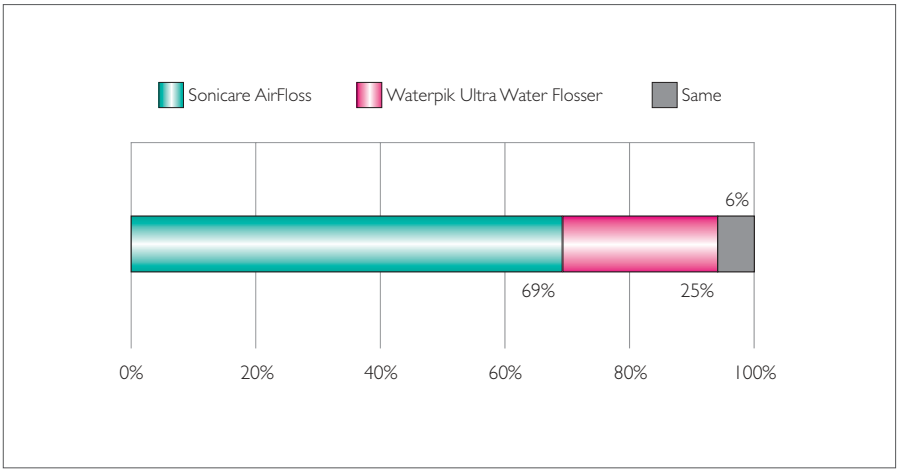
Krell S, Kaler A, Wei J. Data on file, 2010

Objective	To assess ease of use of Philips Sonicare AirFloss and two commercially available interproximal cleaning devices after using each device at home for one week.
Methodology	Eligible participants included 59 adult irregular flossers (floss from one time per month to three times per week). The study utilized a three-period, randomized crossover design. The three interproximal cleaning products tested were Sonicare AirFloss, Johnson & Johnson Reach unwaxed string floss and Waterpik Ultra Water Flosser (an oral irrigator). The study included four weekly, on-site visits, during which a new device was exchanged for the previous device until all of the three interproximal cleaning products were used, per randomized assignment. Participants were given a survey to report their feedback for the use of each product at the fourth visit. Feedback was recorded through an online questionnaire (Survey Monkey).
Results	All of the 59 participants completed the study and survey. Overall, participants were highly satisfied with the use of the Sonicare AirFloss. 86% and 69% of study participants reported Sonicare AirFloss as easier to use than string floss or an oral irrigator, respectively. 78% reported Sonicare AirFloss as gentler on the teeth and gums than string floss. 81% reported that Sonicare AirFloss provided better access to the back of the mouth than string floss.
Conclusion	Among a sample of irregular flossers, Sonicare AirFloss was reported by users to be a preferred alternative for cleaning between teeth, relative to other commonly used modalities. It elicited significantly higher scores for ease of use than floss or an oral irrigator, and Sonicare AirFloss rated higher for gentleness on teeth and gums and its ability to provide better access to the back of the mouth compared to string floss.

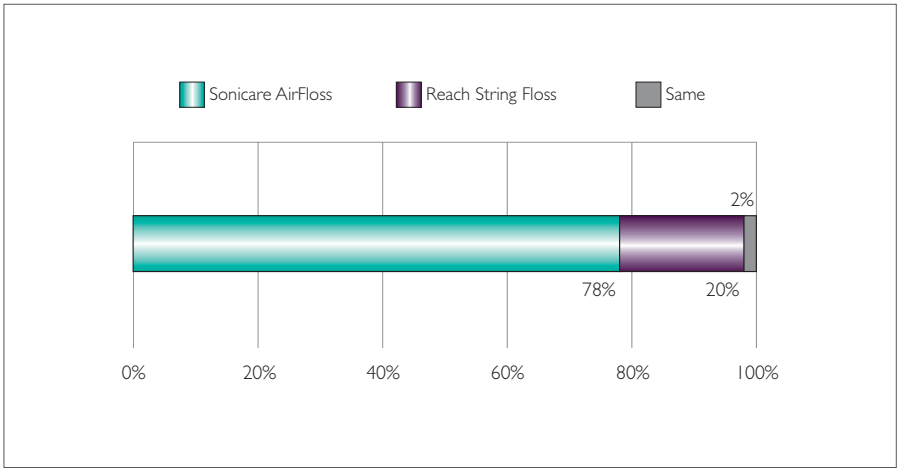
Which product was easier to use?



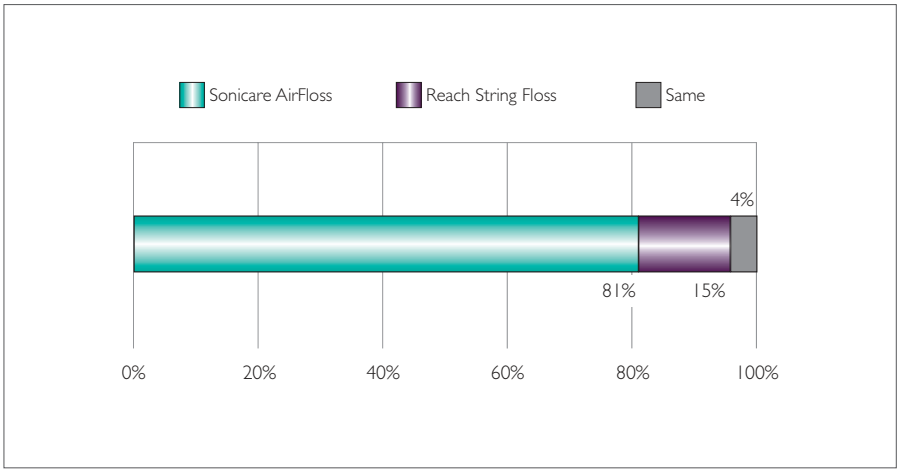
Which product was easier to use?



Which product was gentler on your teeth and gums?



Which product provided better access to the back of your mouth?



Plaque Biofilm Disruption

in vitro study

In vitro evaluation of interproximal biofilm removal with Philips Sonicare AirFloss

de Jager M, Hix J, Aspiras M, Schmitt P. Data on file, 2010

Objective

To evaluate, in vitro, the additional removal of interproximal plaque biofilm of Philips Sonicare AirFloss when used in combination with Philips Sonicare FlexCare.

Methodology

This study evaluated interproximal biofilm removal of Sonicare FlexCare with or without subsequent use of Sonicare AirFloss. An in vitro tooth model was used to assess the efficacy in removing dental plaque biofilm from the interproximal spaces of molar teeth. The dental plaque model was a multispecies oral biofilm grown on hydroxyapatite discs. In a typodont, the discs with biofilm were located on interproximal sites of molar teeth at a distance of 2-4 mm from the tip of the bristles or the nozzle. The typodont was exposed to the dynamic fluid activity generated by the high-frequency bristle movement from the activated Sonicare FlexCare (15 seconds) and by the high-velocity droplet air spray from Sonicare AirFloss (single shot). An inactivated Sonicare FlexCare was used as a control. Plaque removal efficacy was determined by enumeration of the percentage of viable bacteria removed from the discs as a result of these exposures.

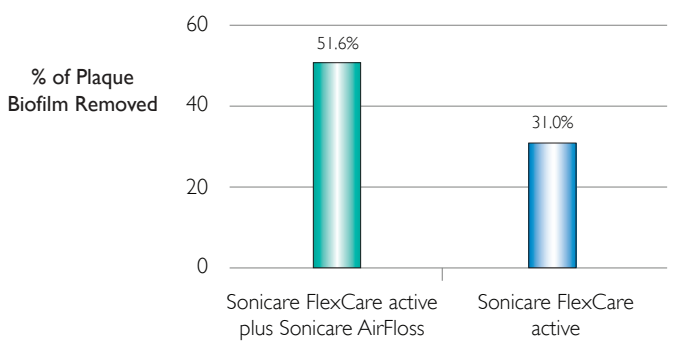
Results

Sonicare AirFloss in conjunction with Sonicare FlexCare removed 66% ($p<0.0001$) more interproximal biofilm than the active Sonicare FlexCare alone. Sonicare FlexCare active removed significantly more biofilm than Sonicare FlexCare inactive ($p<0.0001$).

Conclusion

Sonicare AirFloss removed 66% more interproximal plaque biofilm than Sonicare FlexCare alone.

Comparison of In Vitro Interproximal Plaque Removal



Gingivitis Reduction and Plaque Removal

in vivo study

Effect of Philips Sonicare AirFloss on interproximal plaque and gingivitis

de Jager M, Jain V, Schmitt P, DeLaurenti M, Jenkins W, Milleman J, Milleman K, Putt M.
J Dent Res 90 (spec iss A), 2011

Objective

Philips Sonicare AirFloss is a rechargeable interproximal cleaning device that uses a high-velocity burst of air and water droplets to clean between teeth. The objective of this study was to evaluate the effect of Sonicare AirFloss on interproximal plaque and gingivitis when used in addition to manual toothbrushing.

Methodology

One hundred forty-eight adults (98 females, 50 males; mean age 39.5 years) with moderate gingivitis participated in this single-blind, four-week, parallel, randomized controlled clinical trial. Ethical approval and written informed consent were obtained. Subjects were randomized either to a manual toothbrush (two minutes, twice a day) or to a manual toothbrush plus Sonicare AirFloss (once daily, evening). Changes in gingival inflammation were measured using the Modified Gingival Index (MGI) and Gingival Bleeding Index (GBI) at baseline, two weeks and four weeks. The amount of interproximal plaque was evaluated by analyzing the residual protein concentration (RPC) of six plaque samples collected from four posterior sextants (one interproximal site per sextant) and two anterior sextants (three interproximal sites per sextant). Baseline plaque samples were collected prior to any intervention. At two weeks, the plaque removal efficacy from a single use of Sonicare AirFloss was assessed by collecting interproximal plaque samples immediately after subjects used their assigned treatment regimen. Safety of the products was assessed through oral examination, prior to all other assessments.

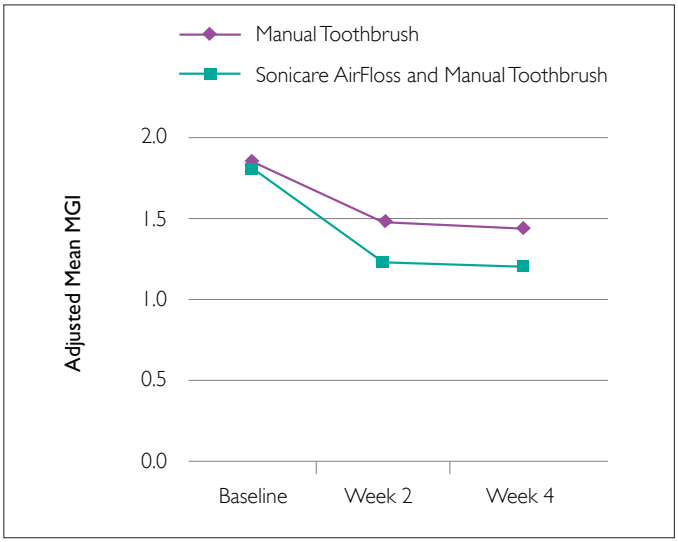
Results

Sonicare AirFloss, when used in addition to a manual toothbrush, provided significantly greater reductions in gingivitis and bleeding sites ($p<0.01$) than a manual toothbrush alone. After four weeks, Sonicare AirFloss reduced gingivitis by 33% more, gingival bleeding by 75% more and the number of bleeding sites by 86% more than a manual toothbrush alone. Interproximal plaque evaluated after a single use showed that Sonicare AirFloss removed significantly more plaque than a manual toothbrush alone ($p<0.01$). Both products were safe to use.

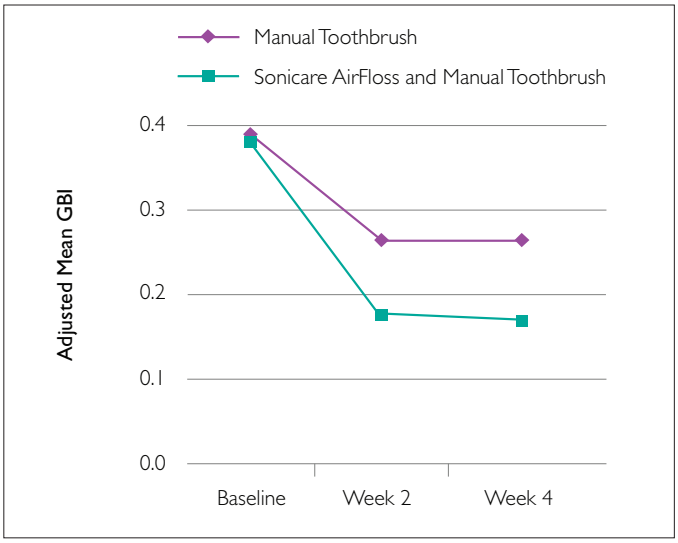
Conclusion

Sonicare AirFloss, when used in addition to manual brushing, removed significantly more interproximal plaque and resulted in significantly greater reductions of gingivitis after two weeks and four weeks of use, compared to manual brushing alone.

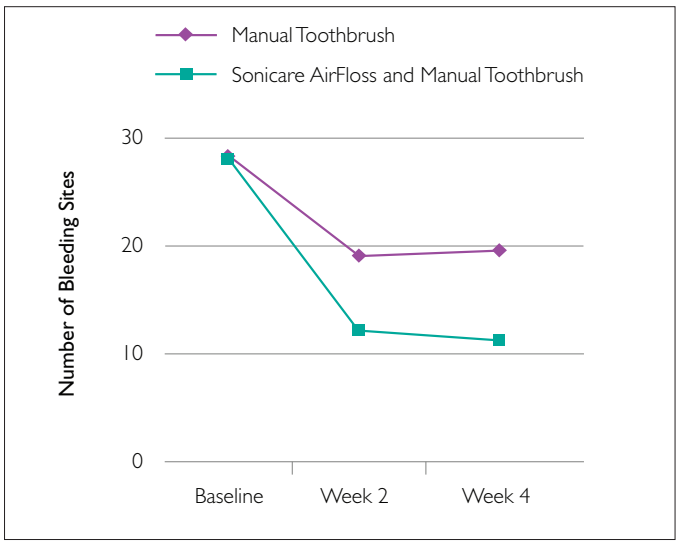
Modified Gingival Index



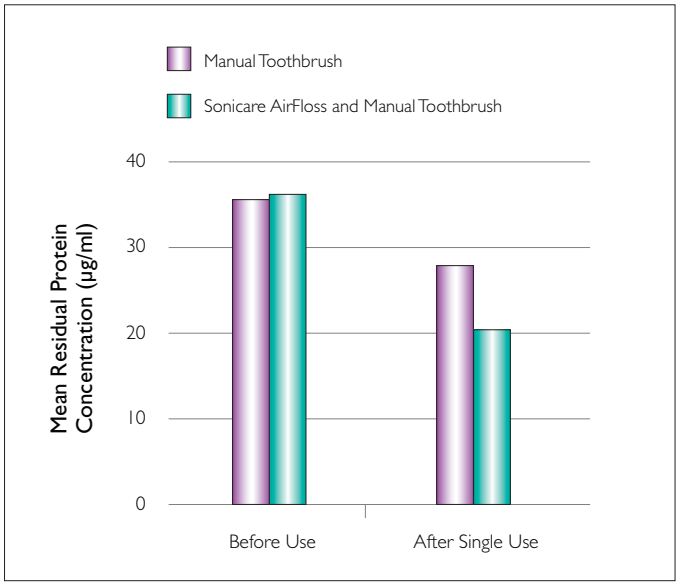
Gingival Bleeding Index



Bleeding Sites



Interproximal Plaque (RPC)



Compliance

in vivo study

In-home use test to assess compliance of Philips Sonicare AirFloss

Krell S, Kaler A, Wei J. Data on file, 2010

Objective	To assess compliance of Philips SonicareAirFloss in a sample of irregular flossers after one month of home use.
Methodology	Eligible participants included 56 adult irregular flossers (floss from one time per month to three times per week). Participants were given a product-usage diary to self report the frequency of usage of the product. The study utilized a single-arm design. All participants received the Sonicare AirFloss with a nozzle and travel charger, a daily-usage diary and product instructions. Per the study instructions, each participant used the Sonicare AirFloss at home and recorded his or her usage in the diary. In addition, feedback was recorded using an online questionnaire (Survey Monkey) at the end of one month. Participants were not restricted from using any other flossing products but were advised to use Sonicare AirFloss in their regular flossing routine.
Results	Fifty-one participants completed and returned their daily-usage diary after the first month of use. On average, irregular flossers used Sonicare AirFloss 1.3 times a day. 96.1% of the participants used Sonicare Airfloss four or more days per week.
Conclusion	96% of irregular flossers reported use of Sonicare AirFloss four or more days per week.

Notes

Notes

www.sonicare.com
4235 050 10651

EXHIBIT I

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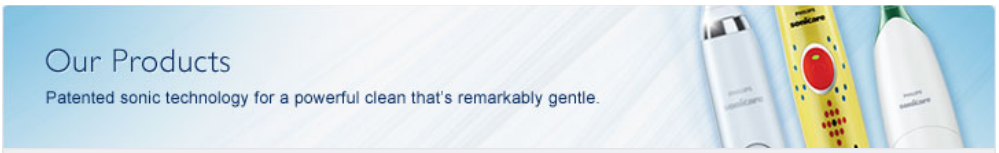

Products & Accessories

AirFloss

Experience a microburst of clean in-between

Sonicare AirFloss is specially designed to give your patients an easy, effective way to clean interproximally. It features microburst technology that delivers microdroplets of air and water to remove plaque biofilm between teeth, and it's proven safe and gentle on gums and teeth. With one-button functionality and a guidance tip that ensures targeted cleaning interproximally, patients using Sonicare AirFloss can quickly clean the entire mouth in just 60 seconds. Sonicare AirFloss has been through meticulous clinical validation and adheres to the Philips Sonicare standards of performance and safety requirements. With Sonicare AirFloss, interdental cleaning has just been reinvented.

Watch the Sonicare AirFloss videos:

Designed to help motivate your patients to clean in-between. View video >

An easier way to clean in-between. View video >

Clinical Proof

Clinical Study: Removes 99% more plaque biofilm between teeth than brushing with manual toothbrush alone >

Clinical Study: Gently and effectively helps improve interproximal gum health in just two weeks >

Read all the science behind Sonicare AirFloss. Download now >

Additional Information

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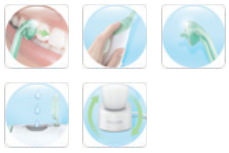
Order AirFloss patient profile brochures:

Rebecca

Features



Roll over to see description

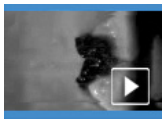
Breakthrough Microburst Technology

Delivers a quick burst of air and microdroplets that reaches between teeth to gently and easily remove interproximal plaque biofilm.

In Vitro Biofilm Removal

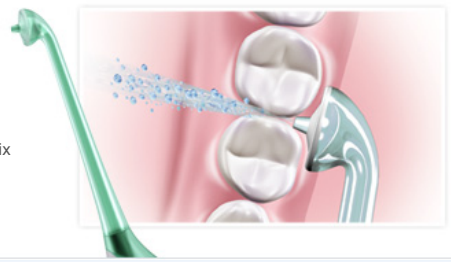
Slow-motion video of Sonicare AirFloss.

View video >



Sonicare AirFloss Nozzles

The AirFloss nozzle was designed to optimize user technique. The guidance tip makes it easy to find the spaces between teeth and to place the tip at the appropriate horizontal angle for maximum cleaning. It is recommended that you replace the nozzle every six months to prevent hard water build-up and reduce the potential risk of bacteria build-up.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies the following documents have been filed electronically on this 15th day of October 2013:

MOTION OF TRUTH IN ADVERTISING, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN OPPOSITION TO PROPOSED SETTLEMENT

BRIEF OF *AMICUS CURIA* TRUTH IN ADVERTISING, INC. IN OPPOSITION TO PROPOSED SETTLEMENT

The documents are available for viewing and downloading to the ECF registered counsel of record as follows:

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I declare that I am employed in the office of a member of the bar of the State of California at whose direction the service was made.

Executed on October 15, 2013, in San Diego, California.

By: */s/Earl L. Bohachek*