**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF OHIO**
**(WESTERN DIVISION)**

| | |
|---|---|
| DAVID VOLZ, AHMED KHALEEL, NICHOLAS ARMADA, SCOTT COOK STEPHANIE BRIDGES AND JUAN SQUIABRO, Individually and on Behalf of Those Others Similarly Situated, Plaintiff, | Case No. 1:10-cv-00879 |
| vs. | **MOTION OF TRUTH IN ADVERTISING, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN OPPOSITION TO PROPOSED SETTLEMENT** |
| THE COCA-COLA COMPANY and, ENERGY BRANDS INC. (d/b/a GLACEAU), Defendants. | Hon. Michael R. Barrett |

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

Truth in Advertising, Inc. (TINA.org) respectfully requests leave of the Court to file the attached *amicus curiae* brief in the above-captioned case in opposition to the proposed settlement. TINA.org is a 501(c)(3) nonprofit organization whose mission is to protect consumers nationwide through the prevention of false and deceptive marketing. To further its mission, TINA.org performs in-depth investigations and files complaints with federal and state government agencies, among others, urging them to take action to put an end to various companies' deceptive marketing practices.

With respect to the instant case, TINA.org is filing this motion and brief because the proposed settlement is fundamentally unfair to the class members – consumers who purchased Vitaminwater over a seven-year period in four states and a U.S. territory. As a consumer advocacy organization working to eradicate false and deceptive advertising, TINA.org has an important interest and a valuable perspective on the issues presented in this case, and thus should be granted *amicus curiae* status. *See, e.g., Vassalle v. Midland Funding LLC, et al.*, Nos. 11-3814, *et al.* (6th Cir. Sept. 24, 2012) (order allowing several non-profit consumer protection organizations and AARP to enter case as *amici* in order to object to a settlement that was approved by the District Court) (attached hereto as Exhibit 1); *see also Neonatology Assocs., P.A. v. Comm'r of Internal Revenue, et al.*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.) ("Even when a party is very well represented, an amicus may provide important assistance to the court. . . . Some friends of the court are entities with particular expertise not possessed by any party to the case. . ."); *Ryan v. CFTC,* 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, J.) ("An amicus brief should normally be allowed when . . . the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide."); Managing Class Action Litigation: A Pocket Guide for Judges, 3d ed., Federal Judicial Ctr. 2010, at 17 ("Institutional 'public interest' objectors may bring a different perspective . . . Generally, government bodies such as the FTC and state attorneys general, as well as nonprofit entities, have the class-oriented goal of ensuring that class members receive fair, reasonable, and adequate compensation for any injuries suffered. They tend to pursue that objective by policing abuses in class action litigation. Consider allowing such entities to participate actively in the fairness hearing.").[1]

In addition, now that the parties to this lawsuit have reached an agreement, they no longer have an adversarial relationship, and thus this Court can look only to objectors to illuminate any potential issues with the settlement.

[1] Neither party nor their counsel played any part in the drafting of this Motion or contributed in any other way.

The attached *amicus* brief explains in detail why TINA.org opposes the proposed settlement. First, the brief explains that the terms are unfair because the injunctive relief in the proposed settlement does not eradicate the deception or benefit the class members. Second, the brief explains that the terms are unfair because the only money being awarded as part of this settlement is going to class counsel (in the amount of $1.2 million).

For these reasons, TINA.org moves to for leave to appear as *amicus curiae* and submit the attached brief in opposition to the proposed settlement as well as the attached notice of intent to appear at the Final Fairness Hearing (attached hereto as Exhibits 2 and 3).

Dated: October 21, 2014

Respectfully,

By:____________________

Ronald L. Burdge
Outside Counsel
(Ohio Bar No. 0015609)
Burdge Law Office Co, LPA
2299 Miamisburg Centerville Road
Dayton, OH 45459-3817
Telephone: (937) 432-9500
ron@burdgelaw.com

Laura Smith, Legal Director
(District of Conn. Bar No. ct28002, not admitted in Ohio)
Truth in Advertising, Inc.
115 Samson Rock Drive, Suite 2
Madison, CT 06443
Telephone: (203) 421-6210
lsmith@truthinadvertising.org

Attorneys for ***AMICUS CURIAE***
Truth in Advertising, Inc.

## CERTIFICATE OF SERVICE

The undersigned hereby certifies the following documents have been filed electronically on this 21 day of October 2014:

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

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

**Via Electronic Service/ECF:**
Brian T. Giles
Statman Harris & Eyrich LLC
Carew Tower
441 Vine Street, Suite 3700
Cincinnati, OH 45202
bgiles@statmanharris.com

**Via Electronic Service/ECF:**
Richard S. Wayne
Joseph J. Braun
Strauss Troy
The Federal Reserve Building
150 East Fourth St.
Fourth Floor
Cincinnati, OH 45202
rswayne@strausstroy.com
jjbraun@strausstroy.com

**Via Electronic Service/ECF:**
Aashish Y. Desai
Desai Law Firm, P.C.
3200 Bristol St., Suite 650
Costa Mesa, CA 92626
aashish@desai-law.com

**Via Electronic Service/ECF:**
William C. Wright
The Wright Law Firm, P.A.
301 Clematis St., Suite 3000
West Palm Beach, FL 33401
willwright@wrightlawoffice.com

**Via Electronic Service/ECF:**
J. Russell B. Pate

The Pate Law Firm
P.O. Box 890
Royal Dane Mall, 2nd Floor
St. Thomas, Virgin Islands 00804
Pate@SunLawVI.com

**Via Electronic Service/ECF:**
Christopher S. Shank
Shank & Hamilton, P.C.
2345 Grand, Suite 1600
Kansas City, MO 64108
chriss@shankhamilton.com

**Via Electronic Service/ECF:**
Shon Morgan
Quinn Emanuel Urquhart & Sullivan, LLP
865 S. Figuero St., 10th Floor
Los Angeles, CA 90017
shonmorgan@quinnamenuel.com

**Via Electronic Service/ECF:**
Faith E. Gay
Isaac Nesser
Quinn Emanuel Urquhart & Sullivan, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
faithgay@quinnemanuel.com
isaacnesser@quinnemanuel.com

**Via Electronic Service/ECF:**
Thomas H. Stewart
Nathanial R. Jones
Blank Rome LLP
1700 PNC Center
201 East Fifth Street
Cincinnati, OH 45202
Stewart@BlankRome.com
Jones-N@BlankRome.com

**Via Electronic Service/ECF:**
James R. Eiszner
Shook Hardy & Bacon LLP
2555 Grand Boulevard
Kansas City, MO 64108
jeiszner@shb.com

**Via Electronic Service/ECF:**
Tammy B. Webb
Shook Hardy & Bacon LLP
One Montgomery, Suite 2700
San Francisco, CA 94140
tbwebb@shb.com

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

Executed on October 21, 2014, in Dayton, Ohio.

By: /s/ Ronald L. Burdge

# EXHIBIT 1

Case No. 11-3814/11-3961/11-4016/11-4019/11-4021

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

**ORDER**

ELAINE PELZER

Proposed Intervenor - Appellant

MARTHA VASSALLE; JEROME JOHNSON

Plaintiffs - Appellees

v.

MIDLAND FUNDING LLC; MIDLAND CREDIT MANAGEMENT, INC.; ENCORE CAPITAL GROUP, INC.

Defendants - Appellees

Upon consideration of the motions to file amicus briefs for Amicus Curiae, AARP and Amicus Curiae, The Center for Responsible Lending, et al.

It is **ORDERED** that the motions be and hereby are **GRANTED**.

**ENTERED BY ORDER OF THE COURT**
Deborah S. Hunt, Clerk

Issued: September 24, 2012

**UNITED STATES COURT OF APPEALS**
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: September 24, 2012

Mr. Daniel E. Birkhaeuser
Bramson, Plutzik, Mahler & Birkhaeuser
2125 Oak Grove Road
Suite 120
Walnut Creek, CA 94596

Ms. Carolyn Elizabeth Coffey
MFY Legal Services
299 Broadway
4th Floor
New York, NY 10007

Mr. Charles Marshall Delbaum
National Consumer Law Center
Seven Winthrop Square
Fouth Floor
Boston, MA 02110

Mr. Matthew A. Dooley
Law Offices
5455 Detroit Road
Sheffield Village, OH 44054-0000

Ms. Donna Jean Ann Evans
Murray & Murray
111 E. Shoreline Drive
Sandusky, OH 44870

Ms. Amy Marshall Gallegos
Jenner & Block
633 W. Fifth Street
Suite 3600
Los Angeles, CA 90071

Scott Huminski
2624 S. Bahama Drive
Gilbert, AZ 85295

Mr. Reginald Sherman Jackson Jr.
Connelly, Jackson & Collier
405 Madison Avenue
Suite 2300
Toledo, OH 43604

Mr. Michael D. Kinkley
Law Offices
4407 N. Division
Suite 914
Spokane, WA 99207

Mr. Scott Michael Kinkley
Law Offices
4407 N. Division
Suite 914
Spokane, WA 99207

Mr. Ian B. Lyngklip
Law Offices
24500 Northwestern Highway
Suite 206
Southfield, MI 48075

Mr. Dennis E. Murray Sr.
Murray & Murray
111 E. Shoreline Drive
Sandusky, OH 44870

Mr. Adam Scott Nightingale
Connelly, Jackson & Collier
405 Madison Avenue
Suite 2300
Toledo, OH 43604

Mr. Dennis M. O'Toole
Law Offices
5455 Detroit Road
Sheffield Village, OH 44054-0000

Ms. Karuna Bhikhu Patel

Center for Responsible Lending
910 Seventeenth Street, N.W.
Suite 500
Washington, DC 20006

Mr. Anthony R. Pecora
Law Offices
5455 Detroit Road
Sheffield Village, OH 44054-0000

Mr. Stuart T. Rossman
National Consumer Law Center
Seven Winthrop Square
Fouth Floor
Boston, MA 02110

Mr. Theodore W. Seitz
Dykema Gossett
201 Townsend Street
Suite 900
Lansing, MI 48933

Mr. Richard Lee Stone
Jenner & Block
633 W. Fifth Street
Suite 3600
Los Angeles, CA 90071

Mr. Kenneth Wayne Zeller
AARP Foundation Litigation
601 E Street, N.W.
Fourth Floor
Washington, DC 20049

Re: Case No. 11-3814/11-3961/11-4016/11-4019/11-4021, *Martha Vassalle, et al v. Midland Funding LLC, et al*
Originating Case No. : 3:11-cv-00096

Dear Sir or Madam,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Florence P. Ebert

Case Manager
Direct Dial No. 513-564-7026

Enclosure

# EXHIBIT 2

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF OHIO**
**(WESTERN DIVISION)**

| | |
|---|---|
| DAVID VOLZ, AHMED KHALEEL, NICHOLAS ARMADA, SCOTT COOK, STEPHANIE BRIDGES AND JUAN SQUIABRO, Individually and on Behalf of Those Others Similarly Situated, | Case No. 1:10-cv-00879 |
| Plaintiff, | **BRIEF OF *AMICUS CURIAE* TRUTH IN ADVERTISING, INC. IN OPPOSITION TO PROPOSED SETTLEMENT** |
| vs. | |
| THE COCA-COLA COMPANY and, ENERGY BRANDS INC. (d/b/a GLACEAU), | DATE: December 2, 2014<br>TIME: 12:30 p.m.<br>LOCATION: Cincinnati |
| Defendants. | Hon. Michael R. Barrett |

The parties to this litigation seek to have this Court approve a settlement in which plaintiffs' attorneys will pocket nearly $1.2 million while class members will receive nothing. The settlement as currently drafted provides no monetary relief for class members and no practical injunctive relief. And while the proposed settlement would legally bind potentially millions of class members to an agreement that has them walking away empty handed, the defendants will be free to continue deceptively marketing their flavored sugar water as Vitaminwater – a healthy beverage alternative to soft drinks. For these basic reasons, Truth in Advertising, Inc., a national consumer advocacy organization dedicated to protecting consumers from false and deceptive advertising, respectfully opposes the proposed settlement as being unfair, and urges the Court to deny approval of it.

## INTEREST OF *AMICUS CURIAE*

Truth in Advertising, Inc. (TINA.org) is a 501(c)(3) nonprofit organization dedicated to protecting consumers nationwide through the prevention of false and deceptive marketing. To further its mission, TINA.org performs in-depth investigations and files complaints with federal and state government agencies, among others, urging them to take action to put an end to various companies' deceptive marketing practices.

As explained in detail in the attached Motion for Leave to File Brief as *Amicus Curiae* in Opposition to Proposed Settlement, TINA.org has an important interest and a valuable perspective on the issues presented in this case.[1]

## ARGUMENT

The essence of plaintiffs' complaint is that defendants use deceptive marketing tactics to sell a "heavily fortified sugary snack beverage" as Vitaminwater, "a nutrient enhanced water beverage" and a healthy alternative to soft drinks. Consolidated Amended Class Action Compl. ¶¶ 1-18. And according to plaintiffs, as a result of falsely claiming that Vitaminwater is a healthy beverage, defendants charge a premium price for it. *Id.* ¶ 21. The parties' proposed settlement will not materially alter any of defendants' deceptive marketing tactics as alleged in plaintiffs' complaint nor reimburse the class for its reliance on these false advertising claims in purchasing Vitaminwater. If this settlement is approved, this Court is effectively authorizing defendants to still:

- Brand their beverage as **Vitamin**water even though the primary ingredient (aside from water) is sugar;[2]

[1] Neither party nor their counsel played any part in the drafting of this brief or contributed in any other way.

[2] *See* Vitaminwater Nutrition Facts, http://vitaminwater.com/files/vitaminwater_2014_NutritionFacts.pdf.

- State on their label that it is a "nutrient enhanced water beverage" even though nutrients consist of less than 0.5% of the content;[3]

- Use health-conscious names such as "Defense," "Rescue," "Energy," and "Revive" for their drinks;

- Use slogans such as "stacked with vitamins – includes antioxidants to help fight free radicals and help support your body," "Has 120% of your Daily Value of vitamin C per serving to support your immune system," and "With vitamin A, an important nutrient for your eyes;"

- And demand a premium price based on the above marketing claims.

All this despite the fact that each 20-ounce bottle of Vitaminwater contains more than 30 grams (i.e., more than six teaspoons) of sugar – more sugar than adults of normal body mass index should be consuming in *an entire day*, according to the World Health Organization's new proposed guidelines, and more sugar than six Oreo cookies or a 1.55 oz Hershey's chocolate bar. *See WHO Opens Public Consultation on Draft Sugar Guidelines*, Mar. 5, 2014, http://www.who.int/mediacentre/news/notes/2014/consultation-sugar-guideline/en/ (attached hereto as Exhibit A); Nabisco Oreo Chocolate Nutrition Facts, http://www.snackworks.com/products/product-detail.aspx?product=4400003202 (attached hereto as Exhibit B); HERSHEY'S Milk Chocolate Bar Nutrition Facts, http://www.hersheys.com/pure-products/details.aspx?id=3480 (attached hereto as Exhibit C). Thus, consuming a 20-ounce bottle of Vitaminwater is no better than consuming a standard candy bar.

Further, as for the three alleged concessions that defendants are agreeing to for injunctive relief, they are but a fool's gold. Defendants' first concession – that they will "state the amount of calories per bottle of the Product on the Principal [sic] Display Panel of the Product" – is of no value to the class because defendants are already displaying the

[3] *Id.*

calories per bottle on the front label. *See* Settlement Agreement and Release, dated July 31, 2014, ¶ 39(a); current Vitaminwater label, photographs available at http://vitaminwater.com/products/. Similarly, the second concession – that if a Vitaminwater label says it is an "excellent source" of any nutrients, then defendants shall have the phrase below that claims in bold type, "see nutrition facts for more detail [sic]" – is unnecessary as Vitaminwater bottles no longer use the phrase "excellent source" and the bottles already state on the front label "see nutrition facts for more details." Settlement Agrmt. and Release, ¶ 39(b); current Vitaminwater label, photographs available at http://vitaminwater.com/products/. Defendants' final concession is a list of ten specific phrases that they agree not to use on their labeling and in their marketing materials in the future.[4] Settlement Agrmt. and Release, ¶ 39(c). The only phrase on the list that was ever on a Vitaminwater bottle, "vitamins + water = all you need," is no longer found on any labels. As for the other nine phrases, defendants are not currently using them to market Vitaminwater. More importantly, there is nothing in the settlement agreement to preclude defendants from using a little creative wordsmithing to make the exact same marketing claims with different words.

**The Injunctive Relief in the Proposed Settlement Does Not Eradicate the Deception or Benefit Class Members**

Given these facts, it is readily apparent that the proposed settlement agreement gives the false impression that defendants are making changes to their marketing in exchange for the class dropping its lawsuit when, in reality, defendants are providing only illusory consideration and a lot of money to plaintiffs' counsel in order to end this litigation. Defendants' reliance, in large part, on past modifications to its marketing

[4] According to the proposed settlement agreement, defendants will have two years before they are legally bound to comply with all the injunctive relief. Settlement Agreement and Release, ¶ 38.

materials as a basis for class members giving up their litigation rights is unacceptable. *See, e.g., In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 195 (5th Cir. 2010) (quoting 4 Newberg § 11:46 at 133) ("The court must be assured that the settlement secures an adequate advantage for the class in return for the surrender of litigation rights against the defendants."); *see also In re Dry Max Pampers Litigation,* 724 F.3d 713, 719 (6th Cir. 2013) (putting the burden of proving the fairness of the settlement on the proponents, and determining that a reinstated refund program would provide unnamed class members little value because "most of them have already had access to it.")[5]

Furthermore, to the extent defendants are promising to change future marketing of Vitaminwater, such changes will not benefit class members, i.e., consumers who have already been misled by defendants' representations. *True v. Am. Honda Motor Co.*, 749 F. Supp.2d 1052, 1077 (C.D. Cal. 2010) ("No changes to future advertising by [defendant] will benefit those who already were misled by [defendant's

[5] Adding insult to injury, the Settlement Agreement does not allow any of the class members to opt out should they be dissatisfied with the terms of the proposed agreement. *See* Settlement Agreement and Release, ¶ 28. In addition, the Settlement Agreement seeks mandatory class certification pursuant to Federal Rule of Civil Procedure 23(b)(2), which is proper only when the defendants' actions "apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. Pro. 23(b)(2). In this case, however, the complaint not only seeks injunctive relief, but monetary damages as well; monetary damages that differ from consumer to consumer as they arise out of individual purchases and vary with purchase price, quantity, and geographically applicable state laws. As such, the class should be certified pursuant to Federal Rule of Civil Procedure 23(b)(3), which would allow, among other things, class members to opt out. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011) ("[I]ndividualized monetary damages belong in Rule 23(b)(3)"); *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 946 (6th Cir. 2011) ("Rule 23(b)(3) [is] the only conceivable vehicle for [a nationwide consumer fraud] claim."). Certifying the class pursuant to Rule 23(b)(2) is improper here and allows the defendants to obtain the broadest possible release while allowing class counsel to capture all of the available money that defendants are willing to pay. *See In re Telectronics Pacing Sys. Inc.*, 221 F.3d 870, 880 (6th Cir. 2000) (parties cannot "bootstrap[]" a mandatory class in this way just by settling for injunctive relief); *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir. 2000) (evincing concern that "plaintiffs may attempt to shoehorn damages actions into the Rule 23(b)92) framework, depriving class members of notice and opt-out protections.").

misrepresentations].”); *see also In re Dry Max Pampers Litigation,* 724 F.3d at 720 (stating that changing the product labeling is not all that valuable to “unnamed class members, most of whose Pampers boxes, once emptied, presumably end up by the curb” and that “’[t]he fairness of the settlement must be evaluated primarily based on how it *compensates class members*’ – not on whether it provides relief to other people, much less on whether it interferes with the defendant’s marketing plans.”); *Vassalle v. Midland Funding LLC,* 708 F.3d 747, 756 (6th Cir. 2013) (“the injunction offers only prospective relief that likely does not benefit class members at all.”); *Crawford v. Equifax Payment Servs.,* 201 F.3d 877, 880 (7th Cir. 2000) (defendant’s injunctive agreement not to use the abusive debt collection letter that was at issue in the case is a “gain” of “nothing” for class members); *Felix v. Northstar v. Location Servs.,* 290 F.R.D. 397, 408 (W.D.N.Y. May 28, 2013) (prospective injunctive relief promise is of no value to class members who only dealt with defendant in past transaction); *In re LivingSocial Mktg. and Sales Practice Litig.,* 298 F.R.D. 1, 18 (D.C. Mar. 22, 2013) (a change in business practices “provides limited direct benefit to class members since they bought their [products in the past] and the injunctive relief applies only to prospective purchasers who may or may not have bought in the past.”); *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions,* by Mayer Brown LLP, http://www.mayerbrown/com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf (attached hereto as Exhibit D) (examining 148 federal class actions that were initiated in 2009 and noting that “[i]n many cases ‘injunctive relief’ has little or no real world impact on class members, but is used to provide a basis for claiming a 'benefit' to class members, justifying an award of attorneys' fees to class counsel.")

In sum, the injunctive relief outlined in the proposed settlement does not eradicate the deception at issue or adequately benefit the Class. For these reasons alone, the proposed settlement is unfair and should not be approved.

**Monetary Settlement: Class Members Nothing -**
**Plaintiffs' Counsel $1.2 Million**

Though class counsel initially sought compensatory and punitive damages for class members, the proposed settlement does not provide any monetary relief for the class but does handsomely reward plaintiffs' counsel to the tune of almost $1.2 million. Such disparate treatment is a clear marker of an unfair settlement. *See Redman v. RadioShack Corp.,* Nos. 14-1470, *et al.,* slip op. at 17 (7th Cir. Sept. 19, 2014) (Posner, J.)[6] ("We have emphasized that in determining the reasonableness of the attorneys' fee agreed to in a proposed settlement, the central consideration is what class counsel achieved for the members of the class rather than how much effort class counsel invested in the litigation.")

In fact, in another class-action lawsuit in this district alleging deceptive marketing claims against Procter & Gamble ("P&G"), where the district court approved a settlement in which P&G agreed to injunctive relief, *cy pres* awards, incentive awards to the named plaintiffs, $2.73 million to Class Counsel, and no monetary award to unnamed class members, the appellate court rejected the settlement as unfair. *In re Dry Max Pampers Litigation*, 724 F.3d 713 (6th Cir. 2013). Specifically, the Sixth Circuit reversed the District Court's approval of the settlement because it determined that the agreement,

[6] All unreported decisions are collectively attached hereto in alphabetical order as Exhibit E.

which provided class members with "nothing but nearly worthless injunctive relief," benefited class counsel "vastly more than it [did] the consumers who comprise the class," and therefore was unfair. *Id.* at 721 ("The conclusion is unavoidable: this settlement gives 'preferential treatment' to class counsel 'while only perfunctory relief to unnamed class members.'") The Court went on to note:

> Most class counsel are honorable; but settlement classes create especially lucrative opportunities for putative class attorneys to generate fees for themselves without any effective monitoring by class members who have not yet been apprised of the pendency of the action. The danger being that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees. Thus, if the fees are unreasonably high, the likelihood is that the defendant obtained an economically beneficial concession with regard to the merits provisions, in the form of lower monetary payments to class members or less injunctive relief for the class than could otherwise have been obtained. Hence the courts must be particularly vigilant for subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations.

*Id.* at 718 (internal citations and quotations omitted).

Here, similar to the *Pampers* litigation, the proposed settlement awards class counsel a fee of almost $1.2 million while providing the class absolutely no monetary award (and, as explained above, largely meaningless injunctive relief).[7] Accordingly, the proposed settlement terms are unfair and should not be approved. *See In re Dry Max Pampers Litigation; see also In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935, 947 (9th Cir. 2011) (vacating district court's approval of false advertising class-action settlement that provided for injunctive relief, $800,000 in attorneys' fees,

[7] In another class-action lawsuit currently pending against defendant Coca-Cola for false advertising, the Court has already warned Class Counsel that it will view any request for attorneys' fees that are part of a settlement with close scrutiny. *Engurasoff et al. v. The Coca-Cola Co. and Coca-Cola Refreshments USA, Inc.*, 13-cv-03990 JSW, 2014 U.S. Dist. LEXIS 116936, at *16 (N.D. Cal. Aug. 21, 2014) ("The Court admonishes Plaintiffs that, to the extent they view this case, or the related cases, as an opportunity to settle a class action and obtain a large sum of attorneys fees, the Court will review any request for attorneys fees as part of a class action settlement with close scrutiny.")

$100,000 in *cy pres* awards, but no monetary compensation to unnamed class members, noting that a sign of collusion among the negotiating parties is "when the class receives no monetary distribution but class counsel are amply rewarded"); *Richardson v. L'Oreal USA, Inc.*, 991 F.Supp.2d 181, 204 (Dist. D.C. 2013) (denying approval of false advertising class-action settlement that called for injunctive relief, $950,000 in attorneys' fees, and no monetary award to unnamed class members, noting that "[w]here counsel initially seek damages and end up obtaining injunctive relief only, rewarding counsel with a full 1.0 multiplier may be unfair."); *see also Redman v. RadioShack Corp.,* Nos. 14-1470, *et al.*, slip op. at 8 (7th Cir. Sept. 19, 2014) (Posner, J.) (reversing district court's approval of class-action settlement that provided class members $10 coupons and class counsel $1 million, noting that the court cannot rubber stamp settlements in class actions because of the built-in conflict of interest: defendant being only interested in how much the settlement will cost him and class counsel primarily interested in the size of the attorneys' fees); *Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir. 2012)("In a class action . . . any settlement must be approved by the court to ensure that class counsel and the named plaintiffs do not place their own interests above those of the absent class members."); *Staton v. Boeing*, 327 F.3d 938, 974 (9th Cir. 2003) ("Precisely because the value of injunctive relief is difficult to quantify, its value is also easily manipulable by overreaching lawyers seeking to increase the value assigned to a common fund," and increase their fees); *In re Oracle Secs. Litig.*, 132 F.R.D. 538, 544-45 (N.D. Cal. 1990) (referring to settlements that provide only injunctive relief and attorneys' fees to be the "classic manifestation" of the class-action agency problem).

## CONCLUSION

In sum, the proposed settlement is unfair because it lacks any real benefit to the class members, does not remedy the deceptive marketing of Vitaminwater as alleged by plaintiffs, and appears only to pay off plaintiffs' counsel so they will go away. For these reasons, we respectfully urge this Court to deny approval of the proposed settlement.

Dated: October 21, 2014 Respectfully,

By:____________________________

Ronald L. Burdge
Outside Counsel/OH Lawyer
(Ohio Bar No. 15609)
Burdge Law Office Co, LPA
2299 Miamisburg Centerville Road
Dayton, OH 45459-3817
Telephone: (937) 432-9500
ron@burdgelaw.com

Laura Smith, Legal Director
(District of Conn. Bar No. ct28002, not admitted in Ohio)
Truth in Advertising, Inc.
115 Samson Rock Drive, Suite 2
Madison, CT 06443
Telephone: (203) 421-6210
lsmith@truthinadvertising.org

Attorneys for Truth in Advertising, Inc.

# CERTIFICATE OF SERVICE

The undersigned hereby certifies the following documents have been filed electronically on this ___ day of October 2014:

**BRIEF OF *AMICUS CURIAE* 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:

**Via Electronic Service/ECF:**
Brian T. Giles
Statman Harris & Eyrich LLC
Carew Tower
441 Vine Street, Suite 3700
Cincinnati, OH 45202
bgiles@statmanharris.com

**Via Electronic Service/ECF:**
Richard S. Wayne
Joseph J. Braun
Strauss Troy
The Federal Reserve Building
150 East Fourth St.
Fourth Floor
Cincinnati, OH 45202
rswayne@strausstroy.com
jjbraun@strausstroy.com

**Via Electronic Service/ECF:**
Aashish Y. Desai
Desai Law Firm, P.C.
3200 Bristol St., Suite 650
Costa Mesa, CA 92626
aashish@desai-law.com

**Via Electronic Service/ECF:**
William C. Wright
The Wright Law Firm, P.A.
301 Clematis St., Suite 3000
West Palm Beach, FL 33401
willwright@wrightlawoffice.com

**Via Electronic Service/ECF:**
J. Russell B. Pate

The Pate Law Firm
P.O. Box 890
Royal Dane Mall, 2nd Floor
St. Thomas, Virgin Islands 00804
Pate@SunLawVI.com

**Via Electronic Service/ECF:**
Christopher S. Shank
Shank & Hamilton, P.C.
2345 Grand, Suite 1600
Kansas City, MO 64108
chriss@shankhamilton.com

**Via Electronic Service/ECF:**
Shon Morgan
Quinn Emanuel Urquhart & Sullivan, LLP
865 S. Figuero St., 10th Floor
Los Angeles, CA 90017
shonmorgan@quinnamenuel.com

**Via Electronic Service/ECF:**
Faith E. Gay
Isaac Nesser
Quinn Emanuel Urquhart & Sullivan, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
faithgay@quinnemanuel.com
isaacnesser@quinnemanuel.com

**Via Electronic Service/ECF:**
Thomas H. Stewart
Nathanial R. Jones
Blank Rome LLP
1700 PNC Center
201 East Fifth Street
Cincinnati, OH 45202
Stewart@BlankRome.com
Jones-N@BlankRome.com

**Via Electronic Service/ECF:**
James R. Eiszner
Shook Hardy & Bacon LLP
2555 Grand Boulevard
Kansas City, MO 64108
jeiszner@shb.com

**Via Electronic Service/ECF:**
Tammy B. Webb
Shook Hardy & Bacon LLP
One Montgomery, Suite 2700
San Francisco, CA 94140
tbwebb@shb.com

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

Executed on October ___, 2014, in Dayton, Ohio.

By: /s/ Ronald L. Burdge

**LIST OF EXHIBITS**

| **Exhibit** | **Page** | **Title** |
|---|---|---|
| Exhibit A | 1-3 | *WHO Opens Public Consultation on Draft Sugar Guidelines*, Mar. 5, 2014, http://www.who.int/mediacentre/news/notes/2014/consultation-sugar-guideline/en/ |
| Exhibit B | 4 | Nabisco Oreo Chocolate Nutrition Facts, http://www.snackworks.com/products/product-detail.aspx?product=4400003202 |
| Exhibit C | 5 | HERSHEY'S Milk Chocolate Bar Nutrition Facts, http://www.hersheys.com/pure-products/details.aspx?id=3480 |
| Exhibit D | 6-29 | *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, by Mayer Brown LLP, http://www.mayerbrown/com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf |
| Exhibit E | 30-66 | Unreported decisions cited in Brief in alphabetical order:<br>• *Engurasoff et al. v. The Coca-Cola Co. and Coca-Cola Refreshments USA, Inc.*, 13-cv-03990 JSW, 2014 U.S. Dist. LEXIS 116936 (N.D. Cal. Aug. 21, 2014);<br>• *Redman v. RadioShack Corp.*, Nos. 14-1470, *et al.*, slip op. at 17 (7th Cir. Sept. 19, 2014) (Posner, J.). |

# EXHIBIT A

## Media centre

# WHO opens public consultation on draft sugars guideline

Note for media

5 MARCH 2014 l GENEVA - WHO is launching a public consultation on its draft guideline on sugars intake. When finalized, the guideline will provide countries with recommendations on limiting the consumption of sugars to reduce public health problems like obesity and dental caries (commonly referred to as tooth decay).

Comments on the draft guideline will be accepted via the WHO web site from 5 through 31 March 2014. Anyone who wishes to comment must submit a declaration of interests. An expert peer-review process will happen over the same period. Once the peer-review and public consultation are completed, all comments will be reviewed, the draft guidelines will be revised if necessary and cleared by WHO's Guidelines Review Committee before being finalized.

### New draft guideline proposals

WHO's current recommendation, from 2002, is that sugars should make up less than 10% of total energy intake per day. The new draft guideline also proposes that sugars should be less than 10% of total energy intake per day. It further suggests that a reduction to below 5% of total energy intake per day would have additional benefits. Five per cent of total energy intake is equivalent to around 25 grams (around 6 teaspoons) of sugar per day for an adult of normal Body Mass Index (BMI).

The suggested limits on intake of sugars in the draft guideline apply to all monosaccharides (such as glucose, fructose) and disaccharides (such as sucrose or table sugar) that are added to food by the manufacturer, the cook or the consumer, as well as sugars that are naturally present in honey, syrups, fruit juices and fruit concentrates.

Much of the sugars consumed today are "hidden" in processed foods that are not usually seen as sweets. For example, 1 tablespoon of ketchup contains around 4 grams (around 1 teaspoon) of sugars. A single can of sugar-sweetened soda contains up to 40 grams (around 10 teaspoons) of sugar.

The draft guideline was formulated based on analyses of all published scientific studies on the consumption of sugars and how that relates to excess weight gain and tooth decay in adults and children.



EXHIBIT A - 1

– Read the draft guideline and submit your comments

**Note to editors**

Papers published with findings of two systematic reviews (analyses of published scientific studies) commissioned by WHO that informed the development of the draft guidelines:

- Dietary sugars and body weight: systematic review and meta-analyses of randomised controlled trials and cohort studies
  Conducted by the University of Otago, New Zealand) published in the BMJ
- Effect on caries of restricting sugars intake: Systematic review to inform WHO guidelines
  Conducted by Newcastle University, UK) published in the Journal of Dental Research

**For more information please contact:**

Tarik Jasarevic
WHO, Geneva
Communications Officer
Telephone: +41 22 791 5099
Mobile: +41 79367 6214
E-mail:jasarevict@who.int

Glenn Thomas
WHO, Geneva
WHO Communications Officer
Telephone: +41 22 791 3983
Mobile: +41 79 509 0677
E-mail:thomasg@who.int

**Related links**

Draft sugars guideline: online public consultation

“Sugars: a uniquely obesogenic nutrient?”

WHO evidence-informed guidelines in Nutrition for Health and Development

WHO e-Library of evidence for nutrition actions (eLENA)

Global action plan for the prevention and control of NCDs 2013-2020

Tools for the prevention and control of NCDs

Global strategy on diet, physical activity and health

More about obesity

More about oral health

More about nutrition

# EXHIBIT B

‹ Back to Search


## Nabisco Oreo Chocolate

Size: 14.3 OZ UPC: 4400003202

Ingredients

SUGAR, UNBLEACHED ENRICHED FLOUR (WHEAT FLOUR, NIACIN, REDUCED IRON, THIAMINE MONONITRATE {VITAMIN B1}, RIBOFLAVIN {VITAMIN B2}, FOLIC ACID), HIGH OLEIC CANOLA AND/OR PALM AND/OR CANOLA OIL, COCOA (PROCESSED WITH ALKALI), HIGH FRUCTOSE CORN SYRUP, LEAVENING (BAKING SODA AND/OR CALCIUM PHOSPHATE), CORNSTARCH, SALT, SOY LECITHIN, VANILLIN--AN ARTIFICIAL FLAVOR, CHOCOLATE.

**NUTRITION FACTS**

Serving Size: 34 g
Serving per container about 12

| **Amount Per Serving** | 3 Cookies |
|---|---|
| Calories 160 | |
| Calories from Fat 60 | |
| | **% Daily Value*** |
| Total Fat 7g | **11%** |
| Saturated Fat 2g | **10%** |
| Trans Fat 0g | **0%** |
| Monounsaturated Fat 3g | **0%** |
| Cholesterol 0mg | **0%** |
| Sodium 140mg | **6%** |
| Potassium 55mg | **2%** |
| Total Carbohydrate 25g | **8%** |
| Dietary Fiber 1g | **3%** |
| Sugars 14g | |
| Protein 1g | |
| Vitamin A **0%** | Calcium **0%** |
| Vitamin C **0%** | Iron **6%** |

*Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs:

| | Calories: | 2,000 | 2,500 |
|---|---|---|---|
| Total Fat | Less than | 65g | 80g |
| Sat Fat | Less than | 20g | 25g |
| Cholest | Less than | 300mg | 300mg |
| Sodium | Less than | 2,400mg | 2,400mg |
| Total Carb | | 300g | 375g |
| Fiber | | 25g | 30g |



EXHIBIT B - 4

# EXHIBIT C

**HERSHEY'S Milk Chocolate Bar**

Pure and simple. Nothing can take the place of this classic.


**May We Suggest ...**

**Nutrition Information**

| | |
|---|---|
| **Kosher Status:** OU-D | |
| **Serving Size:** 1 Bar | |
| **Total Calories** | 210 |
| Calories from Fat | 110 |

| **Amount Per Serving** | **%DV *** |
|---|---|
| **Total Fat** 13g | 20% |
| Saturated Fat 8g | 40% |
| Trans Fat 0g | |
| **Cholesterol** 10mg | 3% |
| **Sodium** 35mg | 1% |
| **Total Carbohydrate** 26g | 9% |
| Dietary Fiber 1g | 4% |
| Sugars 24g | |
| **Protein** 3g | |
| Vitamin A | 0% |
| Vitamin C | 0% |
| Calcium | 8% |
| **Iron** | 2% |

*Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs:

| | Calories: | 2,000 | 2,500 |
|---|---|---|---|
| Total Fat | Less than | 65g | 80g |
| Sat Fat | Less than | 20g | 25g |
| Cholesterol | Less than | 300mg | 300mg |
| Sodium | Less than | 2,400mg | 2,400mg |
| Total Carbohydrate | | 300g | 375g |
| Dietary Fiber | | 25g | 30g |

Hershey's goal is to keep each product's nutrition information up-to-date and accurate but please consult the label on the product's packaging before using. If you notice that something is different on a product's label than appears on our website, please call us for more information at (800) 468-1714.



EXHIBIT C - 5

# EXHIBIT D

MAYER • BROWN

# Do Class Actions Benefit Class Members?

## *An Empirical Analysis of Class Actions*

*By Mayer Brown LLP*

## Executive Summary

This empirical study of class action litigation—one of the few to examine class action resolutions in any rigorous way—provides strong evidence that class actions provide far less benefit to individual class members than proponents of class actions assert.

The debate thus far has consisted of competing anecdotes. Proponents of class action litigation contend that the class device effectively compensates large numbers of injured individuals. They point to cases in which class members supposedly have obtained benefits. Skeptics respond that individuals obtain little or no compensation and that class actions are most effective at generating large transaction costs—in the form of legal fees—that benefit both plaintiff and defense lawyers. They point to cases in which class members received little or nothing.

Rather than simply relying on anecdotes, this study undertakes an empirical analysis of a neutrally-selected sample set of putative consumer and employee class action lawsuits filed in or removed to federal court in 2009.[1]

Here's what we learned:

- In our entire data set, ***not one of the class actions ended in a final judgment on the merits for the plaintiffs***. And none of the class actions went to trial, either before a judge or a jury.
- The vast majority of cases produced ***no benefits to most members of the putative class***—even though in a number of those cases the lawyers who sought to represent the class often enriched themselves in the process (and the lawyers representing the defendants always did).
  - ***Approximately 14 percent of all class action cases remained pending four years after they were filed***, without resolution or even a determination of whether the case could go forward on a class-wide basis. In these cases, class members have not yet received any benefits—and likely will never receive any, based on the disposition of the other cases we studied.
  - ***Over one-third (35%) of the class actions that have been resolved were dismissed voluntarily by the plaintiff***. Many of these cases settled on an individual basis, meaning a payout to the individual named plaintiff and the lawyers who brought the suit—***even***

***though the class members receive nothing***. Information about who receives what in such settlements typically isn't publicly available.

- ***Just under one-third (31%) of the class actions that have been resolved were dismissed by a court on the merits***—again, meaning that class members received ***nothing***.

- One-third (33%) of resolved cases were settled on a class basis.
  - This ***settlement rate is half the average for federal court litigation,*** meaning that a class member is far less likely to have even a chance of obtaining relief than the average party suing individually.
  - ***For those cases that do settle, there is often little or no benefit for class members***.
  - What is more, ***few class members ever even see those paltry benefits—particularly in consumer class actions***. Unfortunately, because ***information regarding the distribution of class action settlements is rarely available***, the public almost never learns what percentage of a settlement is actually paid to class members. But of the six cases in our data set for which settlement distribution data was public, ***five delivered funds to only miniscule percentages of the class: 0.000006%, 0.33%, 1.5%, 9.66%, and 12%.*** Those results are consistent with other available information about settlement distribution in consumer class actions.
  - Although some cases provide for automatic distribution of benefits to class members, automatic distribution almost never is used in consumer class actions—only ***one of the 40*** settled cases fell into this category.
  - Some class actions are settled without even the potential for a monetary payment to class members, with the settlement agreement providing for ***payment to a charity or injunctive relief that, in virtually every case, provides no real benefit to class members***.

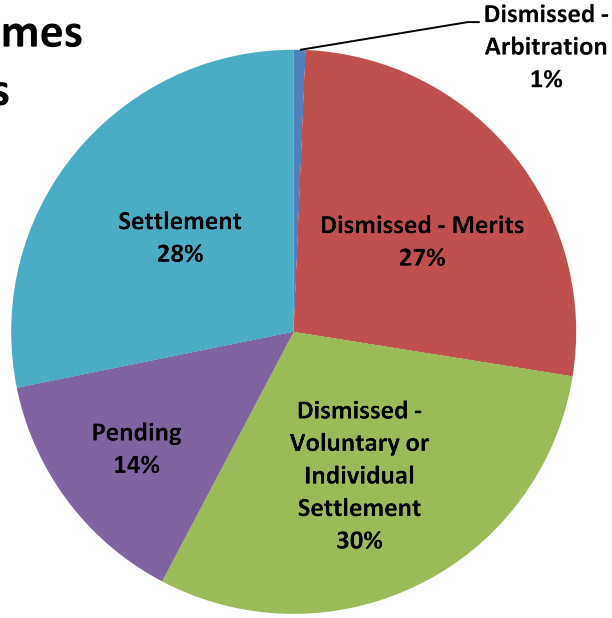
**The bottom line: The hard evidence shows that class actions do not provide class members with anything close to the benefits claimed by their proponents, although they can (and do) enrich attorneys.** Policymakers who are considering the efficacy of class actions cannot simply rest on a theoretical assessment of class actions' benefits or on favorable anecdotes to justify the value of class actions. Any decision-maker wishing to rest a policy determination on the claimed benefits of class actions would have to engage in significant additional empirical research to conclude—contrary to what our study indicates—that class actions actually do provide significant benefits to consumers, employees, and other class members.

## Results

### Overall Outcomes

Of the 148 federal court class actions we studied that were initiated in 2009, 127 cases (or nearly 86 percent) had reached a final resolution by September 1, 2013, the date when the study closed.

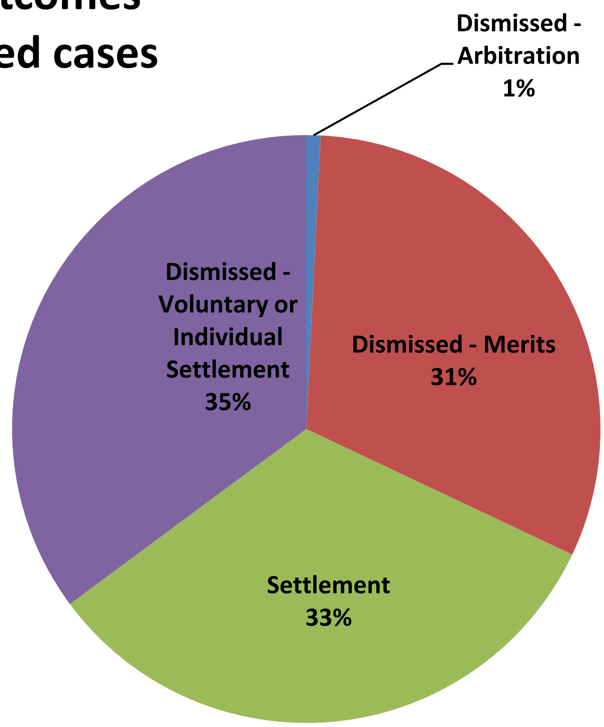
**Figure 1: Outcomes in 148 cases**




***Zero*** **cases resulted in a judgment on the merits.** Of the 148 cases in our sample set***, not one had gone to trial***—either before a judge or jury. And, as of the closing date of our study, ***not one resulted in a judgment for the plaintiffs on the merits***.

Unlike ordinary (non-class) disputed cases, some of which end with a judgment on the merits in favor of the plaintiffs or defendants, class actions end without any determination of the case's merits. The class action claims that make it past the pleadings stage and class-certification gateway virtually always settle—regardless of the merits of the claims.

**Figure 2: Outcomes in 127 resolved cases**




Indeed, Justice Ruth Bader Ginsburg has recognized that "[a] court's decision to certify a class * * * places pressure on the defendant to settle even unmeritorious claims."[2] Then-Chief Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit explained that certification of a class action, even one lacking in merit, forces defendants "to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability."[3] And Judge Diane Wood of the Seventh Circuit has explained that certification "is, in effect, the whole case."[4] That may be why another study of class actions reported that "[e]very case in which a motion to certify was granted, unconditionally or for settlement purposes, resulted in a class settlement."[5]

**Fourteen percent of the class actions filed remain unresolved.** Even though our study period encompassed more than 44 months since the filing of the last case in our sample (and 55 months from the filing of the first case), a significant number of cases—21 of the 148 in our sample, or 14%—remained pending with no resolution, let alone final judgment on the merits.[6]

And there is no reason to believe that these cases are more likely to yield a benefit for class members than the cases that have been resolved thus far. In 15 of these cases either no motion for class certification has been filed or the court has not yet ruled on the motion, and in another 2 the court denied certification. In a significant proportion of these pending cases, it seems likely that class certification will be denied or never ruled upon before the case is ultimately dismissed. After all, prior studies indicate that nearly 4 out of every 5 lawsuits pleaded as class actions are not certified.[7]

**Over one-third of the class actions that have been resolved were dismissed voluntarily by the named plaintiff and produced no relief at all for the class.** Forty-five cases were voluntarily dismissed by the named plaintiff who had sought to serve as a class representative or were otherwise resolved on an individual basis. That means either that the plaintiff (and his or her counsel) simply decided not to pursue the class action lawsuit, or that the case was settled on an individual basis, without any benefit to the rest of the class. These voluntary dismissals represent 30 percent of all cases studied, or 35 percent of cases that reached a resolution by the beginning of September 2013.[8]

In fourteen of the cases that were voluntarily dismissed—approximately one-third of all voluntary dismissals in the data set—the dismissal papers, other docket entries, or contemporaneous news reports made clear that the parties were settling the claim on an individual basis, although the terms of those settlements were not available. Many of the remaining voluntary dismissals also may have resulted from individual settlements.

These settlements often provide that the plaintiff—and his or her attorney—receive recoveries themselves, even though the rest of the class that they sought to represent receive ***nothing***. When parties settle cases on an individual basis, those settlements often are confidential, and the settlement agreements therefore are not included on the court's public docket.[9]

**Just under one-third of the class actions that have been resolved were dismissed on the merits.** In addition to the 45 cases dismissed voluntarily by plaintiffs, 41 cases were dismissed outright by federal courts, through a dismissal on the pleadings or a grant of summary judgment for the defendant. The courts in these cases concluded that the lawsuits were meritless before even considering whether the case should be treated as a class action. These represented 27 percent of all cases studied, and 31 percent of resolved cases.

In other words, ***in over half of all putative class actions studied—and nearly two-thirds of all resolved cases studied—members of the putative class received zero relief.*** These results are depicted in Figures 1 and 2, which appear below. And these results are broadly consistent with other empirical studies of class actions. If anything, for reasons explained in Appendix C, abusive, illegitimate class actions are probably under-represented in our sample, and the sample therefore probably significantly ***overstates*** the extent to which class members benefit from the class action. For comparison, another study found that ***84% of class actions ended without any benefit to the class***.[10]

**Fewer than thirty percent of the cases filed were settled.** All of the remaining class actions that have been concluded were settled on a class-wide basis: The parties reached settlements in 40 cases—28% of all cases studied, or 33% of all resolved cases.[11]

This subset of class actions is the only one in our study in which it is possible that absent class members could possibly receive any benefit at all. As we next discuss, however, the benefits claimed to be associated with such settlements are largely illusory.

## Class Settlements

**Class actions have a significantly lower settlement rate than other federal cases.** The settlement rate for our sample of cases—33% of resolved cases—is much lower than for federal court litigation as a whole. One study of federal litigation estimated that "the aggregate settlement rate across case categories" for two districts studied was "66.9 percent in 2001-2002."[12] Even the least frequently settled case category in that study—constitutional litigation—had a higher settlement rate (39%) than the 33% for the class action cases we studied.[13]

Thus, ***class actions are significantly less likely to produce settlements, and therefore significantly less likely to produce any benefit to class members, than other forms of litigation***. Settlement is the only resolution that produces even the possibility of a benefit to class members, because class actions are virtually never resolved though judgments on the merits, a fact that our study corroborates. And the settlement rate in our sample set is not an outlier: a study of class actions brought in California state court in 2009 reported a similarly low settlement rate of 31.9%.[14]

Moreover, the fact that 40 of our sample cases were settled says nothing about the extent of the benefit, if any, that those settlements conferred on class members.

**Many class settlements—and virtually all settlements of consumer class actions—produce negligible benefits for class members.** It is a notoriously difficult exercise to assess empirically how class members benefit from class action settlements. These settlements fall generally into three basic categories:

- **"Claims-made" settlements**, under which class members are bound by a class settlement—and thereby release all of their claims—but only obtain recoveries if they affirmatively request to do so, usually through use of a claims form.[15] Funds not distributed to claimants are returned to the defendant or, in some cases, distributed to a charity via the *cy pres* process (which creates significant additional problems, as we discuss below). They are not given to class members. Most settlements fall into this category.

- **Injunctive relief/*cy pres* settlements**, in which the relief provided to settling class members involves only injunctive relief (which may provide little or no benefit to class members) or *cy pres* distributions (in which money is paid to charitable organizations rather than class members).

- **"Automatic distribution" settlements**, in which each class member's settlement is distributed automatically to class members whose eligibility and alleged damages could be ascertained and calculated—such as retirement-plan participants in ERISA class actions.

***The parties typically have no meaningful choice among these methods of structuring a settlement***. Automatic distribution settlements are feasible only if the parties have the names and current addresses of class members as well as the ability to calculate each class member's alleged damages. But companies typically lack the information needed to settle cases using an automatic distribution mechanism—especially in consumer cases, where purchase records may be incomplete or unavailable, and/or class members' claimed injuries may vary widely and unpredictably.

***Thus, consumer class actions are almost always resolved on a claims-made basis, and the actual amount of money delivered to class members in such cases almost always is a miniscule percentage of the stated value of the settlement.*** That is because, in practice, relatively few class members actually make claims in response to class settlements: many class members may not believe it is not worth their while to request the (usually very modest) awards to which they might be entitled under a settlement. And the claim-filing process is often burdensome, requiring production of years-old bills or other data to corroborate entitlement to recovery.

**The class members' actual benefit from a settlement—if any—is almost never revealed**. Remarkably, the public almost never has access to settlement distribution data. One study found that settlement distribution data were available in "fewer than one in five class actions in [the] sample."[16] Companies and their defense lawyers are hesitant to reveal how much a company has been required to pay out to class members, and plaintiffs' counsel have strong incentives to conceal the information because requests for attorneys' fees based on a settlement's face value will appear overstated when compared to the actual value. Judges are often happy to have the case resolved, and therefore have little to no interest in requiring transparency in the settlement distribution process.

While third-party claims administrators often possess direct information about claims rates, they are routinely bound by contract to maintain the confidentiality of that information in the absence of party permission, a court order, or other legal authority.[17] This may be a function of the incentive shared by class counsel and defense counsel to avoid facilitating grounds for a class member to object that a settlement was unfair because it provided too little tangible benefit to the class.[18] Indeed, "[h]ow many people were actually members of this class, how many of these class members actually submitted a claim form, and how much they were actually paid appear to be closely held secrets between the class counsel and the defendant."[19]

**In rare cases in which class-settlement distribution data was available, few class members received any benefit at all**. In our data set, ***18 cases were resolved by claims-made settlements***—44% of the total. ***We were able to obtain meaningful data regarding the distribution of settlement proceeds in only six of the 18 cases***, which is not surprising given the well-established and widespread lack of publically available information regarding the extent to which class members actually benefit from settlements. ***Five of the six cases resulted in minuscule claims rates: 0.000006%, 0.33%, 1.5%, 9.66%, and 12%.***[20] These extremely small claim-filing rates are consistent with the few other reports of claim rates in class action settlements that have come to light.

As one federal court observed, "'claims made' settlements regularly yield response rates of 10 percent or less."[21] In fact, the claims rate frequently is ***much lower***—in the single digits. Appendix A contains a list of more than 20 additional cases for which information about distributions is available, all of which involved distributions to less than seven percent of the class and many of which involved distributions to less than one percent of the class.

There is thus ample evidence to infer that ***the extremely small claims rates for cases in our sample is representative of what happens in class actions generally, and particularly in consumer class actions***.[22] And although documents filed in the remaining 12 of the 18 claims-made settlements lacked information about claims rates, there is every reason to believe that class members made claims at the small rates ordinarily observed in such cases. While some may argue that parties should use automatic distribution mechanisms instead of "claims-made" settlements to resolve class actions, the reality is that automatic distribution is difficult, if not impossible, to achieve in many (perhaps most) consumer class actions.

**Only *one* consumer class action settlement was resolved through automatic distribution.** Of the remaining 22 settled cases in our sample, 13 involved ***settlements with automatic distribution of settlement proceeds****.* Ten of these 13 involved claims by retirement plan participants in ERISA class actions, in which the class members' eligibility and alleged damages could be easily ascertained and calculated based on their investment positions. The plans of distribution in these 10 cases generally involved lump-sum payments to the plan, which would then be allocated directly to plan members' accounts.

The other three automatic-distribution settlements were reached in consumer and employment class actions. In each case—atypical of most class actions—the defendant was in a position to ascertain and calculate class members' eligibility and alleged damages:

- In one, an employer settled claims that it conspired with health care providers and insurers to dictate medical treatment provided to about 13,764 employees injured on the job, whose identities were readily known to the defendant employer; employees who were treated by one health-care provider received a check for $520, while injured employees treated by another provider received a check for $50.[23]
- In a second settlement, a credit-card issuer settled claims that it improperly raised the minimum monthly payment and added new fees in connection with promotional loan offers. The defendant issued class members a flat-rate payment of $25, plus (for certain customers) a share of the remaining settlement fund calculated by taking into account the ways the class member had used the promotional loan and had been charged fees.[24]
- Finally, as we explain in more detail below, a third settlement resolved privacy claims against a mobile-phone gaming app developer in exchange for 45 in-game "points" that were automatically distributed to users so they could advance through the game's levels.[25]

Thus, only two consumer cases involved automatic distributions, and in one the distribution involved "game points." ***Only a single settled consumer class action—one of 127 class actions resolved—conveyed real benefits to anything more than a small percentage of the class.***

***Cy pres* awards and injunctive relief serve primarily to inflate attorney's fee awards—and benefit third parties with little or no ties to the putative class.** The final group of 9 settled cases largely involved ***injunctive relief or cy pres distributions.*** Because these cases involve no monetary compensation to class members, it is difficult for outsiders to assess the claimed benefit. Certainly, ***in many cases "injunctive relief" has little or no real-world impact on class members, but is used to provide a basis for claiming a "benefit" to class members justifying an award of attorneys' fees to class counsel*** (as we detail below). The injunctive-relief-only settlements we reviewed included the following:

- Plaintiff subscribers of America Online ("AOL") claimed that it embedded advertisements at the bottom of the subscribers' email messages without their permission. After an early settlement was vacated on appeal for improper *cy pres* awards to unrelated charities, the parties again settled the claims, with AOL promising to tell subscribers how to opt out of email advertisements if it restarted the challenged practice.[26]

- In a class action involving claims that a social-networking app developer failed to protect properly the personally identifiable information of 32 million customers from a data security breach, the settlement provided that the defendant will undergo two audits of its information security policies with regard to maintenance of consumer records, to be made by an independent third party. The settlement explicitly reserves the rights of the plaintiff class to sue for monetary relief.[27]

- Plaintiffs brought false advertising claims against Unilever, contending that it had misrepresented the health or nutritional characteristics of "I Can't Believe It's Not Butter." As part of the settlement, Unilever was to remove all partially hydrogenated vegetable oils from its soft spreads by December 31, 2011, and from its stick products by December 31, 2012, and keep those ingredients out of those products for 10 years. Although they did not receive monetary compensation, class members released all monetary and equitable claims other than claims for personal injury.[28]

- Finally, in a class action alleging the violation of consumer protection laws arising out of the marketing of Zicam supplements (sold as a way of combating the common cold), the parties provided for a number of non-pecuniary "benefits"—all in the form of labeling changes. These include: (1) indicating that the FDA has not approved the supplements; (2) disclosing that customers with zinc allergies or sensitivities should consult a doctor; (3) informing customers that the products are not intended to be effective for the flu or for allergies; and (4) removing language recommending that customers continue to use the products for 48 hours after cold symptoms subside. If the court approves the settlement and requested attorneys' fees, the defendant will pay plaintiff's counsel up to $1.75 million in fees in one case, and another $150,000 in a related MDL proceeding.[29]

Like injunctive relief settlements, ***the* cy pres *doctrine is being used by plaintiffs' lawyers to inflate artificially the purported size of the benefit to the class in order to justify higher awards of attorney's fees to the plaintiffs' lawyers***. In four of the cases we examined, the settlement provided that one or more charitable organizations would receive either all monetary relief, or any remaining monetary relief after claims made were paid out.

Courts often assess the propriety of an attorneys' fee award in the settlement context by comparing the percentage of the settlement paid to class members or charities with the percentage of the settlement allocated to class counsel.[30] That approach has been endorsed by the Manual for Complex Litigation.[31] If no funds are allocated to the class, or a small portion of the amount ostensibly allocated to the class is actually distributed and the remainder of the funds returned to the defendants, the relative percentages could be disturbing to a court reviewing the fairness of the settlement. But if the amount not collected by class members is contributed to a charity that can be claimed to have some tenuous relationship to the class, then the percentage allocated to attorneys' fees may appear more acceptable.

The result, as one district court has warned, is that attorney fee awards "determined using the percentage of recovery" will be "exaggerated by *cy pres* distributions that do not truly benefit the plaintiff class."[32] As Professor Martin Redish has noted, the *cy pres* form confirms that "[t]he real parties in interest in…class actions are…the plaintiffs' lawyers, who are the ones primarily responsible for bringing th[e] proceeding."[33] One district court has noted that when a consumer class action results in a *cy pres* award that "provide[s] those with individual claims no redress," where there are other "incentives" for bringing individual suits, the class action fails the requirement that the class action be "superior to other available methods" of dispute resolution.[34]

**Lawyers (as opposed to class members) were the principal beneficiaries of the remaining settlements in our study**. For the "*cy pres*" settlements in our data set, and the "claims made" settlements for which there is no distribution data, publicly available information provides further support for the conclusion that little in the way of benefit flows to class members. Examples from our data set include:

- ***Disproportionate allocation of settlement funds to attorneys' fees.*** Plaintiffs brought a class action alleging that the defendants improperly interfered with the medical care of injured employees in violation of Colorado law.[35] Under the settlement agreement, the defendants (who denied wrongdoing) were required to make an $8 million fund available to compensate more than 13,500 class members. But class counsel received over $4.5 million out of the $8 million—more than 55 percent of the fund.[36]

- ***Named plaintiffs object to the settlement***. In a class action against the National Football League, retired players alleged that the league was using their names and likenesses without compensation to promote the league. The NFL and some players settled the class-wide claims under federal competition law and state right of publicity laws. But the original named plaintiffs who spearheaded the litigation objected to the settlement, arguing that it provided ***no direct payout to the retired players***.[37] Rather, it created an independent organization that would fund charitable initiatives related to the health and welfare of NFL players—and would create a licensing organization that would help fund the independent organization. Meanwhile, "[p]laintiffs' lawyers would receive a total of $7.7 million under the proposed agreement."[38]

- ***Low recovery for class members.*** Plaintiffs alleged in eight consolidated class actions that their employer, a bank, violated the federal Employee Retirement Income Security Act (ERISA) by offering its own stock as a retirement plan investment option while hiding the true extent of the bank's losses in the mortgage crisis.[39] The class settlement established a $2.5 million common fund that was ostensibly designed to compensate the employees for their losses arising from the bank's alleged breach of fiduciary duty.[40] But commentators note that, when all of the allegations in the various complaints were taken into account, plaintiffs had alleged more than $50 million in losses, meaning that class members would recover no more than five cents on the dollar.[41] And according to the plan of allocation, members of the settlement class who were calculated to have suffered damages less than $25 would receive *nothing*[42]—meaning that their claims were released without even the opportunity to receive something in exchange. Meanwhile, the plaintiffs' attorneys received a fee award amounting to 26% of the common fund ($645,595.78), plus $104,404.22 in expenses.[43]

- ***Settlement requires further use of defendant's services.*** A plaintiff filed a class action alleging that certain mobile-phone gaming apps were improperly collecting and disseminating users' mobile phone numbers.[44] Under the terms of the settlement agreement, class members were not entitled to any monetary payment. Instead, they were slated to receive 45 in-game "points" (with an approximate cash value of $3.75) per mobile device owned; the points could be used to advance through the gaming apps' levels.[45] These points could be redeemed or used only within the defendant's apps.[46] Unsurprisingly, the plaintiffs' counsel were not paid in points, but instead were awarded $125,000 in attorneys' fees.

- ***Attorneys seek fees far exceeding class recovery***. Class counsel in a case involving allegedly faulty laptops found their fee request chopped down from $2.5 million to $943,000.[47] The settlement resulted in a recovery of $889,000 to claimants, plus $500,000 in additional costs for administering the settlement—meaning that the attorneys were seeking just under ***three times*** the amount that would have gone directly to the class—and even after the fees were cut down, they still represented 106 percent of the class's direct recovery.

These characteristics are not unique to the sample cases. To the contrary, results are consistent with a significant number of class action settlements that produce minimal benefits for the class members themselves. We summarize additional examples of such settlements—taken from outside our data set—in Appendix B.

Other studies of class settlements and attorneys' fees confirm that these examples are not outliers: Such settlements commonly produce insignificant benefits to class members and outsize benefits to class counsel. A RAND study of insurance class actions found that attorneys' fees amounted to ***an average of 47% of total class-action payouts***, taking into account benefits actually claimed and distributed, rather than theoretical benefits measured by the estimated size of the class. "In a quarter of these cases, the effective fee and cost percentages were 75 percent or higher and, in 14 percent (five cases), the effective percentages were over 90 percent."[48]

In other words, for practical purposes, counsel for plaintiffs (and for defendants) are frequently the only real beneficiaries of the class actions.

## Conclusion

This study confirms that class actions rarely benefit absent class members in whose interest class actions are supposedly initiated. The overwhelming majority of class actions are dismissed or dropped with ***no recovery*** for class members. And those recoveries that class settlements achieve are typically minimal—and obtained only after long delays. To be sure, not every class action is subject to these criticisms: a few class actions do achieve laudable results. But virtually none of those were consumer class actions. Certainly our analysis demonstrates—at a bare minimum—that the vast majority of class actions in our sample set cannot be viewed as efficient, effective, or beneficial to class members.

# Appendix A: Additional Examples of Settlements With Payments to a Very Small Percentage of Class Members

- The Seventh Circuit vacated an order approving a class action settlement so that the district court could "evaluate whether the settlement is fair to class members," where (among other problems with the settlement) only "a *paltry* three percent" of the quarter-million-wide proposed class "had filed proofs of claim."[49] And the Third Circuit recently noted that "consumer claim filing rates *rarely* exceed seven percent, even with the most extensive notice campaigns."[50]

- One affidavit analyzed 13 cases for which data had been disclosed (and in which the settlement was approved). The median claims rate was 4.70%. The highest claims rate in those cases was 5.98%, and the lowest non-zero claims rate was 0.67%. In two cases, the claims rate was 0%—reflecting that not a single class member obtained the agreed-on recovery.[51]

- A class action alleging antitrust claims in connection with compact disc "music club" marketing settled, with only 2% of the class making claims for vouchers (valued at $4.28) for CDs.[52]

- Indeed, in many cases, the claims rate may be well under 1 percent.

  — Fair Credit Reporting Act case: court noted that "less than one percent of the class chose to participate in the settlement."[53]

  — Case alleging that a software manufacturer sold its customers unnecessary diagnostic tools: court approved settlement despite the fact that only 0.17% of customers made claims for a $10 payment, because "the settlement amount is commensurate with the strength of the class' claims and their likelihood of success absent the settlement."[54]

  — Case involving product liability claims related to alleged antenna problems with Apple's iPhone 4: court approved settlement noting that the "number of claims represents somewhere between 0.16% and 0.28% of the total class."[55]

  — Class action alleging fraud in the procurement of credit-life insurance: Supreme Court of Alabama noted that "only 113 claims" had been made in a class of approximately 104,000—or a response rate of 0.1%.[56]

  — Action alleging that restaurant chain had printed credit-card expiration dates on customers' receipts: "approximately 165 class members" out of 291,000—or fewer than 0.06% of the class—"had obtained a voucher" for one of four types of menu items worth no more than $4.78.[57]

- Class action alleging that Sears had deceptively marketed automobile-wheel alignments: “only 337 valid claims were filed out of a possible class of 1,500,000”—a take rate of just over 0.02%.[58]
- Class action alleging that video game manufacturer had improperly included explicit sexual content in the game: ***one fortieth of one percent*** of the potential class (2,676 of 10 million) made claims.[59]
- Class action involving allegations that a Ford Explorer was prone to dangerous rollovers: only 75 out of “1 million” class members—or ***less than one hundredth of one percent***—participated in the class settlement.[60]

# Appendix B: Additional Examples of Settlements Providing Negligible Benefits to Class Members

- ***Class members receive extended membership in buying club.*** In a class action against DirectBuy—a club for which customers pay a membership fee to purchase goods at lower prices—the plaintiffs alleged that the defendant had misrepresented the nature of the discounts that were available through the club.[61] The settlement afforded class members nothing other than discounts for renewal or extension of their memberships in the very club that was alleged to have tricked them into joining in the first place. Meanwhile, the attorneys for the class "could receive between $350,000 and $1 million."[62]

- ***$21 million for the lawyers, pennies and coupons for the class members.*** One Missouri class settlement in a case against a brokerage house alleging breaches of fiduciary duties provided $21 million to class counsel, but only $20.42 to each of the brokerage's former customers and three $8.22 coupons to each current customer. And most of the coupons are unlikely to be redeemed.[63]

- ***Class members receive right to request $5 refund, lawyers take (and fail to disclose sufficiently) $1.3 million in fees.*** Under the settlement of a class action in which the plaintiffs alleged that Kellogg's had misrepresented that Rice Krispies are fortified with antioxidants, class members could request $5 refunds for up to three boxes of cereal purchased between June 1, 2009, and March 1, 2010.[64] Class counsel sought $1.3 million in attorneys' fees on a claim fund valued at $2.5 million to be paid out to class members.[65]

- ***Class receives opportunity to attend future conferences.*** In a 2009 settlement in the District of Columbia, a court approved a settlement against a conference organizer that failed to deliver promised services to those who had paid to attend. The settlement provides class members with nothing other than coupons to attend future events put on by the same company alleged to have bilked them in the first place; class counsel will take $1.4 million in fees.[66]

- ***Class members receive nothing, class counsel take $2.3 million.*** In a $9.5 million settlement of a class action against Facebook over the disclosure to other Facebook users of personal information about on-line purchases through Facebook's "Beacon" program, the class members received no remedy whatever for the invasions of their privacy and were barred from making future claims for any remedy. Instead, approximately $6.5 million went to create and fund a new organization that would give grants to support projects on internet privacy; a few thousand dollars went to each of the named plaintiffs as "incentive payments"; and class counsel received more than $2.3 million.[67] Meanwhile, although Facebook agreed to end the Beacon program—which it had actually already ended months before—it remained free to reinstitute the program as long as it didn't use the name "Beacon."[68] As one federal appellate judge put it (in a dissent from a decision upholding the settlement):

> The majority approves ratification of a class action settlement in which class members get no compensation at all. ***They do not get one cent***. They do not get even an injunction against Facebook doing exactly the same thing to them again. ***Their purported lawyers get millions of dollars***. Facebook gets a bar against any claims any of them might make for breach of their privacy rights. The most we could say . . . is that in exchange for giving up any claims they may have, the exposed Facebook users get the satisfaction of contributing to a charity to be funded by Facebook, partially controlled by Facebook, and advised by a legal team consisting of Facebook's counsel and their own purported counsel whom they did not hire and have never met.[69]

The Supreme Court ultimately declined to review the Ninth Circuit's decision approving the settlement. As Chief Justice Roberts explained in a rare statement addressing the court's denial of certiorari, the objectors had challenged "the particular features of the specific *cy pres* settlement at issue," but in his view had not addressed "more fundamental concerns surrounding the use of such remedies" and the standards that should govern their use. Such concerns, he pointed out, would have to await a future case.[70]

- ***Court reduced attorneys' fees because of lack of benefit to class members.*** The Sixth Circuit upheld a district court's decision to reduce class counsel's requested fees from $5.9 million to $3.2 million in a settlement of a class action involving auto-insurance benefits.[71] In affirming the decision, the Sixth Circuit pointed out that the district court "did not believe that the class members received an especially good benefit [because] Class Counsel chose to pursue a relatively insignificant claim" as opposed to "other potential claims, …and [they] agreed to a settlement mechanism which yielded a low claims rate[.]"[72] Although the court noted that "the settlement makes available a common fund of $27,651,288.83 less any attorney fee award, costs, and administrative expenses," for individual class member benefits up to a maximum of $199.44, "only a small percent of eligible class members have made claims" totaling approximately $4 million—or 14% of the total common fund available.[73] What is more, class counsel represented in their fee motion that they provided notice to 189,305 class members and received "well over 12,000" claims—in other words, a claims-made rate of just over six percent.[74]

# Appendix C: Study Design and Methodology

## Identifying the Study Sample

The first step in studying putative class actions was to select a suitable pool of cases. Identifying every putative class action filed during 2009 would be impracticable—not least without extensive resources and staff support.[75] We instead used two commercial publications—the *BNA Class Action Litigation Reporter* and the *Mealey's Litigation Class Action Reporter*—to identify cases for inclusion in the study. These publications cover a wide array of developments in class action litigation, and therefore provide a diverse sample of filed class action complaints. The publications have an incentive to report comparatively more significant class actions out of all class actions filed, without wasting readers' time and attention on minor or obviously meritless suits. If anything, the sample would be skewed in favor of more significant class actions filed by prominent plaintiffs' attorneys—which should be *more meritorious on average* than a sample generated randomly from all class actions filed.

We reviewed issues of BNA and Mealey's published between December 2008 and February 2010 in order to identify cases filed in 2009. The reason for that limitation was the importance of analyzing "modern" cases that were filed after the passage of the Class Action Fairness Act of 2005, but long enough ago to track how the cases have actually progressed and whether they have been resolved. From those publications, we identified a pool of putative class actions brought by private plaintiffs that were either filed in federal court or were removed to federal court from state court in 2009. To begin with, because data about state court cases is much more difficult to obtain, we excluded a number of cases, such as those brought in state court initially (where the BNA or Mealey's report did not mention that the case was removed). We also excluded one case that was removed to federal court and then remanded to state court. This left us with 188 cases.

Nineteen of these eventually became part of eleven other consolidated cases that were also part of our data set—whether under the multidistrict litigation ("MDL") procedure, 28 U.S.C. § 1407, or otherwise (for example, cases are often consolidated when they are pending in the same federal district court). When multiple putative class actions appearing in our data set were consolidated, we treated the consolidated case as a single action to avoid the risk of "overcounting" lawsuits.[76] And when a case in our data set was consolidated with other cases not in our data set, we considered activity reflected on the docket of the "lead" consolidated case that was attributable to the individual case as filed. If after consolidation the case was resolved together with the "lead" case—such that we could not trace outcomes for the individual case separate from the "lead" case—we considered activity attributable to the "lead" case. This approach dovetails with the practical mechanics of consolidation: After cases are consolidated into an MDL, for example, the judge to whom the MDL proceeding is assigned will resolve pretrial motions presented in all the consolidated cases. And more generally, to the extent that courts treat a number of separately filed cases together as a single unit for purposes of adjudication, we have followed the courts' lead.[77] Excluding the cases that became part of other consolidated cases in our data set left us with 169 cases.

Our next goal was to identify a set of class actions consisting of claims resembling those asserted by consumers—because that is the area under study by the CFPB. We therefore excluded three non-Rule-23 putative class actions brought by the Equal Employment Opportunity Commission.[78] We also excluded nine Fair Labor Standards Act cases.[79] Finally, we excluded nine securities cases, because the stakes and nature of those claims are very different from the claims asserted in consumer class actions, and because they are litigated in a different manner because of the procedural checks imposed by federal laws governing securities litigation.[80] Excluding these 21 EEOC, securities, and FLSA cases had next to no effect on the statistical results of our study.[81]

Accordingly, the statistics about the total number of class actions filed in 2009 are based on a set of 148 putative class actions.

## Constructing the Data Set

We identified and coded a number of variables about each case. Using the federal courts' Public Access to Court Electronic Records ("PACER") system, we evaluated the filings on each case's docket. Where criteria for a case could be coded in more than one way, we scrutinized the underlying filings and rulings to determine whether the criteria better fit one or another category. For administrative purposes, we treated September 1, 2013, as the date on which our study period closed. We did not code filings and events that were entered onto the docket after that date.

Among the data collected for each case were: jurisdiction; date filed; plaintiffs' firm; assigned judge; cause of action (as reported by PACER); nature of suit (as reported by PACER); whether the case was a lead or related case (if it was in a consolidated action);[82] whether the court granted class certification; whether the case was voluntarily dismissed,[83] settled, settled but on appeal, dismissed, otherwise disposed of, or still pending; the current posture of the case;[84] and the date of the last action on the case.

For cases involving settlements, we also collected information about the date of dismissal or final settlement approval; the terms of the settlement agreement; any attorneys' fees, expenses, and incentive payments to lead plaintiffs; and the presence of any *cy pres* provision in the settlement agreement.

There are, of course, limitations to the data we collected. First, our conclusions are based on the cases that we reviewed. While there is good reason to believe that generalizations can be made to all class actions, the sample is undoubtedly smaller than the total number of class actions filed in 2009. Attempting to estimate that number reliably—let alone to examine those cases—would have exceeded the scope of our review. On the other hand, the sample includes cases from across the country and is drawn from sources that are likely to report on significant class actions—those that are of comparatively greater importance or quality than those actions that neither BNA nor Mealey's considered worth reporting. Because the BNA and Mealey's reporters do not present a random sample of all class actions filed in 2009, it would not be useful to calculate a margin of error or otherwise attempt to quantify the extent to which the sample differs randomly from the population of all class actions filed in 2009.

## Endnotes

1 For information about our methodology, see Appendix C.

2 *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting).

3 *In re Rhone-Poulenc Rorer Inc.,* 51 F.3d 1293, 1299 (7th Cir. 1995).

4 Hon. Diane Wood, Circuit Judge, Remarks at the FTC Workshop: Protecting Consumer Interests in Class Actions (Sept. 13–14, 2004), in *Panel 2: Tools for Ensuring that Settlements are "Fair, Reasonable, and Adequate,"* 18 Geo. J. Legal Ethics 1197, 1213 (2005).

5 Emery G. Lee III et al., *Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions* at 11 (Federal Judicial Center 2008), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Preliminary%20Findings%20from%20Phase%20Two%20Class%20Action%20Fairness%20Study%20%282008%29.pdf (discussing 30 such cases).

6 These results are broadly consistent with other studies of class actions. *See, e.g., id.* at 6 (noting that 9% of cases remained pending after at least 3.5 years).

7 *See* Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does it Make?*, 81 Notre Dame L. Rev. 591, 635-36, 638 (2006).

8 In one of the cases we studied, the court compelled arbitration of the named plaintiff's claims—a determination that almost always precludes class treatment of the case.

9 Unlike class settlements under Federal Rule of Civil Procedure 23, which must be publicly disclosed and approved by the court, individual settlements of lawsuits in federal court need not be disclosed publicly, nor is court approval required. Typically, parties that agree to settle claims on an individual basis in a lawsuit pending in federal court—whether or not those claims are part of a class action—enter into confidential settlement agreements, a condition of which is that the named plaintiff will voluntarily dismiss his or her individual claims with prejudice; remaining claims that were purported to have been brought on behalf of a class may be dismissed without prejudice with respect to other class members, who may or may not assert the claim in subsequent litigation.

10 *See, e.g.,* Lee et al., *supra* note 5, at 6 (noting that in cases not remanded, 55% of cases were voluntarily dismissed without class certification or class settlement, and another 29% were dismissed by the court).

11 This category includes one case in which the parties have announced a class settlement and sought preliminary approval; five cases in which the court has granted preliminary approval (but has not yet finally approved it); one case that resulted in a settlement to fewer than all plaintiff class members; and two cases in which appeals are pending.

12 Theodore Eisenberg and Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?,* 6 J. Empir. Leg. Stud. 111, 115 (2009).

13 *Id*. at 133.

14 Hilary Hehman, *Class Certification in California: Second Interim Report from the Study of California Class Action Litigation*, Judicial Council of California: Administrative Office of the Courts, at Tables D1-D2 (Feb. 2010), http://www.courts.ca.gov/documents/classaction-certification.pdf (observing that 410 of 1294 resolved cases were settled); *see also* Patricia Hatamyar Moore, *Confronting the Myth of "State Court Class Action Abuses" Through an Understanding of Heuristics and a Plea for More Statistics*, 82 UMKC L. Rev. 133, at 165 & n.192 (2013).

15 *See* 4 *Newberg on Class Actions* § 12:35 (4th ed. 2013) ("[A] common formula in class actions for damages is to distribute the net settlement fund after payment of counsel fees and expenses, ratably among class claimants according to the amount of their recognized transactions during the relevant time period. A typical requirement is for recognized loss to be established by the filing of proofs of claim. . . .").

16 Nicholas M. Pace & William B. Rubenstein, *How Transparent are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data* at 3, RAND Institute for Civil Justice Working Paper (July 2008), billrubenstein.com/Downloads/RAND%20Working%20Paper.pdf.

17 *Id.* at 31-32 (explaining that in a survey of class action participants, only 25% of "chief executive officers" at settlement administrators responded to the survey, and even those only "did so solely to inform [the researchers] that the information that they held was 'proprietary' to their clients, namely the attorneys that had hired them to oversee the class action claiming process"); *cf.* Deborah R. Hensler, et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 163-64 (2000) (noting difficulty in obtaining "information about the claiming process and distribution" from a "settlement administrator," who "declined to share distribution figures, suggesting that we talk to the attorneys involved with the case," and noting further that the plaintiffs' and defense attorneys had agreed between themselves "not to discuss or divulge matters related to . . . the actual distribution to the class").

18 *See* Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 Fla. L. Rev. 71, 93 (2007) (explaining that when a "notice do[es] not estimate the size of the class, . . . class members are unable to calculate their own individual recoveries" and therefore lack "sufficient bases for objecting to the proposed settlement"); *see also Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 744-45 (7th Cir. 2008) (Posner, J.) ("The defendants in class actions are interested in minimizing the sum of the damages they pay the class and the fees they pay the class counsel, and so they are willing to trade small damages for high attorneys' fees. . . . The result of these incentives is to forge a community of interest between class counsel, who control the plaintiff's side of the case, and the defendants. . . . The judge . . . is charged with responsibility for preventing the class lawyers from selling out the class, but it is a responsibility difficult to discharge when the judge confronts a phalanx of colluding counsel.") (citations omitted).

19 Hensler, *supra* note 17, at 165.

20 The lone outlier—a case with a 98.72% claims rate—involved the settlement of an ERISA case involving claims about the Bernie Madoff Ponzi scheme for which potentially enormous claims could be made. The math explains why an "astonishing 98.72%" of the 470 members of the damages class filed claims in this $1.2165 billion settlement. Final Order at 11, *In re Beacon Assoc. Litig*., No. 09-cv-777 (S.D.N.Y. May 9, 2013), PACER No. 77-2. Because each class member's individual claim was worth, on average, over $2.5 million, it is unsurprising that over 460 of the class members decided to submit a claim. Needless to say, virtually no consumer or employment class actions settle for anything approaching such a large amount per class member.

21 *Sylvester v. CIGNA Corp.*, 369 F. Supp. 2d 34, 52 (D. Me. 2005).

22 Some earlier studies purported to assess the benefits received by class members, but they examined "only what defendants *agreed to pay*" in settlements, rather than "the amounts that defendants *actually paid* after the claims administration process concluded." Brian Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 826 (2010) (emphasis added); *see also* Theodore Eisenberg & Geoffrey Miller, *Attorney's Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Legal Stud. 248, 258-59 (2010) (using same approach).

Moreover, because Fitzpatrick studied only settlements (*see* 7 J. Empircial Legal Stud. at 812), his study failed to take into account that most putative class actions are dismissed or otherwise terminated without any benefits for class members. And Eisenberg and Miller ignored settlements that promised *only* nonpecuniary relief (such as coupons or injunctive relief) to class members. An earlier version of their study—which laid the methodological groundwork for the later expanded study in 2010 (*see id.* at 252)—appears to have counted cases involving such "soft relief" only when it was "included" along with pecuniary relief. Theodore Eisenberg & Geoffrey Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Stud. 27, 40 (2004).

23 Plaintiffs' Unopposed Motion for Order Preliminarily Approving Class Action Settlement at 8, *Gianzero v. Wal-Mart Stores, Inc.*, No. 09-cv-00656 (D. Colo. Nov. 21, 2011), PACER No. 464 ("*Gianzero* Preliminary Approval Motion").

24 Plaintiffs' Motion for Preliminary Approval of Class Settlement at 5-7, *In re Chase Bank USA, N.A. "Check Loan" Contract Litigation*, No. 09-md-2032 (N.D. Cal. July 23, 2012), PACER No. 338.

25 *See* notes 44–46 and accompanying text.

26 Revised Class Action Settlement Agreement ¶¶ 20-22, *Bronster v. AOL, LLC*, No. 09-cv-3568 (C.D. Cal. July 31, 2013), PACER No. 66-10. The settlement also proposes a *cy pres* award to a more related charitable organization. *Id.* ¶ 23.

27 Settlement Agreement and Release at 4, *Claridge v. RockYou, Inc.*, No. 09-cv-6032 (N.D. Cal. Dec. 15, 2011), PACER No. 55-1.

28 Notice of Joint Motion for Final Approval of Class Settlement and Memorandum of Points and Authorities in Support Thereof at 4, *Red v. Unilever United States, Inc.*, No. 10-cv-387 (N.D. Cal. June 6, 2011), PACER No. 153.

29 Plaintiffs' Memorandum in Support of Motion for Final Approval of Class Action Settlement at 4-5, *Hohman v. Matrixx Initiatives, Inc.*, No. 09-cv-3693 (N.D. Ill. May 26, 2011), PACER No. 81.

30 *See, e.g.*, *Strong v. BellSouth Telecommunications, Inc.*, 137 F.3d 844, 851 (5th Cir. 1998) (affirming the district court's decision to compare the "actual distribution of class benefits" against the potential recovery, and adjusting the requested fees to account for the fact that a "drastically" small 2.7 percent of the fund was distributed); *see also Int'l Precious Metals Corp. v. Waters*, 530 U.S. 1223, 1223 (2000) (O'Connor, J., respecting the denial of certiorari) (noting that fee awards disconnected from actual recovery "decouple class counsel's financial incentives from those of the class," and "encourage the filing of needless lawsuits where, because the value of each class member's individual claim is small compared to the transaction costs in obtaining recovery, the actual distribution to the class will inevitably be small").

31 *See* Federal Judicial Center, *Manual for Complex Litigation (Fourth)* § 27.71 (2004).

32 *SEC v. Bear Stearns & Co.*, 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009).

33 Testimony of Martin H. Redish at 7, U.S. House of Representatives, Committee on the Judiciary, Subcommittee on the Constitution, *Hearing: Class Actions Seven Years After the Class Action Fairness Act* (June 1, 2012), available at http://judiciary.house.gov/hearings/Hearings%202012/Redish%2006012012.pdf.

34 *Hoffer v. Landmark Chevrolet Ltd.*, 245 F.R.D. 588, 601-04 (S.D. Tex. 2007) (Rosenthal, J.). In one of the cases in our sample, the same district judge cautioned that *cy pres* awards "'violat[e] the ideal that litigation is meant to compensate individuals who were harmed,'" but ultimately approved the award because prior court precedents had authorized the use of *cy pres*. *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1076 (S.D. Tex. 2012) (Rosenthal, J.).

35 *Gianzero* Preliminary Approval Motion at 4.

36 *Id.* at 10.

37 The Dryer Plaintiffs' Opposition to Preliminary Approval of the Proposed Settlement Class, *Dryer v. Nat'l Football League*, No. 09-cv-2182 (D. Minn. Mar. 20, 2013), PACER No. 264.

38 Alison Frankel, Retired NFL stars reject settlement of their own licensing class action, REUTERS (Mar. 25, 2013), available at http://blogs.reuters.com/alison-frankel/2013/03/25/retired-nfl-stars-reject-settlement-of-their-own-licensing-class-action/.

39 Class Action Complaint at 2, 24-25, *In re Colonial Bancgroup, Inc. ERISA Litig.*, No. 2:09-cv-792 (M.D. Ala. Aug. 20, 2009), PACER No. 1.

40 *See, e.g.*, Final Judgment at 2-3, *In re Colonial Bancgroup, Inc. ERISA Litig.*, No. 2:09-cv-792 (M.D. Ala. Oct. 12, 2012), PACER No. 207 ("*Colonial Bancgroup* Final Judgment").

41 Bill Donahue, *Colonial Bank Execs Pay $2.5m to Dodge ERISA Claims*, Law360 (June 18, 2012), available at http://www.law360.com/articles/350930

42 Plan of Allocation at 3, *In re Colonial Bancgroup, Inc. ERISA Litig.*, No. 2:09-cv-792 (M.D. Ala. Sept. 14, 2012), PACER No. 192-1.

43 *Colonial Bancgroup* Final Judgment at 8.

44 First Amended Complaint at 2, *Turner v. Storm8, LLC*, No. 4:09-cv-05234 (N.D. Cal. June 22, 2010), PACER No. 27.

45 Motion for Final Approval of Class Action Settlement Agreement at 3, *Turner v. Storm8, LLC*, No. 4:09-cv-05234 (N.D. Cal. Nov. 11, 2010), PACER No. 32.

46 Settlement Agreement at 8, *Turner v. Storm8, LLC*, No. 4:09-cv-05234 (N.D. Cal. June 22, 2010), PACER No. 26-1.

47 Attorney's Fees Slashed in Faulty Laptop Class Action, *BNA Class Action Litigation Report*, 14 Class 1497 (Oct. 25, 2013), available at http://news.bna.com/clsn/CLSNWB/split_display.adp?fedfid=37476946&vname=clasnotallissues&jd=a0e2t3w1f0&split=0. This case was among the ones we studied, but the court's decision awarding a reduced amount of attorneys' fees was issued after the closing date of our study.

48 Nicholas M. Pace et al., *Insurance Class Actions in the United States*, Rand Inst. for Civil Just., xxiv (2007), http://www.rand.org/pubs/monographs/MG587-1.html. Another RAND study similarly found that in three of ten class actions, class counsel received more than the class. *See* Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Executive Summary), Rand Inst. for Civil Just., 21 (1999), http://www.rand.org/pubs/monograph_reports/MR969.html.

49 *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 648, 650 (7th Cir. 2006) (emphasis added).

50 *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 329 n. 60 (3d Cir. 2011) (en banc) (emphasis added; quotation marks omitted).

51 Declaration of Kevin Ranlett in Support of Defendants' Amended Motion to Compel Arbitration at 8, *Coneff v. AT&T Corp.*, No. 2:06-cv-00944 (W.D. Wash. May 27, 2009), PACER No. 199. Mr. Ranlett is a Mayer Brown lawyer.

52 *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 370 F. Supp. 2d 320, 321 (D. Me. 2005).

53 *Yeagley v. Wells Fargo & Co.*, 2008 WL 171083, at *2 (N.D. Cal. Jan. 18, 2008), *rev'd*, 365 F. App'x 886 (9th Cir. 2010).

54 *LaGarde v. Support.com, Inc.*, 2013 WL 1283325, at *6 (N.D. Cal. Mar. 26, 2013). The court approved a proposed modified settlement under which the class members "who made a claim" after having been "offered a $10 cash payment * * * will now receive a $25 cash payment, rather than $10." *Id.* at *4.

55 *In re Apple iPhone 4 Prods. Liab. Litig.*, 2012 WL 3283432, at *1 (N.D. Cal. Aug. 10, 2012).

56 *Union Fid. Life Ins. Co. v. McCurdy*, 781 So. 2d 186, 188 (Ala. 2000).

57 *Palamara v. Kings Family Rests.*, 2008 WL 1818453, at *2 (W.D. Pa. Apr. 22, 2008).

58 *Moody v. Sears, Roebuck & Co.*, 2007 WL 2582193, at *5 (N.C. Super. Ct. May 7, 2007), *rev'd*, 664 S.E.2d 569 (N.C. Ct. App. 2008).

59 *In re Grand Theft Auto Video Game Consumer Litig*., 251 F.R.D. 139 (S.D.N.Y. 2008).

60 Cheryl Miller, "Ford Explorer Settlement Called a Flop," *The Recorder* (July 13, 2009), http://www.law.com/jsp/article.jsp?id=1202432211252.

61 Michelle Singletary, *Class-action Coupon Settlements are a No-Win for Consumers*, Wash. Post, Apr. 28, 2011 at A14.

62 *Id.*

63 *See* Stipulation of Settlement of Class Action, *Bachman v. A.G. Edwards, Inc.*, No. 22052-01266-03 (Mo. Cir. Ct. St. Louis Feb. 18, 2010), http://www.agedwardsclassactionsettlement.com/bach_20100219094521.pdf; *see also* Daniel Fisher, *Lawyer Appeals Judge's Award of $21 Million in Fees, $8 Coupons for Clients*, FORBES.COM (Jan. 10, 2011), http://blogs.forbes.com/danielfisher/2011/01/10/lawyer-appeals-judges-award-of-21-million-in-fees-8-coupons-for-clients ("The judge didn't even see fit to inquire into the lawyers' valuation of the coupon portion of the settlement, despite strong evidence that less than 10% of coupons in such cases are ever redeemed").

64 Stipulation of Settlement at 2-8, *Weeks v. Kellogg*, No. 2:09-cv-8102 (C.D. Cal. Jan. 10, 2011), PACER No. 121.

65 Memorandum of Law in Support of Plaintiffs' Motion for Award of Attorneys' Fees, Expenses, and Plaintiff Service Awards at 4, *Weeks v. Kellogg*, No. 2:09-cv-8102 (C.D. Cal. July 18, 2011), PACER No. 135-1.

66 *See* Memorandum Opinion at 3-5, 8, *Radosti v. Envision EMI, LLC*, No. 1:09-cv-887 (D.D.C. June 8, 2010), PACER No. 40; Order at 1-2, *Radosti v. Envision EMI, LLC*, No. 1:09-cv-887 (D.D.C. Jan. 19, 2011), PACER No. 45.

67 *Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir.), *reh'g en banc den.* 709 F.3d 791 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 8 (2013).

68 Petition for Certiorari at 11-13, *Marek v. Lane*, No. 13-136 (filed July 26, 2013), 2013 WL 3944136.

69 *Lane*, 696 F.3d at 835 (Kleinfeld, J., dissenting) (emphasis added).

70 *Marek*, 134 S. Ct. at 9 (Roberts, C.J., respecting the denial of certiorari).

71 *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 F. App'x 496 (6th Cir. Aug. 26, 2011).

72 *Id.* at 500.

73 Opinion and Order at 10-11, *Van Horn v. Nationwide Prop. & Cas. Ins. Co*., No. 1:08-cv-605 (N.D. Ohio, Apr. 30, 2010), PACER No. 308.

74 Class Counsel's Supplemental Memorandum in Support of Class Counsel's Motion for Award of Attorney's Fees and Reimbursement of Litigation Expenses at 3-4, 7, *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, No. 1:08-cv-605 (N.D. Ohio Mar. 19, 2010), PACER No. 296

75 *See, e.g.*, Deborah Hensler, et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* § 4.60 (RAND Institute for Civil Justice, Monograph MR-969/1-ICJ) (1999) ("Enormous methodological obstacles confront anyone conducting research on class action litigation. The first obstacle is a dearth of statistical information. No national register of lawsuits filed with class action claims exists. Until recently, data on the number of federal class actions were substantially incomplete, and data on the number and types of state class actions are still virtually nonexistent. Consequently, no one can reliably estimate how much class action litigation exists or how the number of lawsuits has changed over time. Incomplete reporting of cases also means that it is impossible to select a random sample of all class action lawsuits for quantitative analysis.").

76 By way of example, four cases—*Sansom v. Heartland Payment Sys., Inc.* No. 09-cv-335 (D.N.J.); *Lone Summit Bank v. Heartland Payment Sys., Inc.* No. 09-cv-581 (D.N.J.); *Tricentury Bank v. Heartland Payment Sys., Inc.* No. 09-cv-697 (D.N.J.), and *Kaissi v. Heartland Payment Sys., Inc.* No. 09-cv-540 (D.N.J.)—eventually were consolidated into *In re: Heartland Payment Sys., Inc., Customer Data Security Breach Litigation*, No. 4:09-md-02046 (S.D. Tex.).

77 The decision to treat these consolidated cases along with the lead case had little effect on our data. A comparison of statistics on outcomes reveals that, if anything, treating consolidated class actions as a single action rather than separately tended to overstate the benefits of class actions.

In our full 188-case sample set (including the consolidated cases), 99 cases (54%) were dismissed, whether on the merits by the court, by the plaintiff voluntarily, or as an inferred settlement on an individual basis; 31 cases (16%) remain pending; 55 cases (29%) were settled on a class-wide basis; and 3 cases (2%) were dismissed after the court granted a motion to compel arbitration. By comparison, in the 169-case sample set (excluding the consolidated cases), 99 cases (57%) were dismissed, whether on the merits by the court, by the plaintiff voluntarily, or as an inferred settlement on an individual basis; 23 cases (14%) remained pending; 47 cases (28%) were settled on a class-wide basis; and 1 (1%) was dismissed after the court granted a motion to compel arbitration.

Similarly, this methodology ensures that me-too actions—cases filed by other attorneys after a complaint in a different case, raising materially identical claims—that are routinely dismissed after consolidation without any award or settlement will instead be treated as sharing in any benefits to class members that were actually obtained.

78 The Supreme Court has held that the EEOC may pursue enforcement actions under Title VII § 706 without being certified as a class representative under Federal Rule of Civil Procedure 23. *See Gen. Tel. Co. of Nw., Inc. v. EEOC*, 446 US. 318 (1980). The Supreme Court's reasoning would appear to apply equally outside the context of Title VII. Because the EEOC does not need to pursue a Rule 23 class, the dynamics of EEOC class-wide enforcement actions differ markedly from those in Rule 23 actions.

79 Class actions under the FLSA are certified conditionally as "opt-in" classes. Section 216(b) of the FLSA permits a right of action against an employer by an employee on behalf of "other employees similarly situated," who must have opted in by providing and filing with the court "consent in writing" to become a plaintiff. 29 U.S.C. § 216(b). These cases present different incentives for plaintiffs' counsel than consumer class actions, because they typically involve statutory attorneys' fees to prevailing plaintiffs and may involve large backpay and overtime pay awards.

80 As one academic study explained, securities class actions "are managed under a set of class action rules distinct from those used for other Rule 23(b)(3) classes—and…the plaintiffs with the largest losses have a significant role in the litigation (including choosing class counsel and defining the terms of the settlement) and can hardly be thought of [as] an 'absent' class member." Pace & Rubenstein, *supra* note 16, at 20; *see*, *e.g.*, Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-76, 109 Stat. 737 (1995); Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998).

81 Recall that our 169-case sample set, which included these cases, resulted in 57% of cases dismissed, 14% pending, 28% settled on a class-wide basis, and 1% dismissed after an order compelling arbitration. *See supra* note 77. After excluding them, our 148-case sample set resulted in 57% of cases dismissed, 14% pending, 28% settled on a class-wide basis, and 1% dismissed after an order compelling arbitration. *See* Figure 1.

82 If a case was a related case in a consolidated action, we collected information based on what happened in the lead case.

83 If a case was voluntarily dismissed, we attempted to discern from filings (and from sources external to the docket) whether the dismissal should be attributed to a settlement on an individual basis—such as when the filings refer to a settlement, or when the named plaintiff sought to dismiss her own claims with prejudice but without prejudice to absent members of the putative class. On one hand, this is likely to understate the rate at which individual plaintiffs settle their claims individually, which in any event results in no recovery to other absent members of the putative class unless another lawsuit moves forward. On the other hand, we were often not able to discern whether the claims in a lawsuit dismissed voluntarily would continue to be litigated (or settled) by another named plaintiff under a different case caption. Thus our decision to select a readily accessible

sample of class actions may understate the extent to which members of a putative class may have their claims dismissed on the merits, or alternatively settled, in a class action under a different docket.

84 The data set includes two certified class actions in which motions for summary judgment are pending. The data set also includes an additional certified class action in which the court granted summary judgment to the plaintiffs on their claim for injunctive relief, and granted summary judgment to the defendants on all remaining claims. At the time our study closed, on September 1, 2013, the parties proposed text for an injunctive order that would resolve the parties' remaining claims on a class-wide basis.

# EXHIBIT E

**GEORGE ENGURASOFF and JOSHUA OGDEN, individually and on behalf of all others similarly situated, Plaintiffs, v. THE COCA-COLA COMPANY and COCA-COLA REFRESHMENTS USA, INC., Defendants.**

**No. C 13-03990 JSW**

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA**

***2014 U.S. Dist. LEXIS 116936***

**August 21, 2014, Decided**
**August 21, 2014, Filed**

**COUNSEL:** [*1] For George Engurasoff, individually and on behalf of all others similarly situated, Joshua Ogden, individually and on behalf of all others similarly situated, Plaintiffs: Ben F. Pierce Gore, LEAD ATTORNEY, Pratt & Associates, San Jose, CA; Bradley F Silverman, LEAD ATTORNEY, Fleischman Law Firm, New York, NY; Keith M. Fleischman, LEAD ATTORNEY, The Fleischman Law Firm, New York, NY; Robert L. Plotz, LEAD ATTORNEY, New York, NY.

For The Coca-Cola Company, Coca-Cola Refreshments USA, Inc., Defendants: Tammy Beth Webb, LEAD ATTORNEY, Ina Doung-May Chang, Shook, Hardy & Bacon L.L.P., San Francisco, CA; Jane M. Metcalf, Sarah E. Zgliniec, Steven A. Zalesin, Travis J. Tu, Patterson Belknap Webb and Tyler LLP, New York, NY.

**JUDGES:** JEFFREY S. WHITE, UNITED STATES DISTRICT JUDGE.

**OPINION BY:** JEFFREY S. WHITE

**OPINION**

**ORDER DENYING IN PART AND GRANTING IN PART DEFENDANTS' MOTION TO DISMISS**

Now before the Court is the motion to dismiss filed by Defendants the Coca-Cola Company and Coca-Cola Refreshments USA, Inc. ("Defendants"). Upon consideration of the parties' papers and the relevant legal authority, the Court denies in part and grants in part the motion to dismiss. The motion for consolidation is also before the Court. However, [*2] in light of the recent transfer of two other related cases, the Court DENIES the motion to consolidate as premature without prejudice to refiling once the parties from all of the cases have had an opportunity to meet and confer regarding consolidation.[1]

1 The Court GRANTS Defendants' and Plaintiffs' requests for judicial notice. *Fed. R. Evid. 201*. The Court DENIES Plaintiffs' supplemental request for judicial notice and DENIES Defendants' request to file a reply to Plaintiffs' supplemental brief. The Court has only considered the supplemental briefing to the extent it complies with the Court's Order allowing supplemental briefing on the Supreme Court ruling in *POM Wonderful LLC v. Coca-Cola Co., 134 S.Ct. 2228, 189 L. Ed. 2d 141 (2014)* and its impact on the motion to dismiss.

**BACKGROUND**

In this purported class action, Plaintiffs challenge the ingredients label on Defendants' carbonated cola beverage, known as Coca-Cola or Coke. Defendants include the ingredient phosphoric acid on the Coke label. Plaintiffs allege that phosphoric acid is actually an artificial flavor and/or chemical preservative and should be labeled as such in accordance with the applicable regulations. Defendants argue that phosphoric acid does not constitute an artificial flavor and/or chemical preservative under [*3] the applicable regulations and, thus, Plaintiffs claims are preempted and should be dismissed.

The putative class action alleges causes of action for violations of the following state consumer protection laws: (1) California Consumer Legal Remedies Act ("CLRA"), *California Civil Code § 1750, et seq.*; (2) Unfair Competition Law ("UCL"), *California Business and Professions Code § 17200, et seq.*; (3) False Advertising Law ("FAL"), *California Business and Professions Code § 17500, et seq.*, and (4) breach of the implied warranty of merchanability. The Court shall address additional facts as necessary in the remainder of this Order.

**LEGAL STANDARD**

Defendants move to dismiss each of the claims pursuant to *Rule 12(b)(6)*. A motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)* must be granted where the pleadings fail to state a claim upon which relief can be granted. The court construes the complaint in the light most favorable to the non-moving party and considers all material allegations in the complaint as true. *Sanders v. Kennedy, 794 F.2d 478, 481 (9th Cir. 1986)*. However, even under the liberal pleading standard of *Federal Rule of Civil Procedure 8(a)(2)*, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (citing *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986))*.

Pursuant to *Twombly*, a plaintiff must not merely allege conceivable conduct but must instead allege "enough facts [*4] to state a claim to relief that is plausible on its face." *Id. at 570*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 677, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citing *Twombly, 550 U.S. at 556*). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. . . When a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id*. (quoting *Twombly, 550 U.S. at 557*) (internal quotation marks omitted).

Pursuant to *Federal Rule of Civil Procedure 9(b)*, "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." In addition, a claim "grounded in fraud" may be subject to *Rule 9(b)*'s heightened pleading requirements. A claim is "grounded in fraud" if the plaintiff alleges a unified course of fraudulent conduct and relies entirely on that course of conduct as the basis of his or her claim. *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1104 (9th Cir. 2003)*. However, *Rule 9(b)*'s particularity requirements must be read in harmony with *Federal Rule of Civil Procedure 8*'s requirement of a "short and plain" statement of the claim. Thus, the particularity [*5] requirement is satisfied if the complaint "identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations." *Moore v. Kayport Package Exp., Inc., 885 F.2d 531, 540 (9th Cir. 1989)*; *see also Vess, 317 F.3d at 1106*. Accordingly, "[a]verments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Vess, 317 F.3d at 1107* (quoting *Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997))*.

"If the allegations are insufficient to state a claim, a court should grant leave to amend, unless amendment would be futile. *See, e.g., Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990)*; *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc., 911 F.2d 242, 246-47 (9th Cir. 1990)*.

**ANALYSIS**

**A. Motion to Dismiss**.

**1. Preemption**.

The Food Drug and Cosmetics Act ("FDCA") empowers the Federal Drug Administration ("FDA") (a) to protect the public health by ensuring the safety, wholesomeness, sanitariness, and proper labeling of foods; (b) to promulgate regulations to implement this statute; and (c) to enforce its regulations through administrative proceedings. *See 21 U.S.C. § 393(b)(2)(A)*. The FDCA established a comprehensive federal scheme of food regulation to ensure food safety and proper labeling in an effort to avoid misleading consumers. *See 21 U.S.C. § 341, et seq.* Among other labeling requirements, the FDCA mandates the identification of artificial flavors and chemical preservatives. *See 21 U.S.C. § 343(k)*.

In 1990, Congress amended the FDCA by enacting the Nutrition Labeling and Education Act [*6] of 1990 ("NLEA") to "clarify and to strengthen [the FDA's] authority to require nutrition labeling on foods and to establish the circumstances under which consumers may bring claims over such nutrition labels. *See* H.R. Rep. No. 101-538, at 7 (1990), reprinted in 1990 U.S.C.C.A.N. 3336, 3337. Pursuant to the NLEA, the FDA promulgated regulations relating to food labeling. *See, e.g., 21 C.F.R. § 101.1, et seq.*

Generally, the FDA considers a food misbranded if "its labeling is false or misleading in any particular." *See 21 U.S.C. § 343(a)(1)*. However, the NLEA amendments included a broad express preemption provision that governs the labeling of products. *See 21 U.S.C. § 343-1(a)(3)*. Congress declared that the NLEA "shall not be construed to preempt any provision of State law, unless such provision is expressly preempted under [*21 U.S.C. § 343-1(a)*]." Pub. L. No. 101-535, 104 Stat. 2353, 2364 (Nov. 8, 1990). In particular, the NLEA provides, in pertinent part, that no state may directly or indirectly establish "any requirement for the labeling of food that is not identical to the requirement of [*21 U.S.C. § 343(q)*]." *See 21 U.S.C. § 343-1(a)(4)*. The NLEA, however, does not purport to preclude all state regulation of nutritional labeling, but rather seems to "prevent State and local governments from adopting inconsistent requirements with respect to the labeling of nutrients." [*7] *Astiana v. Ben & Jerry's Homemade, Inc., 2011 U.S. Dist. LEXIS 57348, 2011 WL 2111796, at *8 (N.D. Cal. May 26, 2011)* (quoting H. Rep. No 101-538, at 10 (1990)).

California's Sherman Laws adopt the federal labeling requirements as the food labeling requirements of the state. *See Cal. Health & Safety Code § 110100(a)* ("All food labeling regulations and any amendments to those regulations adopted pursuant to the federal act, in effect on January 1, 1993, or adopted on or after that date shall be the food regulations of this state."). In addition to this blanket provision, the Sherman Laws specifically adopted certain provisions that mirror or incorporate by reference the FDCA and NLEA food labeling and packing requirements, including the following provisions that, inter alia, form the basis for the "unlawful" prong of plaintiff's UCL claim: "Any food is misbranded if it bears or contains any artificial flavoring, artificial coloring, or chemical preservative, unless its labeling states that fact. Exemptions may be established by the department." *See Cal. Health & Safety Code § 110740*.

The issue presented by Defendants' motion to dismiss is whether phosphoric acid is considered an artificial flavor or chemical preservative under the FDCA and the applicable regulations. If it is not, Plaintiffs' claims would be preempted.

**a. Artificial Flavor**.

The FDA regulations define "artificial [*8] flavor" as

> any substance, the function of which is to impart flavor, which is not derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible yeast, herb, bark, bud, root, leaf or similar plant material, meat, fish, poultry, eggs, dairy products, or fermentation products thereof. Artificial flavor includes the substances listed in *§§ 172.515(b)* and *182.60* of this chapter except where these are derived from natural sources.

*See 21 C.F.R. § 101.22(a)(1)*. Plaintiffs allege that Defendants use phosphoric acid to add a tartness to Coke. On the face of the above regulation, Plaintiffs allegations appear sufficient to show, at this procedural stage, that phosphoric acid was used to impart flavor, but was not labeled in accordance with the applicable regulations. Defendants make several arguments in an attempt to show that, as a matter of law, the Court may determine that phosphoric acid is not an artificial flavor. The Court does not find any of their arguments persuasive.

First, Defendants argue that because phosphoric acid is not listed as one of the substances in *21 C.F.R. §§ 172.515(b)* and *182.60*, the Court should find that the FDA has made a determination that phosphoric acid is not an artificial flavor. However, as the regulation states,

[*9] theses lists are not exhaustive. Therefore, the absence of phosphoric acid on these lists does not mean that the FDA has made a finding that phosphoric acid is *not* an artificial flavor.

Second, Defendants argue that an artificial flavor has to impart a "characteristic flavor." In support of this argument, Defendants cite to *21 C.F.R. §§ 170.3(o)(11), (12)*. This regulation provides:

> The following terms describe the physical or technical functional effects for which direct human food ingredients may be added to foods. . . .
>
> . . .
>
> (11) Flavor enhancers: Substances added to supplement, enhance, or modify the original taste and/or aroma of a food, without imparting a characteristic taste or aroma of its own.
>
> (12) Flavoring agents and adjuvants: Substances added to impart or help impart a taste or aroma in food.

*See 21 C.F.R. §§ 170.3(o)(11), (12)*. These regulations, standing alone, are insufficient to insert a requirement that all artificial flavors, by definition, must impart a characteristic taste and/or aroma. The cases on which Defendants rely do not assist either. *See Ivie v. Kraft Foods Global, Inc., 961 F. Supp. 2d 1033, 1041 (N.D. Cal. 2013)*; *Viggiano v. Hansen Natural Corp., 944 F. Supp. 2d 877, 888-89 (C.D. Cal. 2013)*; *Lam v. General Mills, Inc., 859 F. Supp. 2d 1097, 1102-03 (N.D. Cal. 2012)*. In each of those cases, the courts were addressing the claim that an ingredient in the product made the natural characteristic flavor label misleading pursuant to *21 C.F.R. § 101.22(i)(2)*, a regulation [*10] that is not at issue in the above captioned matter. This regulation provides, in pertinent part, that

> If the label, labeling, or advertising of a food makes any direct or indirect representations with respect to the primary recognizable flavor(s), by word, vignette, e.g., depiction of a fruit, or other means, or if for any other reason the manufacturer or distributor of a food wishes to designate the type of flavor in the food other than through the statement of ingredients, such flavor shall be considered the characterizing flavor and shall be declared in the following way:
>
> . . .
>
> (2) If the food contains any artificial flavor which simulates, resembles or reinforces the characterizing flavor, the name of the food on the principal display panel or panels of the label shall be accompanied by the common or usual name(s) of the characterizing flavor, in letters not less than one-half the height of the letters used in the name of the food and the name of the characterizing flavor shall be accompanied by the word(s) "artificial" or "artificially flavored", in letters not less than one-half the height of the letters in the name of the characterizing flavor, e.g., "artificial vanilla", "artificially [*11] flavored strawberry", or "grape artificially flavored".

*See 21 CFR § 101.22(i)*. Neither Plaintiffs nor Defendants contend that the Coke label makes any direct or indirect representation with respect to the primary recognizable flavor. Accordingly, this regulation, and the authority construing it, is inapplicable. Significantly, the *Ivie* court, when addressing a claim that more closely relates to the claims asserted by Plaintiffs here -- that certain ingredients constituted artificial flavors or sweeteners and should have been labeled as such -- the court held that the factual determination of whether such ingredients did, in fact, qualify as artificial flavors or sweeteners could not be made upon a motion to dismiss. *See Ivie v. Kraft Foods Global, Inc., 2013 U.S. Dist. LEXIS 25615, 2013 WL 685372, *10 (N.D. Cal. Feb. 25, 2013)*. The court did not consider whether or not the ingredients imparted a characteristic flavor.

The Court concurs with the finding of the court in *Ivie* and finds that it cannot make a factual determination upon a motion to dismiss as to whether phosphoric acid qualifies as an artificial flavor. Accordingly, the Court cannot find, as a matter of law, that Plaintiffs' claims with respect to artificial flavoring are expressly preempted.

**b. Chemical Preservative**.

The FDA regulations define "chemical [*12] preservative" as

> any chemical that, when added to food, tends to prevent or retard deterioration thereof, but does not include common salt, sugars, vinegars, spices, or oils extracted from spices, substances added to food by direct exposure thereof to wood smoke, or chemicals applied for their insecticidal or herbicidal properties.

*See 21 C.F.R. § 101.22(a)(5)*. Defendants argue that chemical preservatives only include ingredients that are specifically added to food for their preservative function, and that, phosphoric acid does not meet this definition for Coke. However, even if Defendants' interpretation of the FDA regulations was accurate, it would require a factual determination that is not appropriate at this procedural stage. Accordingly, the Court cannot find, as a matter of law upon a motion to dismiss, that Plaintiffs' claims with respect to chemical preservatives are expressly preempted.

Nor does the Court find that Plaintiffs' claims are impliedly preempted or that the Court should abstain from deciding their claims pursuant to the primary jurisdiction doctrine.

**2. Failure to State a Claim**.

Defendants also move to dismiss Plaintiffs' claims on the grounds that they fail to state a claim. Specifically, [*13] Defendants argue that Plaintiffs fail to allege sufficient facts to show reliance as required under their UCL, FAL, and CLRA claims, that Plaintiffs' "Original Formula" claims fail, and that Plaintiffs fail to allege an implied warranty claim.

**a. Reliance**.

Plaintiffs need to allege reliance for their claims under the UCL, FAL, and CLRA. *Kwikset Corp. V. Superior Ct., 51 Cal. 4th 310, 326, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011)*; *see also Wilson v. Frito-Lay North America, Inc., 961 F. Supp. 2d 1134, 1143-44 (N.D. Cal. 2013)*. Plaintiffs argue that they do not need to allege reliance for their unlawful claim under the UCL. However, because this claim is grounded in fraud, their unlawful claim is subject to the same requirements regarding reliance. Nevertheless, Plaintiffs sufficiently plead that they did not know that phosphoric acid was an artificial flavor or a chemical preservative, that they would not purchased Coke if they had known it contained artificial flavoring and/or a chemical preservative, and that they relied on Coke's labels. (Amended Class Action Compl., ¶¶ 107-109, 117.) Accordingly, the Court denies the motion to dismiss on this ground.

**b. Original Formula**.

Plaintiffs' Amended Class Action Complaint includes several allegations regarding Coke's "original formula." Defendants argue that Plaintiffs' allegations regarding the "original formula" fail [*14] to state a claim. Plaintiffs do not oppose Defendants' motion on this ground. Accordingly, the Court dismisses Plaintiffs' claims to the extent they are premised on contentions regarding Coke's "original formula."

**c. Plaintiffs' Implied Warranty Claim**.

"Unless excluded or modified [ ], a warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." *Cal. Comm. Code § 2314(1)*. "[L]iability for an implied warranty does not depend upon any specific conduct or promise on [the defendant's] part, but instead turns upon whether the[ ] product is merchantable under the code." *Hauter v. Zogarts, 14 Cal. 3d 104, 117, 120 Cal. Rptr. 681, 534 P.2d 377 (1975)*. The Commercial Code does not "impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of quality." *Id*. A plaintiff who claims a breach of the implied warranty of merchantability must show that the product "did not possess even the most basic degree of fitness for ordinary use." *Mocek v. Alfa Leisure, Inc., 114 Cal. App. 4th 402, 406, 7 Cal. Rptr. 3d 546 (2003)*.

Where the plaintiffs did not allege that the products lacked the most basic degree of fitness, courts have rejected claims that products violate the implied warranty of merchantability based on the alleged label violations under [*15] the FDCA. *See, e.g., Viggiano v. Hansen Natural Corp., 944 F. Supp. 2d 877, 896 (C.D. Cal. 2013)* (dismissing implied warranty of merchantability claim where plaintiff did not allege that Hansen's diet soda was not suitable for use as a diet soda); *Swearingen v. Amazon Preservation Partners, Inc., 2014 U.S. Dist. LEXIS 111704, 2014 WL 3934000, *1 (N.D. Cal. Aug. 11, 2014)* (dismissing claim premised on labeling violation where plaintiffs failed to allege that the products "lack even the most basic degree of fitness for ordinary use"); *Bohac v. Gen. Mills, Inc., 2014 U.S. Dist. LEXIS 41454, 2014 WL 1266848, *10 (N.D. Cal. Mar. 26, 2014)* (dismissing implied warranty of merchantability claim where plaintiff did not allege that the accused granola bars "were not edible or contaminated"). Plaintiffs fail to cite to any authority demonstrating a mere alleged labeling violation, in the absence of any allegation regarding the product's basic degree of fitness for ordinary use, is sufficient to state a claim for breach of implied warranty. Accordingly, the Court dismisses Plaintiffs' breach of implied warranty claim. The Court will provide Plaintiffs with leave to amend to state a claim for breach of the implied warranty.

**CONCLUSION**

For the foregoing reasons, the Court DENIES IN PART AND GRANTS IN PART Defendants' motion to dismiss. The Court GRANTS the motion to dismiss as to Plaintiffs' allegations regarding Coke's "original formula" and as to Plaintiffs' claim for breach of the implied warranty. [*16] The Court DENIES the motion in all other respects. Plaintiffs may file an amended complaint to allege a claim for breach of implied warranty. In light of the likely consolidation of this case with the other related cases, the Court will not set a deadline to amend at this time.

The Court HEREBY CONTINUES the case management conference to September 26, 2014 at 11:00 a.m. The parties shall file an updated case management statement by no later than September 19, 2014. The statement shall include a proposal from the parties regarding a deadline to amend the pleadings to include a claim for breach of implied warranty. Moreover, if all parties agree to consolidating all of the actions in the MDL proceeding, the deadline will also be the deadline to file a consolidated complaint. If all parties do not agree to consolidation, Plaintiffs shall file a motion to consolidate by no later than September 19, 2014.

The Court admonishes Plaintiffs that, to the extent they view this case, or the related cases, as an opportunity to settle a class action and obtain a large sum of attorneys fees, the Court will review any request for attorneys fees as part of a class action settlement with close scrutiny. [*17] From what the Court has observed to date, Plaintiffs have been expending additional, unnecessary hours. As an example, in response to an order allowing supplemental briefing simply on the implications of the Supreme Court's ruling in one case, Plaintiffs filed a fifteen page brief along with voluminous exhibits addressing issues that went far beyond the legal application of the Supreme Court's case.

**IT IS SO ORDERED**.

Dated: August 21, 2014

/s/ Jeffrey S. White

JEFFREY S. WHITE

UNITED STATES DISTRICT JUDGE

In the

# United States Court of Appeals

## For the Seventh Circuit

---

Nos. 14-1470, -1471, -1658

SCOTT D.H. REDMAN, individually and on behalf of all others similarly situated, *et al.*,

*Plaintiffs-Appellees*,

*v.*

RADIOSHACK CORPORATION,

*Defendant-Appellee*.

APPEAL OF: MICHAEL ROSMAN, *et al.*,

*Objectors*.

---

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 11 C 6741 — **Maria G. Valdez**, *Magistrate Judge*.

---

No. 14-1320

SULEJMAN NICAJ,

*Plaintiff-Appellant*,

*v.*

SHOE CARNIVAL, INCORPORATED,

*Defendant-Appellee*.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 13 C 7793 — **Thomas M. Durkin**, *Judge*.

ARGUED SEPTEMBER 8, 2014 — DECIDED SEPTEMBER 19, 2014

Before WOOD, *Chief Judge*, and POSNER and HAMILTON, *Circuit Judges*.

POSNER, *Circuit Judge*. We have consolidated for decision appeals in two class actions filed under the Fair and Accurate Credit Transactions Act ("FACTA"), 15 U.S.C. § 1681c(g). The Act provides, so far as relates to these cases, that "no person that accepts credit cards or debit cards for the transaction of business shall print [electronically, as distinct from by handwriting or by an imprint or copy of the card] more than the last 5 digits of the card number *or the expiration date* upon any receipt provided to the cardholder at the point of the sale or transaction." §§ 1681c(g)(1), (2) (emphasis added). The present cases concern the expiration date. The idea behind requiring its deletion is that, should the cardholder happen to lose the receipt of a transaction, the less information the receipt contains the less likely is an identity thief who happens to come upon the receipt to be able to figure out the cardholder's full account information and thus be able to make purchases that the seller will think were made by the legitimate cardholder.

A typical credit card has 16 digits and an expiration date that is the last day of a designated month and year. Even if the identity thief has all 16 digits, without the expiration date he may be unable to use the card. He can of course guess at the expiration date—the date is unlikely to be more than a few years in the future and there are only 12 months in a year; so if he guesses 60 times he's very likely to hit the jackpot. But if he guesses wrong the first few times that he places an order, the card issuer may well get suspicious and refuse to authorize his next order. See, e.g., D. Lee, "Nine Reasons Your Credit Card Was Declined," *Fox Business*, May 21, 2013, www.foxbusiness.com/personal-finance/2013/05/21/nine-reasons-your-credit-card-was-declined/ (visited Sept. 12, 2014, as were the other websites cited in this opinion). It's common in telephone and internet transactions for the consumer to be asked for an expiration date, and most systems will not allow the would-be customer to keep guessing at the date, as the guessing suggests that he may be an identity thief.

Additional reasons for requiring deletion of the expiration date include that "expiration dates combined with the last four or five digits of an account number can be used to bolster the credibility of a criminal who is making pretext calls to a card holder in order to learn other personal confidential financial information. Expiration dates are solicited by criminals in many e-mail phishing scams …, are one of the personal confidential financial information items trafficked in by criminals …, are described by Visa as a special security feature …, [and] are one of the items contained in the magnetic stripe of a credit card, so it is useful to a criminal when creating a phony duplicate card." Don Coker, "Credit Card Expiration Dates and FACTA," *HGExperts.com*, www.hgexperts.com/article.asp?id=6665.

If a violation of the statute is willful, a consumer whose receipt contains as a result of the violation data that should have been deleted, but who sustains no harm because no one stole his identity as a result of the violation, is nevertheless entitled to "statutory damages," as distinct from compensatory or punitive damages, of between $100 and $1000. 15 U.S.C. § 1681n(a)(1)(A). (Statutory damages are in effect bounties—means of inducing private persons to enforce a regulatory law.) In contrast, a consumer harmed by the violation of the statute can obtain actual damages by showing that the violation was the result of negligence, § 1681o; he need not prove willfulness.

To act "willfully" is, for purposes of civil law, to engage in conduct that creates "an unjustifiably high risk of harm that is either known or so obvious that it should be known," *Farmer v. Brennan*, 511 U.S. 825, 836 (1994)—reckless conduct, in other words, as held in *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 56–60 (2007), but reckless conduct in the civil sense. Criminal recklessness is generally held to require "knowledge of a serious risk to another person, coupled with failure to avert the risk though it could easily have been averted," *Slade v. Board of School Directors*, 702 F.3d 1027, 1029 (7th Cir. 2012); see also *Black's Law Dictionary* 1298–99 (Bryan A. Garner ed., 8th ed. 2004), "whereas in civil cases at common law it is enough that the risk, besides being serious and eminently avoidable, is obvious; it need not be known to the defendant." *Slade v. Board of School Directors*, *supra*, 702 F.3d at 1029.

The known or obvious risk in this case would be failing to delete the expiration date on the consumer's credit-card or debit-card purchase receipt, whereas to be guilty merely of negligence it would be enough that a reasonable person would have deleted it. See *Wassell v. Adams*, 865 F.2d 849, 855 (7th Cir. 1989).

Willfulness is an issue in both our cases. But it is a peripheral issue in the RadioShack case, while it is the primary issue in our other case, the Shoe Carnival case. Although both are class action suits, the district court in *Shoe Carnival* dismissed the suit with prejudice before certifying a class; there are no issues in that case concerning class action procedure. (The defendant could have sought class certification in order to prevent future similar suits by other class members, but did not.) *RadioShack*, in contrast, is centrally about class action procedure. The parties settled and the district court approved the settlement, and the appeal is by class members who objected to the approval. We begin with that case but defer discussion of the willfulness issue in it to later, when we take up the appeal in *Shoe Carnival*.

RadioShack Corporation is a large, well-known retail purveyor mainly of consumer electronics, cell phones, and related consumer products such as batteries, see "RadioShack," *Wikipedia*, http://en.wikipedia.org/wiki/RadioShack, sold mainly in RadioShack's thousands of stores rather than online. The class action suit was filed on behalf of consumers who bought products at RadioShack stores, paid with credit or debit cards, and received electronically printed receipts that contained the card's expiration date. The suit was filed in September 2011. In May 2013, before any substantive motions had been decided, the named plaintiffs (realistically, class counsel) agreed with RadioShack on terms of settlement. The essential term was that each class member who responded positively to the notice of the proposed settlement would receive a $10 coupon that it could use at any RadioShack store. The class member could use it to buy an item costing $10 or less (but he would receive no change if the item cost less than $10), or as part payment for an item costing more. He could stack up to three coupons (if he had them) and thus obtain a $30 item, or a $30 credit against a more expensive item. He could also sell his coupon or coupons, but the coupons had to be used within six months of receipt because they would expire at the end of that period.

With regard to three-coupon stacking, the only way a member of the class could obtain more than a single coupon would be to buy one or more coupons from another class member, because the settlement allows only one coupon per customer no matter how many of his or her RadioShack purchases involved the erroneous receipts (in itself an arbitrary restriction on the value of the settlement to class members). But coupons may be difficult to buy. The owner would be reluctant to sell it for less than $10, as that would mean selling at a loss, but no sane person would pay more because a $10 coupon is worth only $10. Doubtless some owners, however, will sell because they don't plan to use the coupon or have no interest in a product that doesn't cost less than $10. Those owners are potential sellers. Nevertheless the secondary market in coupons is bound to be thin because of the paucity of coupons, the short expiration date, the limit to three per transaction (so people who want big-ticket items won't find the secondary market attractive as a source of coupons), and the bother of going online to buy $10 coupons at small discounts.

Although the class was assumed to contain 16 million members, notice of the proposed settlement was sent to fewer than 5 million. Actually no one can be sure whether the 16 million transactions involved 8 million different consumers, 12 million, or any other number, because of the one-coupon-per-person restriction. This may be a reason why the settlement administrator notified only about 5 million RadioShack consumers, though cost may have been the primary reason.

Of those potential class members who received notice of the proposed settlement, some 83,000 (we'll assume for simplicity that it was exactly 83,000)—a little more than one half of one percent of the entire class, assuming the entire class really did consist of 16 million different consumers—submitted claims for the coupon in response. The magistrate judge's statement that "the fact that the vast majority of class members—over 99.99%—have not objected to the proposed settlement or opted out suggests that the class generally approves of its terms and structure" is naïve, as is her basing confidence in the fairness of the settlement on its having been based on "arms-length negotiations by experienced counsel." The fact that the vast majority of the recipients of notice did not submit claims hardly shows "acceptance" of the proposed settlement: rather it shows oversight, indifference, rejection, or transaction costs. The bother of submitting a claim, receiving and safeguarding the coupon, and remembering to have it with you when shopping may exceed the value of a $10 coupon to many class members. And "arm's-length negotiations" are consistent with the existence of a conflict of interest on the part of one of the negotiators—class counsel—that may warp the outcome of the negotiations. The magistrate judge's further reference to "the considerable portion of class members who have filed claims" questionably treats one-half of one percent as being a "considerable portion."

Another term of the proposed settlement was that RadioShack would pay class counsel $1 million (reduced by the district court to $990,291.88, but we'll round it off to $1 million for simplicity) in attorneys' fees, plus pay various administrative costs including the cost of notice. The agreed-upon attorneys' fees, plus the $830,000 worth of coupons at face value, plus the administrative costs, add up to about $4.1 million. Class counsel argued that since the attorneys' fees were only about 25 percent of the total amount of the settlement, they were reasonable. The district court, agreeing, approved the settlement, precipitating this appeal by two groups of class members who objected to the settlement in the district court.

A trial judge's instinct, in our adversarial system of legal justice, is to approve a settlement, trusting the parties to have negotiated to a just result as an alternative to bearing the risks and costs of litigation. But the law quite rightly requires more than a judicial rubber stamp when the lawsuit that the parties have agreed to settle is a class action. The reason is the built-in conflict of interest in class action suits. The defendant (as RadioShack's lawyer candidly admitted at the oral argument) is interested only in the bottom line: how much the settlement will cost him. And class counsel, as "economic man," presumably is interested primarily in the size of the attorneys' fees provided for in the settlement, for those are the only money that class counsel, as distinct from the members of the class, get to keep. The optimal settlement from the joint standpoint of class counsel and defendant, assuming they are self-interested, is therefore a sum of money moderate in amount but weighted in favor of attorneys' fees for class counsel. Ordinarily—in this case dramatically—individual members of the class have such a small stake in the outcome of the class action that they have no incentive to monitor the settlement negotiations or challenge the terms agreed upon by class counsel and the defendant.

True, there is always a named plaintiff—a member of the class (sometimes several members) listed as the plaintiff in the case filings—because there is no civil suit without a plaintiff. But often (though we were told at argument not in this case) the named plaintiff is the nominee of class counsel, and in any event he is dependent on class counsel's good will to receive the modest compensation ($5,000 in this case) that named plaintiffs typically receive.

The judge asked to approve the settlement of a class action is not to assume the passive role that is appropriate when there is genuine adverseness between the parties rather than the conflict of interest recognized and discussed in many previous class action cases, and present in this case. See, e.g., *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014); *Staton v. Boeing Co.*, 327 F.3d 938, 959–61 (9th Cir. 2003); *In re GMC Pick–Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 801, 819–20 (3d Cir. 1995). Critically the judge must assess the value of the settlement to the class and the reasonableness of the agreed-upon attorneys' fees for class counsel, bearing in mind that the higher the fees the less compensation will be received by the class members. When there are objecting class members, the judge's task is eased because he or she has the benefit of an adversary process: objectors versus settlors (that is, versus class counsel and the defendant).

Unfortunately the magistrate judge in approving the settlement in *RadioShack* failed to analyze the issues properly. Let's begin with the value of the award to the class members. The judge accepted the settlors' contention that the defendant's entire expenditures should be aggregated in determining the size of the settlement; it was this aggregation that reduced the award of attorneys' fees to class counsel to a respectable-seeming 25 percent. But the roughly $2.2 million in administrative costs should not have been included in calculating the division of the spoils between class counsel and class members. Those costs are part of the settlement but not part of the value received from the settlement by the members of the class. The costs therefore shed no light on the fairness of the division of the settlement pie between class counsel and class members.

Of course without administration and therefore administrative costs, notably the costs of notice to the class, the class would get nothing. But also without those costs class counsel would get nothing, because the class, not having learned of the proposed settlement (or in all likelihood of the existence of a class action), would have derived no benefit from class counsel's activity. And without reliable administration the defendant will not have the benefit of a valid and binding settlement. Yet although the administrative costs benefit class counsel and the defendant as well as the class members, the district court's fee award incorrectly treated every penny of administrative expense as if it were cash in the pockets of class members. By doing so the court eliminated the incentive of class counsel to economize on that expense—and indeed may have created a perverse incentive; for higher administrative expenses make class counsel's proposed fee appear smaller in relation to the total settlement than if those costs were lower.

We are mindful that in *Staton v. Boeing Co.*, *supra*, 327 F.3d at 975, the Ninth Circuit said that "where the defendant pays the justifiable cost of notice to the class—but not, as here, an excessive cost—it is reasonable (although certainly not required) to include that cost in a putative common fund benefiting the plaintiffs for all purposes, including the calculation of attorneys' fees." The reason the court gave was that notice is a benefit to the class. The court overlooked the fact that it is also a benefit to class counsel. And in this case the administrative costs taken into account by the magistrate judge in determining the "fairness" of the attorneys' fee award were not limited to costs of notice to the class.

The ratio that is relevant to assessing the reasonableness of the attorneys' fee that the parties agreed to is the ratio of (1) the fee to (2) the fee plus what the class members received. At most they received $830,000. That translates into a ratio of attorneys' fees to the sum of those fees plus the face value of the coupons of 1 to 1.83, which equates to a contingent fee of 55% ($1,000,000 ÷ ($1,000,000 + $830,000)). Computed in a responsible fashion by substituting actual for face value, the ratio would have been even higher because 83,000 $10 coupons are not worth $830,000 to the recipients. Anyone who buys an item at RadioShack that costs less than $10 will lose part of the value of the coupon because he won't be entitled to change. Anyone who stacks three coupons to buy an item that costs $25 will lose $5. Anyone who fails to use the coupon within six months of receiving it will lose its entire value. (Six-month coupons are not unusual, but redemption periods usually are longer. See, e.g., *In re Mexico Money*

*Transfer Litigation (Western Union & Valuta)*, 164 F. Supp. 2d 1002, 1010–11 (N.D. Ill. 2000) (35 months); *Henry v. Sears Roebuck & Co.*, 1999 WL 33496080, at *10 (N.D. Ill. 1999) (nearly three years).) Anyone who sells his coupon will get less than the coupon's face value. Some recipients of coupons will lose them or forget about them. The chipping away at the nominal value of the settlement by the numerous restrictions imposed in the settlement agreement echoes the even more egregious such chipping away that we encountered in *Eubank v. Pella*, *supra*, 753 F.3d at 724–26.

No attempt was made by the magistrate judge or the parties to the proposed settlement to estimate the actual value of the nominal $830,000 worth of coupons. Couponing is an important retail marketing method, and one imagines that it would have been possible to obtain expert testimony (including neutral expert testimony by the court's appointing an expert, as authorized by Fed. R. Evid. 706), or responsible published materials, on consumer response to coupons. And likewise it should have been possible to estimate the value of couponing to sellers—a marketing device that in some circumstances must be more valuable than cutting price, as otherwise no retailer would go to the expense of buying and distributing coupons. In fact couponing is believed to confer a number of advantages on a retail seller (which RadioShack is):

> Regular use of good couponing strategy will provide a steady stream of new customers and high quality sales leads. … Coupons have the effect of expanding or increasing your market area. We know that consumers will travel far to redeem a valuable coupon. Coupons will entice new customers that have been shopping at your competitor. It's a proven fact that consumers will

> break routine shopping patterns to take advantage of a good coupon offer. Coupons attract new residents when they are actively in the market for products and services. … Coupons will re-activate old customers. Those customers that have been lured away by your competitor will start buying from you again when you give them a good reason to do so. … Coupon advertising provides the opportunity for additional profits through sale of related items. … When you offer a special "deal" on a coupon to invite a customer to do business with you, you have to remember that this same customer will probably end up buying additional items that carry a full profit margin. In addition, you also are being given the opportunity to "sell-up" to a more profitable product or service. You would not have had this opportunity had it not been for the coupon getting the customer through the door in the first place. Coupons build store traffic which results in additional impulse purchases. Coupons are measurable and accountable. … It's simply a matter of counting the number of coupons redeemed to judge the effectiveness of the offer. Wise use of this consumer feedback will guide you in creating future offers that improve your results.

Thom Reece, "How to Use Coupons to Promote Your Business," *business know-how*, www.businessknowhow.com/marketing/couponing.htm.

Another way in which couponing benefits a firm in RadioShack's position is that it costs the seller only the wholesale price of a product bought by a customer with a coupon in order to give the customer a retail benefit. RadioShack is out of pocket only the wholesale price of a $10 item bought with a coupon; it would have been out a full $10 had the settlement required it to pay class members in cash. True, there are administrative costs in processing coupon transactions, but there are such costs in processing cash transactions as well. And while were there no coupons there would be more cash sales, at full retail price, coupon selling must be advantageous for sellers relative to price cuts or else it wouldn't be as common as it is.

To the extent that couponing would thus benefit RadioShack, it reduces the cost of the proposed settlement and therefore the likelihood that it would endanger the company's solvency. That's fine, as we're about to see, because RadioShack appears to be teetering on the brink of insolvency and if it goes over the brink the value of the coupons may be drastically impaired. But while we don't know how much $830,000 of coupons would be worth to the class, we can be confident that it would be less than that nominal amount, doubtless considerably so. And we note that were the value only $500,000—and it may indeed be no greater—the agreed-upon attorneys' fee award would be the equivalent of a 67 percent contingency fee.

One possible solution, in a case in which the agreed-upon attorneys' fee is grossly disproportionate to the award of damages to the class, is to increase the share of the settlement received by the class, at the expense of class counsel. Another possible solution is to jack up the award of damages, in this case for example from $830,000 to $2 million (cash, not coupons), while leaving the fee award at $1 million. The administrative costs might also be increased, specifically by increasing the number of class members notified of the settlement, in order to give more class members a slice of the pie. The total cost of the settlement might rise from $4.1 million to say $6 million.

But here's the rub, regarding the second suggested adjustment in the settlement, the adjustment that increases the size of the settlement rather than its division between class counsel and class members: RadioShack is in terrible financial shape. Recently Moody's reduced the company's credit rating to Caa2 ("rated as poor quality and very high credit risk"). Moody's Investor Service, "Rating Action: Moody's Downgrades RadioShack's CFR to Caa2; Outlook Remains Negative," May 5, 2014, www.moodys.com /research/Moodys-downgrades-RadioShacks-CFR-to-Caa2-outlook-remains-negative--PR_294298. See also Will Ashworth, "RadioShack Stock—Cue the Comeback? RSH Doled Out a Doubler Within a Week, But How Real Are RadioShack's Survival Chances?," *InvestorPlace*, Sept. 2, 2014, http://investorplace.com/2014/09/radioshack-stock-rsh-comeback/#.VA9IrvldUnU. An article by William Alden ominously entitled "RadioShack Sees Filing for Bankruptcy Near" was published just last week in the *New York Times*, Sept. 12, 2014, p. B3.

Adding millions to the cost of the settlement to RadioShack might, if not precipitate the company's failure, make it more likely—an outcome that might leave very little for the class members. A modest settlement is the prudent course. And a coupon settlement has the virtue of boosting RadioShack's business, since as we've noted couponing is a marketing device that must sometimes be more effective than an equivalent price cut. So even if the proposed settlement of $830,000 in coupons is worth a good deal less than face value and is therefore modest relative to a potential class of millions of consumers, we think it was adequate in the parlous circumstances in which the defendant finds itself. But that is not to say that the $1 million attorneys' fee is reasonable; and if it were cut down the amount saved could be reallocated to the class, thereby increasing the meager value of the settlement to the class members. That was the first possible modification that we mentioned: changing the relative shares of the settlement received by class counsel and class members without increasing the amount of the settlement.

The magistrate judge based the fee award on the amount of time that class counsel reported putting in on the case, but increased the amount so calculated by 25 percent to reflect the risk created by the possibility that the suit would fail—that, for example, RadioShack might be able to refute an inference of willfulness. But the reasonableness of a fee cannot be assessed in isolation from what it buys. Suppose class counsel had worked diligently—as hard and efficiently as they say they worked—but only a thousand claims had been filed in response to notice of the proposed settlement, so that the total value of the class, even treating a $10 coupon as the equivalent of a $10 bill, was only $10,000. No one would think a $1 million attorneys' fee appropriate compensation for obtaining $10,000 for the clients, even though a poor response to notice is one of the risks involved in a class action. In the present case, similarly though less dramatically, the efforts of class counsel yielded an extremely modest harvest, the value of which the district court made no effort to assess, instead assuming unjustifiably that a $10 coupon is worth $10 to every recipient.

Our response is the same to class counsel's further argument that had the case gone to trial the defendant might have won because a jury might decide that the defendant's violation of the Fair and Accurate Credit Transactions Act had not been willful. We'll be discussing the application of the Act's concept of willfulness in connection with our other case; suffice it to note here that, as we've explained, attorneys' fees don't ride an escalator called risk into the financial stratosphere. Some cases should not be brought, because the litigation costs will exceed the stakes, and others are such long shots that prudent counsel will cut his expenditure in litigating them of time, effort, and money to the bone. Neither course was followed by class counsel in this case. But, as it happened, RadioShack's violation probably *was* willful, as we'll see.

We have emphasized that in determining the reasonableness of the attorneys' fee agreed to in a proposed settlement, the central consideration is what class counsel achieved for the members of the class rather than how much effort class counsel invested in the litigation. But in thus emphasizing value over cost we may seem to be taking sides in a controversy over the interpretation of the coupon provisions of the Class Action Fairness Act, in particular 28 U.S.C. §§ 1712(a) and (b)(1), which read as follows:

> (a) *Contingent Fees in Coupon Settlements*. If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.
>
> (b) *Other Attorney's Fee Awards in Coupon Settlements*. (1) In general. If a proposed settlement in a class action

> provides for a recovery of coupons to class members, and a portion of the recovery of the coupons is not used to determine the attorney's fee to be paid to class counsel, any attorney's fee award shall be based upon the amount of time class counsel reasonably expended working on the action.

This is a badly drafted statute. To begin with, read literally the statutory phrase "value to class members of the coupons that are redeemed" would prevent class counsel from being paid in full until the settlement had been fully implemented. For until then one wouldn't know how many coupons had been redeemed. An alternative interpretation of "value … of the coupons that are redeemed" would be the face value of the coupons received by class members who responded positively to notice of the class action. In this case that would be 83,000 of the millions of class members who received notice, though not all 83,000 will actually use the coupon.

A thoughtful article, after pointing out that "in many situations … it may not be possible or desirable to wait for actual redemption rates to become known" before a coupon class action is settled, nevertheless reads the statutory language "value … of the coupons that are redeemed" literally and so is driven to suggest complicated methods, which would require amending the Class Action Fairness Act, for valuing a coupon settlement without delaying implementation of the settlement indefinitely. Robert H. Klonoff & Mark Hermann, "The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements," 80 *Tulane L. Rev.* 1695, 1701–02 (2006). This interpretation of section 1712(a) is, however, in some tension with section 1712(d), which empowers the district court to "receive expert testimony from a witness qualified to provide information on the actual value to the class members of the coupons that are redeemed." Such a witness could be asked to estimate the likely value of the coupons to the class members before the redemption period expires, and such evidence might provide a more efficient method of compensating the class members and winding up the litigation than waiting months or years for the redemption period to expire and then revising the settlement by giving the class members more or less, or class counsel more or less. Moreover, if the settlement can't be wound up until the redemption period expires, this places pressure on the district court to approve a short redemption period, as in this case—and the shorter the period, the less the value of the coupon. And finally "value" could mean estimated economic value of the settlement, rather than face value times number of coupons.

There is no need for a rigid rule—a final choice, for all cases, among the possibilities suggested. In some cases the optimal solution may be part payment to class members and class counsel up front with final payment when the settlement is wound up. That might be appropriate in a case such as this. What was inappropriate was an attempt to determine the ultimate value of the settlement before the redemption period ended without even an estimate by a qualified expert of what that ultimate value was likely to prove to be.

Another problem with section 1712 is that while subsection (a) is mandatory—under it the attorneys' fee in a coupon settlement *must* be based on the coupons' redemption value—subsection (b)(1) provides an alternative method of determining attorneys' fees in such a case: "the amount of time class counsel reasonably expended working on the action"—what is called, in an opaque bit of legal jargon, the "lodestar method" of calculating fee awards for class counsel.

*In re HP Inkjet Printer Litigation*, 716 F.3d 1173, 1183–84 (9th Cir. 2013), held (with one judge dissenting) that subsection (b)(1) is limited to cases in which the settlement provides both coupon and cash benefits to the class members—whe there are just coupons subsection (a) *must* be used. The reasoning is that coupon redemption value can't be the sole basis for calculating a reasonable attorneys' fee for class counsel if coupons are not the only benefit to the class, but can be if they are the only benefit. This interpretation reflects the suspicion of coupon settlements (the basis of the suspicion being well illustrated by this case) that was the motivation for the coupon provisions of the Act. We need not complicate this opinion further by taking sides in *HP Inkjet*. The important thing is that the district court should be alert to the many possible pitfalls in coupon settlements—pitfalls that moved Congress to amend the Class Action Fairness Act with specific reference to such settlements.

It wouldn't make much difference—maybe it wouldn't make any—if the district court could use the approach of subsection (b)(1) even in all-coupon case like this. The reason is that hours can't be given controlling weight in determining what share of the class action settlement pot should go to class counsel. The judge could start with hours but couldn't rightly stop there. The analogy to hourly billing by law firms fails because law firms bill clients who have agreed to be billed on that basis. Class counsel don't have clients with whom they negotiate billing. Class members do not tell class counsel how much time to expend on a case and how much they can charge per hour. The stakes for an individual class member are typically (as in this case) too slight to induce him to participate actively in the litigation. Class counsel's billing rate and maximum billable hours have to be determined by the court in reviewing the terms of the proposed settlement of the class action. And in that review the amount of the class settlement allocable to class counsel should depend critically on the value of class counsel's work to the class.

Suppose that after working diligently for many days—an amount of work for which normally they would charge a client $1 million—class counsel discovered that the expected value of the litigation (the most reliable predictor of what a judge or jury would award as damages and an appellate court uphold) was $1.1 million, and on that basis they settled the suit with the defendant for that amount. It would be absurd to approve a settlement that awarded class counsel ten times the damages awarded the class ($100,000 in the example), on the basis of "the amount of time class counsel reasonably expended working on the action," even if the expenditure was "reasonable" given what class counsel reasonably but mistakenly had thought the case worth to the class. For that would be a settlement in which class counsel had been able to shift the entire risk of the litigation to their clients.

Analysis is more complex when the principal benefits of the settlement are nonmonetary, as when equitable relief is awarded rather than damages. A value must be attached to the relief obtained by the class as part of the determination of an appropriate attorneys' fee for class counsel, but a rough estimate may be permissible, especially when, as in civil rights cases, much of the value of the equitable relief may be nonmonetizable.

We have called this case an "all-coupon" case but class counsel call it a "zero-coupon" case. They say that a coupon that can be used to buy an entire product, and not just to provide a discount, is a voucher, not a coupon. "Voucher" is indeed the term used in the settlement agreement, because the parties didn't want to subject themselves to the coupon provisions of the Class Action Fairness Act. But the idea that a coupon is not a coupon if it can ever be used to buy an entire product doesn't make any sense, certainly in terms of the Act. Why would it make a difference, so far as the suspicion of coupon settlements that animates the Act's coupon provisions is concerned, that the proposed $10 coupon could be used either to reduce by $10 the cash price of an item priced at more than $10, or to buy the entire item if its price were $10 or less? Coupons usually are discounts, but if the face value of a coupon exceeds the price of an item sold by the issuer of the coupon, the customer often is permitted to use the coupon to buy the item—and sometimes he'll be refunded the difference between that face value and the price of the item. See, e.g., "Coupons: What Are They and Where Do I Start?," *Penny Pinchin' Mom,* www.pennypinchinmom.com /getting-started-on-penny-pinchin-mom/coupons-what-are-they-and-where-do-i-star/.

That is the character of RadioShack's proposed coupons: they can be used either to buy entire items priced up to $10 (though without a refund of any difference between the face value of the coupon and the price of the item bought with it) or to obtain a discount on a pricier item. There are no data on how often a $10 coupon would be used in a RadioShack store to buy an item costing $10 or less rather than to obtain a discount on a pricier item. But it's unlikely that a buyer would use a coupon to buy an item costing less than $10, since the buyer would receive no change. And we are not told how many items in the typical RadioShack store cost exactly $10. (For items that cost more, the coupon is a discount.) We are told that 6000 different products sold by RadioShack are priced at $10 or less, out of some 20,000 different RadioShack products advertised in an online catalog. See *RadioShack—Do It Together*, www.google.com/?gws_rd=ssl#q=RadioShack%20products&nfpr=1&start=0. But we are not told how many of each of the low-priced products the average RadioShack store carries. But it is apparent that the products are actively promoted and presumably most in demand by consumers are on average more expensive than $10. See, e.g., *Weekly Electronics Deals and Discounts*, www.radioshack.com/category/index.jsp?categoryId=41803466. And this means that even if "coupon" is narrowly defined to mean a discount, RadioShack's coupons are mainly coupons in just that narrow sense, and only occasionally vouchers.

In any event the narrow sense is untenable. As we said before, from the standpoint of the dominant concerns that animate the provisions of the Class Action Fairness Act regarding coupon settlements it's a matter of indifference whether the coupon is a discount off the full price of an item or is equal to (or for that matter more than) the item's full price. The Senate Report on the coupon provisions, S. Rep. No. 109-014, pt. IV.D.1 (Lawyers Receive Disproportionate Shares of Settlements), https://beta.congress.gov/109/crpt/srpt14/CRPT-109srpt14.pdf., at pp. 15–20, does not define coupon, but treats the term as interchangeable with "voucher, " *id*. at 16, and evinces no wish to treat vouchers differently from coupons in the evaluation of a proposed class action settlement.

Class counsel point out that elsewhere in the legislative history concern is expressed with settlements that compel class members to spend more money with the defendant if they want to benefit from the settlement, as is the case with a discount, but not with a voucher that is simply exchanged for an item so that no cash changes hands. But this was not Congress's only concern, as shown by the Senate Report just cited, which, as we pointed out, in documenting the abuses of coupon settlements does not give "coupon" the narrow definition urged by class counsel.

This case illustrates *why* Congress was concerned that class members can be shortchanged in coupon settlements whether a coupon is used to obtain a discount off the full price of an item or to obtain the entire item; we have noted the ways in which store credit for $10 is not as valuable to the recipient as $10 in cash. Class counsel's proposed distinction between discount coupons and vouchers also would impose a heavy administrative burden in distinguishing coupons used for discounts on more expensive items ("coupons" in class counsel's narrow sense of coupon) and the identical coupons used to pay the full prices of cheaper items ("vouchers" in class counsel's lexicon and not "coupons" at all). Class counsel *trumpet* the 6000 items that class members can buy with just the coupon—namely any product that costs $10 or less. As the present case illustrates, assessing the reasonableness of attorneys' fees based on a coupon's nominal face value instead of its true economic value is no less troublesome when the coupon may be exchanged for a full product. There is in short no statutory or practical reason for distinguishing among coupons that offer 10 percent, 50 percent, 90 percent, or 100 percent cash savings.

The difficulty of valuing a coupon settlement exposes another defect in the proposed settlement: placing the fee award to class counsel and the compensation to the class members in separate compartments. The $1 million attorneys' fee is guaranteed, while the benefit of the settlement to the members of the class depends on the value of the coupons, which may well turn out to be much less than $830,000. This guaranty is the equivalent of a contingent-fee contract that entitles the plaintiff's lawyer to the first $50,000 of the judgment or settlement plus one-third of any amount above $50,000—so if the judgment or settlement were for $100,000 the attorneys' fee would be $66,667, leaving only a third of the combined value (to plaintiff and lawyer) of the settlement to the plaintiff.

Another questionable feature of the settlement is the inclusion of a "clear-sailing clause"—a clause in which the defendant agrees not to contest class counsel's request for attorneys' fees. Because it's in the defendant's interest to contest that request in order to reduce the overall cost of the settlement, the defendant won't agree to a clear-sailing clause without compensation—namely a reduction in the part of the settlement that goes to the class members, as that is the only reduction class counsel are likely to consider. The existence of such clauses thus illustrates the danger of collusion in class actions between class counsel and the defendant, to the detriment of the class members.

As explained (with copious references to both judicial and academic sources) in William D. Henderson, "Clear Sailing Agreements: A Special Form of Collusion in Class Action

Settlements," 77 *Tulane L. Rev.* 813 (2003), clear-sailing clauses are found mainly in cases such as the present one in which the value of the settlement to the class members is uncertain because it is not a cash settlement. This complicates the difficulty faced by the district court in determining an appropriate attorneys' fee, and a clear-sailing clause exacerbates the difficulty further by eliminating objections to an excessive fee by the defendant. Clear-sailing clauses have not been held to be unlawful per se, but at least in a case such as this, involving a non-cash settlement award to the class, such a clause should be subjected to intense critical scrutiny by the district court; in this case it was not.

There is still more wrong with the settlement. Rule 23(h) of the civil rules requires that a claim for attorneys' fees in a class action be made by motion, and "notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner." Class counsel did not file the attorneys' fee motion until after the deadline set by the court for objections to the settlement had expired. That violated the rule. *In re Mercury Interactive Corp. Securities Litigation*, 618 F.3d 988, 993–95 (9th Cir. 2010); see also Committee Notes on the 2003 Amendments to Rule 23. From reading the proposed settlement the objectors knew that class counsel were likely to ask for $1 million in attorneys' fees, but they were handicapped in objecting because the details of class counsel's hours and expenses were submitted later, with the fee motion, and so they did not have all the information they needed to justify their objections. The objectors were also handicapped by not knowing the rationale that would be offered for the fee request, a matter of particular significance in this case because of the invocation of administrative costs as a factor warranting increased fees. There was no excuse for permitting so irregular, indeed unlawful, a procedure.

A final concern with the settlement involves the lead named plaintiff, Scott Redman. He is employed by a law firm for which the principal class counsel, Paul Markoff and Karl Leinberger, once worked. "The named plaintiffs are the representatives of the class—fiduciaries of its members—and therefore charged with monitoring the lawyers who prosecute the case on behalf of the class (class counsel)." *Eubank v. Pella*, *supra*, 753 F.3d at 719. There ought therefore to be a genuine arm's-length relationship between class counsel and the named plaintiffs. We don't say there wasn't such a relationship in the present case, but we do wish to remind the class action bar of the importance of insisting that named plaintiffs be genuine fiduciaries, uninfluenced by family ties (as in *Eubank*) or friendships.

The magistrate judge, in approving the inadequate settlement proposal, may have been concerned with the cost of litigation to fragile RadioShack if the settlement was disapproved and the case had to be tried. But very few class actions are tried, see *id*. at 720, and this one would not have been an exception. RadioShack can't afford costly litigation, and class counsel can't afford to risk a delay in settling, lest RadioShack declare bankruptcy. A renegotiated settlement will simply shift some fraction of the exorbitant attorneys' fee awarded class counsel in the existing settlement that we are disapproving to the class members.

We come at last to our second case, *Shoe Carnival*, which pivots on the meaning of "willfully" in the Fair and Accurate Credit Transactions Act. The willfulness issue in *RadioShack* case was straightforward. The company had been found in an earlier lawsuit to have left the expiration date on receipts in violation of a parallel state statute, see *Ferron v. RadioShack Corp*, 886 N.E.2d 286 (Ohio App. 2008), and apparently failed to take adequate precautions against repeating the violation, this time of the (materially identical) federal statute. By the time RadioShack discovered the mistake, 16 million unlawful receipts had been handed to its customers, as we know. The company had to know that there was a risk of error because the identical risk had materialized previously. Knowing the risk and failing to take any precaution against it—though a completely adequate precaution would have cost nothing—were indicative of willful violation.

That RadioShack's violation probably was willful underscores the meagerness of the settlement value to the class members. Class counsel—a handful of lawyers—divide up a million dollars, under the settlement that the district court approved, while a relative handful of class members (83,000 out of 16 million potential class members) receive only 10 cents on the dollar, since the coupon is only $10 even though the minimum statutory damages for a willful violation is $100. And 10 cents on the dollar is actually an exaggeration of the benefit of the settlement to the class, because the coupons are worth less in the aggregate than their face value. Yet as we also said, given RadioShack's parlous financial state it would be a mistake to increase the aggregate size of the settlement beyond its current $4.1 million ceiling. Our only concern therefore is the division of spoils between class counsel and class members. It seems apparent that each class member has a valid claim to a good deal more than one $10 coupon, and it would seem therefore that the equities favor a reallocation of some of what we are calling the spoils from class counsel to the class members who have submitted claims for the coupons. We are mindful that recipients of statutory damages are not being compensated for actual injury, but in effect are being paid bounties to assist in efforts to reduce identity theft. But identity theft is a serious problem, and FACTA is a serious congressional effort to combat it.

The willfulness issue in *Shoe Carnival* is different from that in *RadioShack*. There was no previous violation to alert the company; and it is not argued that mistakes made by other credit-card sellers should have alerted it to the risk of violating the statute inadvertently. And if there was a violation, it was not willful because it consisted of a permissible interpretation of an ambiguous statute. Cf. *Safeco Ins. Co. of America v. Burr*, *supra*, 551 U.S. at 68. Instead of omitting the entire expiration date from credit-card receipts, Shoe Carnival omitted just the year; the month in which the credit card expired remained. Now "expiration date" is not a defined term in the statute. It could mean the month, day (if other than the last day of the month), and year in which the card expires, and it is arguable that if any of these are left out there's no actual expiration date on the receipt, just a fragment of such a date.

The first part of the statutory provision, dealing with the credit-card number, is explicit that all the digits that make up the number need not be deleted to avoid a violation; the last five can remain. The second part of the provision, dealing with the expiration date, is not explicit. All that is clear is that "January," with no year, is not an expiration date; it's just part of such a date.

There wouldn't be any purpose, however, in allowing the seller to leave the month of expiration on the receipt. The last five digits of the card number are permitted to remain so that in the event of a dispute with the card company or maker of the receipted sale, the customer's ownership of the card can be veritied; in addition, "printing any small subset of the digits on a card enables the customer to know which card was used for a particular purpose (that's why merchants want to print some of the digits), without enabling a stranger to learn the full number." *Van Straaten v. Shell Oil Products Co. LLC*, 678 F.3d 486, 490 (7th Cir. 2012). All that allowing the month to remain on the receipt does, however, is give an identity thief a datum that he may be able to use in conjunction with other data to determine the cardholder's identity, as when Merchant A prints the last 5 digits and the month, Merchant B prints the last 5 digits and the year, and Merchant C prints no dates inadvertently prints the entire credit card number—and an identity thief gains access to all three receipts. Though that's unlikely to happen, there is no upside to allowing the month to appear on the receipt; and so there is a persuasive argument for interpreting "expiration date" in the statute to mean "expiration date or any part thereof," as held in *Long v. Tommy Hilfiger U.S.A., Inc.*, 671 F.3d 371 (3d Cir. 2012), which noted that if part of the expiration date is allowed to remain on the receipt, and different sellers leave different parts of the expiration date on their receipts, a person who found different receipts for purchases by the same cardholder might learn the entire expiration date. This is why the statute permits the receipt to show only the *last* five digits of the card number—if it could show any five digits, an identity thief could reconstruct the entire number if he obtained multiple receipts of sales to the same cardholder.

There is, however, sufficient ambiguity attending the provision of the statute regarding the expiration date to justify the district court's determination that Shoe Carnival had not willfully violated FACTA. The interpretation of the statute advanced by the company was possible, indeed plausible, possibly even correct; and that is enough, as the district court held, to negate an inference of willfulness.

To conclude, the judgment approving the settlement in *RadioShack* (Nos. 14-1470, -1471, and -1658) is reversed and the case remanded to the district court for further proceedings consistent with this opinion. The judgment in favor of the defendant in *Shoe Carnival* (No. 14-1320) is affirmed.

# EXHIBIT 3

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF OHIO**
**(WESTERN DIVISION)**

| | | |
|---|---|---|
| DAVID VOLZ, AHMED KHALEEL, NICHOLAS ARMADA, SCOTT COOK, STEPHANIE BRIDGES AND JUAN SQUIABRO, Individually and on Behalf of Those Others Similarly Situated, | : | Case No. 1:10-cv-00879 |
| Plaintiff, | : | **NOTICE OF *AMICUS CURIAE* TRUTH IN ADVERTISING, INC.'S INTENT TO APPEAR AT FINAL FAIRNESS HEARING** |
| vs. | : | |
| THE COCA-COLA COMPANY and, ENERGY BRANDS INC. (d/b/a GLACEAU), | : | Hearing Date: December 2, 2014<br>Hearing Time: 12:30 p.m.<br>Hearing Location: Cincinnati |
| Defendants. | : | Hon. Michael R. Barrett |

To All Parties and Their Respective Attorneys of Record:

PLEASE TAKE NOTICE that proposed *amicus curiae* Truth in Advertising, Inc. hereby files this written Notice of its Intent to Appear, through its counsel, at the Final Fairness Hearing on December 2, 2014 at 12:30 p.m. in the above-entitled court.

Dated: October ___, 2014 Respectfully,

By:___________________________

Ronald L. Burdge
Outside Counsel
(Ohio Bar No. 0015609)
Burdge Law Office Co, LPA
2299 Miamisburg Centerville Road
Dayton, OH 45459-3817
Telephone: (937) 432-9500
ron@burdgelaw.com

Laura Smith, Legal Director
(District of Conn. Bar No. ct28002, not admitted in Ohio)
Truth in Advertising, Inc.
115 Samson Rock Drive, Suite 2
Madison, CT 06443
Telephone: (203) 421-6210
lsmith@truthinadvertising.org

Attorneys for Amicus Curiae
Truth in Advertising, Inc.

## CERTIFICATE OF SERVICE

The undersigned hereby certifies the following documents have been filed electronically on this ___ day of October 2014:

**NOTICE OF *AMICUS CURIAE* TRUTH IN ADVERTISING, INC.'S INTENT TO APPEAR AT FINAL FAIRNESS HEARING**

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

**Via Electronic Service/ECF:**
Brian T. Giles
Statman Harris & Eyrich LLC
Carew Tower
441 Vine Street, Suite 3700
Cincinnati, OH 45202
bgiles@statmanharris.com

**Via Electronic Service/ECF:**
Richard S. Wayne
Joseph J. Braun
Strauss Troy
The Federal Reserve Building
150 East Fourth St.
Fourth Floor
Cincinnati, OH 45202
rswayne@strausstroy.com
jjbraun@strausstroy.com

**Via Electronic Service/ECF:**
Aashish Y. Desai
Desai Law Firm, P.C.
3200 Bristol St., Suite 650
Costa Mesa, CA 92626
aashish@desai-law.com

**Via Electronic Service/ECF:**
William C. Wright
The Wright Law Firm, P.A.
301 Clematis St., Suite 3000
West Palm Beach, FL 33401
willwright@wrightlawoffice.com

**Via Electronic Service/ECF:**
J. Russell B. Pate

The Pate Law Firm
P.O. Box 890
Royal Dane Mall, 2nd Floor
St. Thomas, Virgin Islands 00804
Pate@SunLawVI.com

**Via Electronic Service/ECF:**
Christopher S. Shank
Shank & Hamilton, P.C.
2345 Grand, Suite 1600
Kansas City, MO 64108
chriss@shankhamilton.com

**Via Electronic Service/ECF:**
Shon Morgan
Quinn Emanuel Urquhart & Sullivan, LLP
865 S. Figuero St., 10th Floor
Los Angeles, CA 90017
shonmorgan@quinnamenuel.com

**Via Electronic Service/ECF:**
Faith E. Gay
Isaac Nesser
Quinn Emanuel Urquhart & Sullivan, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
faithgay@quinnemanuel.com
isaacnesser@quinnemanuel.com

**Via Electronic Service/ECF:**
Thomas H. Stewart
Nathanial R. Jones
Blank Rome LLP
1700 PNC Center
201 East Fifth Street
Cincinnati, OH 45202
Stewart@BlankRome.com
Jones-N@BlankRome.com

**Via Electronic Service/ECF:**
James R. Eiszner
Shook Hardy & Bacon LLP
2555 Grand Boulevard
Kansas City, MO 64108
jeiszner@shb.com

**Via Electronic Service/ECF:**
Tammy B. Webb
Shook Hardy & Bacon LLP
One Montgomery, Suite 2700
San Francisco, CA 94140
tbwebb@shb.com

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

Executed on October __, 2014, in Dayton, Ohio.

By: /s/ Ronald L. Burdge