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August 25, 2008

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Re: ***Edward B. West, et al. v. Carfax, Inc., et al.***
Trumbull County Court of Common Pleas
Case No. 04-CV-1898
Appellate Case No. 2008-TR-00045

Dear Mr. Ambrosy:

Enclosed is Brief Of Appellees Carfax, Inc. and Polk Carfax, Inc. in this matter.

Very truly yours,

Tracey L. Turnbull

TLT/dw
Enclosure
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IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT

NO. 2008 T 0045

EDWARD B. WEST,
an individual resident of Niles, Trumbull County, Ohio,
on behalf of himself and all similarly situated
persons and entities,

Plaintiff-Appellee,

vs.

CARFAX, INC. and POLK CARFAX, INC.,

Defendants-Appellees,

CENTER FOR AUTO SAFETY, *et al.*,
Class members-Objectors-Appellants.

Appeal from Court of Common Pleas, Trumbull County

BRIEF OF APPELLEES CARFAX, INC. AND POLK CARFAX, INC.

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COUNTERSTATEMENT OF THE CASE

Carfax, Inc. sells information about used cars. (*See, e.g.*, Transcript of Docket ("T.d.") 61, ¶¶ 13-20; *see also* T.d. 28 ¶¶ 13-15, 19-20 & Exs. 2-3.) For consumer customers, it provides this information in Vehicle History Reports viewable on the Internet and delivered solely by e-mail. Over 99% of Carfax's communications with consumers are by e-mail. (T.d. 89, at Supplemental Affidavit of David L. Silversmith dated June 27, 2007 ("Silversmith Supp. Aff.").)

While Carfax, Inc. has never claimed to have information about all accidents involving the used cars on which it reports, on August 4, 2004, Plaintiff filed a Class Action Complaint for Violations of the Ohio Sales Practices Act and Common Law asserting that Carfax, Inc. and an affiliate (collectively, "Carfax") had misled consumers in this respect. (*See generally* T.d. 1.) On September 5, 2006, after some motion practice and discovery, the parties entered into a Settlement Agreement to resolve those claims, and similar claims in nine other putative class actions in seven other jurisdictions, on a nationwide basis pursuant to an amended complaint. (*See* T.d. 53, 56 ¶¶ 3, 4 & Ex. A, 61.)

On October 27, 2006, following argument and briefing by the parties, the trial court issued an order preliminarily approving this settlement. (T.d. 59.) Six months later, on May 25, 2007, after publication notice and over 1.7 million e-mails to Class Members (which resulted in objections from only twenty-seven purported objectors, including the eighteen Appellants here), the trial court held a fairness hearing on the settlement.

The trial court did not approve the settlement as presented at that fairness hearing, however. Instead, after argument and discussion, the trial court ordered the parties to negotiate

further, setting a supplemental briefing schedule for review of any revised settlement that might result from that process. (*See* T.d. 88.)

On June 29, 2007, the parties submitted a Revised Settlement Agreement addressing matters discussed at the prior hearing and providing both enhanced settlement benefits and additional notice to the Class. (T.d. 91.) A few weeks later, on July 13, 2007, Appellants filed objections to the Revised Settlement Agreement. (T.d. 93.) They also sought for the first time to compel discovery with respect to the claims made under the prior Settlement Agreement (T.d. 92), a motion the trial court later denied (although it did allow them to intervene). (T.d. 100, 101; *see also* T.d. 109.)

On May 6, 2008, the trial court, exercising its discretion, approved the Revised Settlement Agreement and the settlement it contained as fair, adequate, and reasonable. (T.d. 96.) In doing so it followed well-known Ohio law concerning such settlements. A month later, on June 5, 2008, Appellants filed a notice of appeal (T.d. 107)—and an application for attorneys' fees for their supposed role in bringing about the revised settlement (T.d. 102). On June 19, 2008, Appellants filed a revised notice of appeal. (T.d. 111.)

COUNTERSTATEMENT OF FACTS

Carfax collects data on used cars from many different sources, correlates it, and provides various information services to the public (through its www.carfax.com website that provides reports online and by e-mail) and to car dealers and other business subscribers (also primarily through a website, www.carfaxonline.com). (*See, e.g.*, T.d. 61, ¶¶ 13-20; *see also* T.d. 28 ¶¶ 13-15, 19-20 & Exs. 2-3.) Carfax did not and does not represent that the information it sells is error-free or that it has all possible information about all used cars. (*See, e.g.*, T.d. 1, Ex. B at 1, 3; T.d. 28 Ex.1, § 3; T.d. 56 Ex. P, ¶ 8 & Exs. I, pages CFDV-000060, 91-92, 484, 486.)

For example, the many different disclosures by Carfax about its services, and particularly its Vehicle History Reports, made to Class Members over time included statements such as:

- "CARFAX may not have the complete history of every vehicle" (T.d. 56 Ex. P, at Ex. B);
- Major accidents are ones "so severe they must be reported to State DMVs" and that, in contrast, "[o]f course, we don't have all minor accidents . . . ." (T.d. 56, Ex. P, at Ex. I, page CFDV-000060);
- Carfax's data sources include "Accident data. • Damage reports from accidents (selected states only) • Police-reported detail", (T.d. 56, Ex P, at Ex. I, pages CFDV-000091-92);
- "A CARFAX Vehicle History Report is based only on information supplied to CARFAX. Other information about this vehicle, including problems, may not have been reported to CARFAX", (T.d. 56, Ex. P, at Ex. I at CFDV-000484); and
- "Not all accidents are reported to CARFAX", (T.d. 56, Ex. P, at Ex. I, page CFDV-000486).

On August 4, 2004, despite such disclosures, Plaintiff filed a Class Action Complaint for Violations of the Ohio Sales Practices Act and Common Law against Carfax. (T.d. 1.) Plaintiff asserted that Carfax misled consumers as to whether it has police-reported accident data for all used cars. (*See* T.d. 1 ¶¶ 11, 19-22, 25-26.) Other plaintiffs represented by some of Class Counsel here, or by other lawyers, filed nine similar actions in seven other states.[1]

During the course of this litigation, while motion practice and discovery were underway, Carfax prevailed in several of those nine other cases. It lost in none of them. In one,

[1] Those other cases were *Auttonberry v. Carfax, Inc.* (S.D. Miss.), No. 3:05CV264 HTW-JCS ; *Bryson v. Carfax, Inc.* (N.C. Super. Ct.), Case No. 5CV500734; *Davis v. Carfax, Inc.* (Ok. Dist. Ct.), No.CJ-04-1316L ; *Fitchett v. Carfax, Inc.* (Cal. Super. Ct.), No. 426331; *Hajovsky v. R.L. Polk & Co.* (Tex. Dist. Ct.), No. 04-002148-CV-272; *Janota v. Carfax, Inc.* (Tex. Dist. Ct.), No. A-04-0219-CV-A; *Jay Auto. Group, Inc. v. Carfax, Inc.* (Ga. Sup. Ct.), No. SU 4 CV 3103; *Lifsey v. Carfax, Inc.* (Cal. Super. Ct.), No. BC 329052; and *Mid-South Motors, Inc. v. Carfax, Inc.* (Tenn. Cir. Ct.), No. CT-006060-03. (*See* T.d. 56 ¶¶ 2, 25-28, 30, 33 & Exs. E-K, M-N.)

a Tennessee trial court denied the plaintiffs' motion for certification of a class for purposes of litigation. *See* Order, *Mid-South Motors, Inc. v. Carfax, Inc.* (Tenn. Cir. Ct. Oct. 28, 2005), No. CT-006060-03. (T.d. 56 ¶ 29 & Ex. I.) In another, the plaintiff dismissed her own case in the face of Carfax's motion to dismiss. *See* Order, *Auttonberry v. Carfax, Inc.* (D. Miss. Aug. 31, 2006), No. 3:05CV264HTW-JCS. (T.d. 56 ¶ 34 & Ex. O.) In a third, an Oklahoma trial court both denied the plaintiff's motion for class certification for purposes of litigation and granted Carfax's motion to dismiss for improper venue. *See* Order, *Davis v. Carfax, Inc.* (Okla. Dist. Ct. Dec. 28, 2005), No. CJ-04-1316 L. (T.d. 56 ¶ 36 & Ex. Q.)

As matters progressed in this case and the other similar cases against Carfax, counsel for the parties retained a well-known former federal District Court judge, the Honorable J. Lawrence Irving, as a mediator. (*See* T.d. 56.) Under his supervision, the parties eventually reached a proposed nationwide resolution of all similar claims through a single settlement in this Court. (*E.g.*, T.d. 56 ¶ 41.)

On September 5, 2006, the parties entered into a formal Settlement Agreement. (T.d. 56 ¶ 42 & Ex. A.) Because the claims in this case centered on disclosure of the supposed limitations on a part of the information provided by Carfax to its customers (*see, e.g.*, T.d. 1 ¶¶ 10-11, 19-21, 23, 25-26); T.d. 53 ¶¶ 9-12, 19-20), the proposed settlement required that Carfax make changes to its website (its primary vehicle for communication with consumer customers) and other disclosures (*see, e.g.*, T.d. 56 Ex. A, ¶¶ I(O)(3)).

To address alleged concerns about the past, however, the proposed settlement also provided choices of economic benefits, both in the form of Vouchers for free reports from Carfax (T.d. 56 Ex. A, ¶¶ I(V)(2)-(4), VI), and in the form of a Voucher for cash reimbursement of costs for a particular third-party inspection service (*see* T.d. 56 Ex. A, ¶¶ I(V)(1), VI). While the

information about police accident reports allegedly missing from Carfax disclosures related to only a small part of the information sold by Carfax, the economic benefits available to Class Members were worth as much as, or more than, what they would have paid for any Carfax report (as low as $14.99 for individual consumer purchases during the Class period). (*See* T.d. 56 Ex. A, ¶ I(V) (providing up to two free reports—a total of $49.98 based on then-current pricing, http://www.carfax.com/cfm/purchase_options.cfm (last accessed May 3, 2007))—or a cash refund of $20 on a particular inspection).)

On October 27, 2006, the trial court heard argument from the parties and preliminarily approved this proposed settlement. (T.d. 59.) It also approved a notice plan and proposed notices to Class Members. (*See* T.d. 56 Ex. A; T.d 59.) In late 2006 and early 2007, as directed by the trial court, Carfax sent e-mails to 1,770,929 Carfax customer e-mail addresses (*see* T.d. 56 Ex. A, ¶ III(C); T.d. 87 ¶¶ 13-14) and published in newspapers with a daily circulation of over 2.7 million a notice that directed Class Members both to a settlement website and to a toll-free number for additional information (*see* T.d. 56 Ex. A, ¶¶ I(T), III(A), (B) & Exs. A, B; T.d. 89 (at Silversmith Supp. Aff. ¶ 2)).

The notice of the proposed settlement led to substantial attention from the press. *See, e.g.*, http://www.consumerreports.org/cro/cars/news/january-2007/carfax-sued-over-vehicle-history-reports/overview/0107_carfax_sued_over_vehicle_history_reports.htm (last accessed May 3, 2007); http://www.automotivedigest.com/view_art.asp?articlesID=21994 (last accessed May 3, 2007), Lade, *Doubt Cast on CarFax Reports*, Baltimore Sun (Feb. 24, 2007), available at http://www.baltimoresun.com/business/bal-bz.carfax24feb24,0,3226178.story?track=rss (last accessed May 3, 2007); Tompor, *On the Lookout for a Lemon*, Fort Wayne News-Sentinel (Feb. 9, 2007), available at http://www.fortwayne.com/mld/newssentinel/business/16662391.htm (last

accessed May 3, 2007). In response to the notice ordered by the trial court and this further attention in the press, the parties received only 143 opt-outs and objections to the proposed settlement from twenty-seven purported objectors, including the eighteen organized by lawyers from Public Citizen—the Appellants here. (*See, e.g.*, T.d. 85 ¶ 3.)[2] Appellants asserted the same arguments then that they raise now, largely supported by affidavits of incompetent and hearsay testimony never admitted into evidence by the trial court. (*See generally* T.d. 71; T.d. 72 at 8-10, 13-25; T.d. 73.)

On May 25, 2007, the trial court held a fairness hearing on the proposed settlement. Rather than approving it, however, the trial court sent the parties off for further negotiations after setting a hearing date for any revised settlement that might result. (*See* T.d. 88.)

On June 29, 2007, after several weeks of such negotiations, Carfax and the Class agreed to a Revised Settlement Agreement. (T.d. 91.) The Revised Settlement Agreement made a number of substantive changes in the proposed settlement. First, it further modified the disclosures to be made by Carfax on its website (and made them easier to find by hyperlinking to them from the www.carfax.com homepage). (*See* T.d. 91 ¶ I(O)(3)(j).) Second, it made

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[2] Not all of the Appellants were proper objectors, because not all of them were Class Members. For example, the Affidavit of Clarence Ditlow establishes that the Center for Auto Safety never purchased a Carfax Vehicle History Report. (*See* T.d. 71 at Ditlow Aff. ¶ 1.) It chose instead to use reports purchased by its staffers in their own names, thus violating the Terms and Conditions for use of Carfax's service (and leaving the Center for Auto Safety without standing here, *see e.g.*, *In re Holocaust Victim Assets Litig.* (E.D.N.Y. 2004), 302 F. Supp. 2d 89, 116 (organization lacked standing where members did not have standing); *State ex rel. Consumers League of Ohio v. Ratchford* (1982), 8 Ohio App. 3d 420, 424; 457 N.E.2d 878 (consumer organization lacked standing because member did not demonstrate a "concrete injury in fact"); *accord, e.g.*, *California Grocers Ass'n, Inc. v. Bank of Am. Nat'l Trust Sav. Ass'n* (Cal. App. 1994), 27 Cal. Rptr. 2d 396, 399; *Rebney v. Wells Fargo Bank* (Cal. App. 1990), 269 Cal. Rptr. 844, 852-54). (*See also* T.d. 89 at 8 n.8 (defects in standing of six other Appellants).)

Vouchers for free or discounted Vehicle History Reports expressly transferable. (*See* T.d. 91 ¶ I(X)(2), (3), (4).) And third, it substantially broadened the scope of the $20 refund for inspections. The kind of inspection eligible for the refund, and the places where the inspection could be obtained, were substantially expanded. The inspection could now include any comprehensive mechanical inspection (the kind recommended by the Unites States Federal Trade Commission, *see* FTC Bureau of Consumer Protection, "Pre-Purchase Independent Inspection", at http://www.ftc.gov/bcp/edu/pubs/consumer/autos/aut03.pdf at 7-8 (last accessed Aug. 24, 2008)) and may be obtained from any American Safety Engineer-certified or American Automobile Association-approved mechanic, service station, or garage. (*See* T.d. 91 ¶ I(X)(1).) The purpose of the inspection for which a refund could be obtained has also been expanded. It is no longer limited to an inspection of a used car the holder of the settlement Voucher wants to purchase. It can also include inspections of a car that the holder of the settlement Voucher wants to sell or keep. (*See* T.d. 91 ¶¶ I(X)(1)(b), (c).)

In addition to these substantive changes, the Revised Settlement Agreement provided for a new Supplemental E-mail Notice to all e-mail addresses Carfax has of consumers back to October 27, 2003, thus adding several more years of e-mail addresses to those already used. (T.d. 91 ¶ I(W), III(D) & Ex. C.) Class Members would also have a new opportunity to opt out or to make or change claims. (T.d. 91 ¶ IV(D) & Ex. C.)

On May 6, 2008, over the objections of the Appellants here, the trial court approved the revised settlement in the Revised Settlement Agreement as fair, adequate, and reasonable. (T.d. 96.) On June 4, 2008, the Court denied Appellants' tardy motion to compel discovery, but allowed them to intervene. (T.d. 100, 101.)

None of the improved benefits of the revised settlement have been distributed and none of the new notices have been given because, on June 5, 2008, and again on June 17, 2008, Appellants appealed from the trial court's judgment. (T.d. 107, 111.) Amazingly, despite having opposed the revised settlement, Appellants also sought attorneys' fees for their supposed role in "improving" it. (T.d. 102.)

STANDARD OF REVIEW

"The determination of whether a settlement is fair, adequate and reasonable is committed to the sound discretion of the trial court and will not be disturbed on appeal in the absence of some demonstration that the trial court abused its discretion." *See, e.g., In re Kroger Co. S'holders Litig.* (1990), 70 Ohio App. 3d 52, 68, 590 N.E.2d 391 (citation omitted). This Court therefore reviews the grant of final approval by a trial court to a class action settlement, the choice of notice to class members concerning that settlement, and the extent of discovery granted or denied to class members objecting to that settlement, for abuse of discretion. *See also, e.g., Mcdonald v. Medical Mut. of Cleveland, Inc.* (1975), Cuyahoga App. No. 33779, 1975 Ohio App. LEXIS 6066, at *4; *Madison County Bd. Of Comm'rs v. Bell*, Madison App. No. CA2005-09-036, 2007-Ohio-1373, ¶ 48; *Ward v. NationsBanc Mortg. Corp.*, Erie App. No. E-05-040, 2006-Ohio-2766, ¶ 27; *Mauzy v. Kelly Servs. Inc.* (1996), 75 Ohio St. 3d 578, 592, 664 N.E.2d 1272. (To the extent that a class notice approved by a trial court violates the Due Process Clause of the United States Constitution, that issue would be reviewed *de novo*. *See, Whitman v. Whitman*, Hancock App. No. 5-05-36, 2007-Ohio-4231, ¶15 ("Questions concerning procedural due process are matters of law to be determined de novo on appellate review.").) No matter what the standard of review, however, this Court "should affirm a trial court's judgment so long as that

judgment can be sustained under any appropriate legal theory," even if it was not theory the trial court used. *Conley v. Caudill*, Pike App. No. 02CA697, 2003-Ohio-2854, ¶ 6.

ARGUMENT

An appellate court's chief worry in class action settlements is usually that a trial court has "rubber stamped" a settlement proposed by the parties. The actions of the trial court in this case were the opposite of a rubber stamp. It exercised its discretion vigorously, leading the parties towards a revised settlement before granting final approval.

In finally approving a revised settlement, the trial court properly informed its discretion with Ohio law. It followed Ohio Rule 23(E) as to the notice to be given of the revised settlement. It followed *Beder v. Cleveland Browns* (2001), 114 Ohio Misc.2d 26, 758 N.E.2d 307, as to approval of the substance of the settlement as fair, adequate, and reasonable for the class. And it correctly denied the tardy demand for discovery by Appellants. This Court should affirm the trial court's resulting judgment in all respects.

POINT I

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WITH RESPECT TO CLASS NOTICE

The first assignment of error by Appellants is that "[t]he trial court erred in approving a class action settlement that does not take reasonable steps to provide individual notice to all class members." Brief for Appellants Center for Auto Safety, *et al.* ("App. Br.") at 5. As Appellants concede, however, *see* App. Br. at 5, the standard for notice of a class action settlement is that it "shall be given to all members of the class in such manner as the court directs." Ohio Civ. R. 23(E). Neither that Rule nor other applicable law mandates that a trial court exercise its discretion to require "individual notice" to all class members in a class action

settlement, and certainly not to require that "individual notice" be sent to class members whose address is only 50% likely to be correct.

In addition, as the words "as the court directs" indicate, the standard for review of class notice in a class action settlement is abuse of discretion. *See, e.g., In re Kroger Co. S'holders Litig.* (1990), 70 Ohio App. 3d 52, 68, 590 N.E.2d 391. Appellants' citation to *Searles v. Germain Ford of Columbus, L.L.C.* (2007), 174 Ohio App. 3d 555, 558, 883 N.E.2d 480, does not change this standard. Under the rationale of that case, the only issue for *de novo* review would be whether a notice "does not satisfy the Due Process Clause of the United States Constitution", App. Br. at 5. *See Whitman*, 2007-Ohio-4231, ¶15.

In support of their position that "[t]he trial court erred in approving a class action settlement that does not take reasonable steps to provide individual notice to all class members", App. Br. at 5, Appellants simply repeat to this Court the same arguments and cases they cited to the trial court. (*Compare, e.g.,* T.d. 72 *and* T.d. 93 *with* App. Br. at 5-11.) They offer no new cases on the issue of notice. Nor have they changed their arguments to account fully for the notice yet to be given pursuant to the revised settlement itself. While they now divide those arguments into three subsections, *see* App. Br. at 5, 8, 9, they really have two complaints: first, a complaint about e-mail notice and, second, a complaint about publication notice.

A. The E-Mail and Supplemental E-Mail Notice Approved by the Trial Court Was Reasonable and Proper.

Appellants do not dispute that Carfax provides its Vehicle History Reports to consumers by e-mail, not regular mail. They offer no record evidence that Carfax even *has* mail

addresses for consumers.[3] For this reason alone, e-mail notice would seem to be not only "reasonably calculated to reach the intended" Class Members, *Jones v. Flowers* (2006), 547 U.S. 220, 226, but the *best* form of notice. *Cf. Browning v. Yahoo!, Inc.* (N.D. Cal. 2007), No. C04-01463, 2007 U.S. Dist. LEXIS 86266, at *12-13 ("Email notice was particularly suitable in this case, where settlement class members' claims arise from their visits to Defendants' Internet websites."). Further supporting this conclusion, Appellants do not dispute that ninety-two percent of the e-mail notices sent previously by Carfax with respect to the original proposed settlement were received by their addressees. *See* App. Br. at 11. Instead, they argue simply that people may not read their e-mail. App. Br. at 9-11.

The trial court also heard this argument, saw the limited evidence that Appellants offered (*see* T.d. 93), saw the competing evidence from Carfax (*see* T.d. 89, 94), and was perfectly capable of concluding that e-mail and regular mail are no different in this respect—people do not read all their mail, or all their e-mail. Nor did Appellants offer any evidence that regular mail would produce receipt rates even as high as the ninety-two percent receipt rates for the initial e-mail notice by Carfax.

Given that Appellants cannot seriously claim that e-mail notice to consumers—who only do business with Carfax electronically—is an inadequate form of notice, they have attacked the number of e-mails sent (or to be sent in the future). (*See* App. Br. at 5-8.) But the standard they propose for this purpose—that Carfax must send "individual notice to all class members who can be reasonably identified", App. Br. at 5, even if a reasonably valid e-mail

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[3] Carfax offered competent evidence to the contrary, in fact. (*See* T.d. 87 ¶ 8 (Carfax's "database is not designed or maintained to collect regular mail addresses or to identify consumers by their regular mail address. The database is organized by each consumer's e-mail address and by the Vehicle Identification Number of the vehicle for which a report is sought.").)

address for such a Class member *cannot* be identified, is wrong. Nor does applicable law require it.

The due process standard for notice in a state court class action was set in 1985 by the United States Supreme Court in *Philips Petroleum Co. v. Shutts* (1985), 472 U.S. 797. The standard the court adopted used language from its earlier opinion on federal class action notice in *Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, that "[t]he notice must be the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Phillips Petroleum Co.*, 472 U.S. at 812 (emphasis added) (quoting *Mullane*, 339 U.S. at 314-15). The court did *not* use the language from its other major opinion on federal class action notice, *Eisen v. Carlisle & Jacquelin* (1974), 417 U.S. 156, 173-77, which had set a potentially *higher* standard for such notices in litigated class actions under Federal Rule of Civil Procedure 23(c)(2)(B). As a result of this choice, the "individual notice" standard of *Eisen*—"[i]ndividual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort", 417 U.S. at 173—is not constitutionally required, despite Appellants' assertions to the contrary. *See* App. Br. at 7; *cf., e.g.*, 2 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*, § 13:50 (3d ed. 1992) (noting that *Eisen* itself did not set a constitutional standard); *accord, e.g.,* Mark C. Weber, Preclusion and Procedural Due Process in Rule 23(b)(2), 21 U. Mich. J.L. Reform 347, 383-84 (1988) ("[T]he Eisen Court explicitly disavowed reliance on the due process clause in upholding the notice requirement," instead relying on its interpretation of Federal Rule 23 in response to a challenge regarding the imposition of costs on the defendant, not a notice challenge).

Appellants simply refuse to acknowledge this. *See* App. Br. at 7-8. If they are right, however, everyone else—respected commentators, other state courts, and even many federal courts—has been wrong over and over again for years in approving of class notices sent to fewer than all identifiable class members. *See., e.g., Linder v. Thrifty Oil Co.* (Cal. 2000), 2 P.3d 27, 37 (refusing to require individual notice); *Archibald v. Cinerama Hotels* (Cal. 1976), 544 P.2d 947, 953 (similar); *Sulcov v. 2100 Linwood Owners, Inc.*, (N.J. Sup. Ct. App. Div. 1997), 303 N.J. Super. 13, 36, 696 A.2d 31, 42 (no mandatory individual notice requirement since "publication and representative notice and such other forms of constructive notice as will meet the constitutional tests of due process under the circumstances presented will be permitted." (internal citation omitted)); *Rebney v. Wells Fargo Bank* (Cal. App. 1990), 269 Cal. Rptr. 844, 856 n.6 (refusing to require individual notice to even part of class of seven million former customers); *Cartt v. Superior Ct. of Los Angeles County* (Cal. App. 1975), 124 Cal. Rptr. 376, 381, 386 ("Neither due process nor the integrity of the class action process demands such useless and wasteful procedures" as individual notice by mail to a class of over 700,000); Jesse Tiko Smallwood, Nationwide State Law Class Actions and the Beauty of Federalism, 53 Duke L.J. 1137, 1169 (2003) ("when direct notification is unreasonably burdensome, publication and representative notice is sufficient").

In Oklahoma, for example, the courts have held that no direct individual notice (such as was done here with over 1.7 million e-mails) is required in cases having over 500 class members. *See Dean v. Multiple Injury Trust Fund* (Okla. 2006), 145 P.3d 1097, 1104-05 (citing Okla. Stat., Tit. 12, § 2023(C)(2)(c)). Thus, were the claims here to have been settled in Oklahoma under the rubric of the *Davis* case, Carfax could legally have avoided the expense of

any individual notice. Instead, it has already provided individual notice to almost two million class members, and will provide individual notice to even more in the future.

As this indicates, an Ohio state court is free to be more flexible about the application of its notice rule than the federal rule Appellants attempt to apply. *Compare, e.g., Cartt*, 124 Cal. Rptr. at 383 n. 16. (Federal Rule 23 is not a "procedural strait jacket" on state courts) *with* App. Br. at 5-7 *and cases cited therein*. Furthermore, properly read, even the federal rule Appellants seek to impose on our state courts would not have required the trial court to mandate a notice program different than what it approved for the revised settlement here.

While Appellants complain about the notice already given in this case, the affidavits filed by some of them below clearly indicated that it was widespread enough to reach even people who neither read the Publication Notice nor received any individual E-Mail Notice. (*See, e.g.,* T.d. 71 (Anderson Aff. ¶ 6; B. Brown Aff. ¶ 3; N. Brown Aff. ¶ 15; Crabtree Aff. ¶ 9; Evans Aff. ¶ 5; Faulkner Aff. ¶ 6; Lau Aff. ¶ 6; Paulson Aff. ¶ 6; Rheingold Aff. ¶ 5; Thuss Aff. ¶ 6; Uechi Aff. ¶ 5; Wolfe Aff. ¶ 6.) As the court noted in *DeHoyos v. Allstate Corp.,* it is fair to argue that "the objectors' knowledge of the settlement and their submission of objections according to the terms of the notice illustrates the effectiveness of the notice program." (W.D. Tex. 2007), 240 F.R.D. 269, 298. Nonetheless, in the Revised Settlement Agreement, Carfax agreed to send Supplemental E-Mail Notice to all e-mail addresses Carfax has of consumers back to October 27, 2003, thus adding several more years of e-mail addresses to those already used. (T.d. 91 ¶ I(W), III(D) & Ex. C.)

This 2003 cut-off date was chosen for a reason in the revised settlement. Carfax presented unrebutted evidence to the trial court that "[f]or 2003, the percentage of . . . e-mail addresses" it could find for customers that, based on the testing of a random sample, would still

be valid in 2007 was only "68.63%." (T.d. 89, Silversmith Supp. Aff. ¶ 6.) Going further back, the percentage dropped to "50-50." (T.d. 89, Silversmith Supp. Aff. ¶ 6.) Today, another year later, the percentage of valid e-mail addresses available to Carfax from 2003 has probably dropped closer to "50-50."

Even the federal standard in *Eisen* that Appellants wish to impose on our state courts would not require "individual notice to all class members" just because Carfax has their names. It would require that "[i]ndividual notice . . .be sent to all class members whose names *and addresses may be ascertained through reasonable effort.*" 417 U.S. at 173.[4] An "address" that has only about a 50-50 chance of still being the identifying information of where a class member may actually be reached is not really an "address" any more, and certainly not one of the kind contemplated in *Eisen.* And it is not a "reasonable effort" to have to spend the money to send something to such an unreliable "address."

Many of the numerous cases that reject Appellants' view of notice can be explained by this application of this "reasonableness" standard hidden in plain sight in the *Eisen* language on which Appellants would otherwise rely. For example, in the *DeHoyos* case, even a federal court had no problem granting final approval to a class action settlement in which the defendant provided notice by publication and the Internet instead of individually by regular mail. *See* 240 F.R.D. at 298. It rejected the objectors' arguments that the defendant insurance company should have mailed notice to its current policyholders in order to reach the class. *See id.* In doing so, it also specifically rejected the claim made by Appellants here that the law

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[4] Thus, in *Thompson v. Midwest Found. Indep. Physicians Ass'n* (S.D. Ohio 1988), 124 F.R.D. 154, 157 (cited in App. Br. at 8), the court approved of individual mail notice as "the best notice practicable under the circumstances" because accurate "names and last known addresses of all class members were available from [defendant's] business records" without difficulty.

requires individual mail notice without regard to the reasonableness of that choice. *Id.*; *see also, e.g., Dumont v. Charles Schwab & Co.* (E.D. La. July 21, 2000), No. 99-2840, 2000 U.S. Dist. LEXIS 10906, at *24-25 (if the cost and time involved in a direct mail effort would likely not reach a number of customers "because of stale addresses" then "it would be unreasonable at best to require this exercise in futility"); *Sollenbarger v. Mountain States Tel. & Tel. Co.* (D.N.M. 1988), 121 F.R.D. 417, 437 (even under federal rules, individual mail notice to a class derived from millions of present and former telephone customers over five years would have been "patently unreasonable"); *Gilbert v. El Paso Co.* (Del. Ch. June 17, 1986), Nos. 7075, 7079, 1986 Del. Ch. LEXIS 411, at *16-17 (where there was "a substantial likelihood that during" a lapse of three years "many members of the . . . class have changed their addresses, and thus would be unlikely to receive mailed individual notices", no such individual notice required).[5]

Thus, as the court held in *Macarz v. Transworld Sys. Inc.*, "[i]n every case, reasonableness is a function of anticipated results, costs, and amount involved." (D. Conn. 2001), No. 3:97CV2194 (JBA), 2001 U.S. Dist. LEXIS 18005, at *4 (reversing prior order of individual mail notice to entire class as unreasonable and holding publication notice in local Connecticut newspapers sufficient) (quoting *In re Nissan Motor Corp. Antitrust Litig.* (C.A. 5, 1977), 552 F.2d 1088, 1098). Significantly, Ohio law already appears to favor the kind of flexibility reflected in this case, and the others cited above, and therefore does not require unreasonable efforts at individual notice. *See Walker v. Firelands Cmty. Hosp.*, Erie App. No. E-03-009, 2004-Ohio-681, ¶ 25 (class notice by publication only could be an option even where

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[5] *Toledo Fair Housing Ctr. v. Nationwide Mut. Ins. Co.* (1996), 94 Ohio Misc.2d 127, 704 N.E.2d 648 (cited in App. Br. at 8), is not to the contrary. There, the plaintiffs alleged that the defendant insurance company discriminated against homeowners based on their home address. In other words, the class was actually *defined* by the class members' addresses. Yet the court still allowed notification of some class members by publication alone. *Id.* at 133-34.

names and addresses of class members were available). Thus, the trial court here properly approved the parties' E-Mail Notice and Supplemental E-Mail Notice programs.

B. The Publication Notice Approved by the Trial Court Was Reasonable and Proper.

As Appellants know, Carfax also gave Publication Notice to the Class. Indeed, as the *Walker* opinion indicates, notice by publication alone could have been entirely appropriate here. As another court has observed, "[w]here the membership of a class is large, such as in this case, and individual damages are minimal, notice by publication alone may . . . be[] adequate." *Wershba v. Apple Computer, Inc.* (Cal. App. 2001), 110 Cal. Rptr. 2d 145, 167; *see also, e.g., Thomas v. NCO Fin. Sys.* (E.D. Pa. Mar. 31, 2004), No. 00-CV-05118, 2004 U.S. Dist. LEXIS 5405, at *14, 15 (publication notice alone satisfies due process where individual mailed notice would have been expensive and over-inclusive).

Given that Carfax also gave (and will give) substantial individual notice to the Class, the trial court had great flexibility in the publication notice it could approve. Yet Appellants still complain about it. According to their hired "expert", for example, notice in a newspaper such as USA Today is a "particularly poor choice[ ]" because that newspaper "generates much of its readership among business travelers." (*See* T.d. 93 at 9 (quoting T.d. 73).) What Appellants fail to mention, however, is that their hired "expert" has recently *endorsed* publication in *USA Today* as an effective means of notice to class members. *See Turner v. Murphy Oil USA, Inc.* (E.D. La. 2007), 472 F. Supp. 2d 830, 841. Thus, the trial court was completely justified in approving the publication of notice in USA Today and Investors Business Daily in this case. *See also, e.g., Kriegel v. Pacific Sci. Co.* (C.D. Cal. Mar. 1, 1999), No. CV 98-4163 MMM (JGx), 1999 U.S. Dist LEXIS 21788, at *5 (adequate to publish notice

of settlement once in Wall Street Journal); *Wershba,* 110 Cal. Rptr. 2d at 167 (overruling objections "that publication was insufficient" when made in "two publications with a total circulation of over 2.5 million subscribers"); *Dunk v. Ford Motor Co.* (1996), 56 Cal. Rptr. 2d 483, 491 (upholding class action settlement where publication notice given only in USA Today).[6]

C. The Other Cases Cited by Appellants Do Not Change this Result.

Finally, the other cases cited by Appellants purportedly showing that the trial court abused its discretion in approving the notice in this matter, *see* App. Br. at 8-11, are all readily distinguishable. For example, in *Jones v. Flowers*, the United States Supreme Court did *not* hold that "federal due process" requires "follow up action with respect to emails that were undeliverable." App. Br. at 11 n.3. Rather, it held that under the particular facts of that case the state (not a private party) should have taken additional steps with respect to undelivered mail only "if practicable to do so . . . [but that] if there were no reasonable additional steps . . . it cannot be faulted for doing nothing." 547 U.S. at 225, 234; *see, e.g., Zimmer Paper Prods. Inc. v. Berger & Montague, P.C.* (C.A. 3), 758 F.2d 86, 91 (rejecting argument that counsel had obligation to "undertake follow-up procedures after the first notice was sent"). What the Supreme Court has actually said is that "due process does not require actual notice" and that notice is "constitutionally sufficient if it was reasonably calculated to reach the intended recipient when sent." *Jones*, 547 U.S. at 225-26. In *Greenfield v. Villager Indus., Inc.*, the court

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[6] In the nationwide class action settlement upheld in *Wershba*, the defendant "e-mailed notice to approximately 2.4 million class members", "published the class notice in USA Today and MacWorld" and posted it on a website. 110 Cal. Rptr. 2d at 152. The result was similar to the result here (where the parties have also used e-mail , publication notice, and a settlement website): "Only 363 class members chose to opt out of the settlement. Only 20 class members objected to the settlement." *Id.*

found publication notice insufficient because, unlike here, it was the *only* method of notice used. (C.A. 3, 1973), 483 F.2d 824, 830. And in *In re Orthopedic Bone Screw Prods. Liab. Litig.*, the court expressly refused to "opine as to the constitutional sufficiency of the notice" at issue. (C.A. 3, 2001), 246 F.3d 315, 326. In short, Appellants are wrong about the notices in this case. The trial court was right.

POINT II

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN APPROVING THE AMENDED SETTLEMENT WITHOUT REQUIRING PROOF OF UNKNOWN REDEMPTION RATES OR CLAIMS TO BE MADE

Appellants' second assignment of error is that "[t]he trial court erred in approving a class action settlement without requiring the parties to provide any indication of the likely redemption rate, and, in particular, information about the number of claims made." App. Br. at 11. The standard for approval of a class action settlement is whether the court, in its discretion, determines that the settlement is "fair, reasonable, and adequate" after applying the eight factors described in the seminal *Beder* case, 114 Ohio Misc.2d at 28. *See also, e.g., Sutherland v. ITT Residential Capital Corp.* (1997), 122 Ohio App. 3d 526, 533, 702 N.E.2d 436. The "likely redemption rate, and, in particular, information about the number of claims made" (or claims to be made) is not one of those eight factors.[7]

[7] While Appellants assert that *Searles*, 174 Ohio App. 3d at 558, makes the issue of "redemption rate" and "claims made" one of law to be addressed in connection with a settlement, *see* App. Br. at 12 n.4, they are wrong. In *Searles*, the appellant challenged the trial court's interpretation of an Ohio statute, which "raise[d] issues of law *apart from* Civ.R. 23", and which was therefore subject to *de novo* review. 174 Ohio App. 3d at 558 (emphasis added). Furthermore, the *Searles* opinion states expressly that "the trial court has *discretion* to apply the requirements of Civ.R. 23 . . . ." *Id.* (emphasis added).

Appellants nonetheless cite nineteen cases to this Court for the proposition that the trial court "erred in approving a class action settlement without requiring the parties to provide any indication of the likely redemption rate, and, in particular, information about the number of claims made." App. Br. at 11; *see* App. Br. at 11-18. Not a single one of them, state or federal, is from Ohio.[8] (The only state or federal Ohio opinion Appellants cite in their second assignment of error is their incorrect procedural citation to *Searles*.) Nowhere do Appellants even mention the standards actually followed in Ohio and found in *Beder*.

Under *Beder*, a court presented with a class action settlement must consider whether the settlement would be "fair, reasonable, and adequate" to the class as a whole before granting approval. 114 Ohio Misc.2d at 28; *accord, e.g., Sutherland,* 122 Ohio App. 3d at 533. The eight factors to which courts in Ohio look to make this determination include:

> 1. Likelihood of recovery, or likelihood of success, 2. Amount and nature of discovery or evidence, 3. Settlement terms and conditions, 4. Recommendation and experience of counsel, 5. Future expense and likely duration of litigation, 6. Recommendation of neutral parties, if any, 7. Number of objectors and nature of objections, and 8. The presence of good faith and the absence of collusion . . . .

Beder, 114 Ohio Misc.2d at 28 (quoting 2 Herbert B. Newberg & Alba Conte, *supra*, § 11:43 at 11-97). Appellants do not challenge any of the trial court's findings (*see* T.d. 96 at 4-17) with respect to these eight factors. Nor do they offer any Ohio authority for the proposition that a ninth or tenth factor has now been added to the *Beder* test. *Cf. In re Kroger Co. S'holders Litig.*

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[8] Similarly, Appellants' citations to the guidelines of the National Association of Consumer Advocates ("NACA"), *see* App. Br. at 15-16, are essentially citations to their own personal opinions, not to an independent source of authority. The NACA website lists Appellants Ira Rheingold as Executive Director and Board Member and Mark Steinbach as Board Member. *See* http://www.naca.net/consumer-advocates-board (last accessed August 20, 2008). As the court noted in *In re Mexico Money Transfer Litig.* (N.D. Ill. 2000), 164 F. Supp. 2d 1002, 1029, *aff'd* (C.A. 7, 2001), 267 F.3d 743, *cert. denied sub nom. Garcia v. Western Union Fin. Servs.* (2002), 535 U.S. 1018, the NACA guidelines "have never been adopted by a court." *Id.* at 1029.

(1990), 70 Ohio App. 3d 52, 68 & n.9, 590 N.E.2d 391 (setting forth factors to be considered by the court in determining fairness of class action settlement, none of which require the proponents of the settlement to prove the dollar value of the settlement); *Mcdonald v. Medical Mut. of Cleveland, Inc.* (1975), Cuyahoga App. No. 33779, 1975 Ohio App. LEXIS 6066, at *4 (a class action settlement must be "fair, reasonable, and adequate . . . [T]he court must balance the likelihood that the plaintiff will prevail against the benefits derived from the settlement and the expense and delay of trial and appeal").

While (as this tends to indicate) no Ohio court has addressed it directly, courts elsewhere have clearly held that "proponents of the settlement" do *not* need to "prove the[] value" of any "coupons" by redemption rate or otherwise. *E.g., Wershba,* 110 Cal. Rptr. 2d at 163 (citing *Dunk,* 56 Cal. Rptr. 2d at 490). Other courts have also clearly held that "there is no requirement that class action settlement coupons have a cash redemption value. . . . Nor is there any requirement imposed in the case law that the settlement agreement include a minimum redemption level for coupons." *In re Mexico Money Transfer Litig.* (N.D. Ill. 2000), 164 F. Supp. 2d 1002, 1029, *aff'd* (C.A. 7, 2001), 267 F.3d 743, *cert. denied sub nom. Garcia v. Western Union Fin. Servs.* (2002), 535 U.S. 1018.

There is no doubt that the Vouchers here are valuable. Some provide free reports from Carfax. (*See* T.d. 91 ¶ I(X)(2)-(4) (one or two free Vehicle History Reports, or a 50% discount on unlimited reports for a month).) These Vehicle History Report Vouchers are also transferable. (*See* T.d. 91 ¶¶ I(X)(2), (3), (4).) *Cf. In re Western Union Money Transfer Litig.* (E.D.N.Y. Oct. 19, 2004), No. CV-01-0335 (CPS), 2004 U.S. Dist. LEXIS 29377, at *40 (coupons provided sufficient value to settling plaintiffs in part because "the coupons are freely transferable . . . . As a result, even those defendants who no longer use defendants' service will

be able to sell their coupons or give them away"); *see also, e.g., In re Cuisinart Food Processor Antitrust Litig.*, (D. Conn. Oct. 24, 1983), No. M.P.L. 447, 1983 U.S. Dist. LEXIS 12412, at *13 ("fact that . . . coupons are transferable enhances their economic value"). Another Voucher provides cash of up to $20 without having to buy or get anything from Carfax at all. (*See* T.d. 91 ¶ I(X)(1).)

These are attractive options well within the range of benefits offered in other cases, particularly when compared to the relative weakness of the claims here—and they do not have the defect of coupons rejected as lacking value by other courts. *Cf., e.g., In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.* (C.A. 3, 1995), 55 F.3d 768, 807, *cert. denied sub nom. GMC v. French* (1995), 516 U.S. 824 (cited in App. Br. at 12) (the only use that could be made of a coupon was the purchase of another defective product from the defendant at full price); *see also, e.g., In re Excess Value Ins. Coverage Litig.* (S.D.N.Y. July 30, 2004), Nos. M-21-84 (RMB), MDL-1339, 2004 U.S. Dist. LEXIS 14822, at *46-47 ("Unlike coupons . . . in other class actions—where class members only benefit if they use the coupon in connection with the purchase of an expensive durable good, the vouchers in this case are easily redeemable on relatively inexpensive consumable goods and services").[9] Indeed, they are

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[9] As this indicates, this is not a settlement where Class Members can only get "discounts of dubious value", App. Br. at 18 (quoting *In re Compact Disc Minimum Advertised Price Antitrust Litig.* (D. Me. 2003), 216 F.R.D. 197, 221 (approving some settlements and not approving another)). In fact, even before the Revised Settlement Agreement, Class Members could receive either cash, or discounted services in the form of Vehicle History Reports, or *free*, not discounted, services in the form of Vehicle History Reports. In the settlement rejected by the court in *In re Compact Disc*—after the court had expressed doubt about it during preliminary approval, *see id.* at 222 n.62—only discounts of 50% were available, they were not transferable, and there were already *larger* discounts available from the settling defendants for their compact discs. *Id.* at 220 n.56.

"'much more attractive' than" coupon programs approved in some other cases. *E.g., Wershba*, 110 Cal. Rptr. 2d at 163.[10]

As this indicates, the settlement here—in addition to its injunctive relief—contains valuable economic benefits for the Class.[11] Class Members may choose to pursue them or not (and the Supplemental E-Mail Notice will obviously encourage that pursuit). No law or rule required the trial court, however, to demand guesses or evidence from anyone as to "take rates" or "claims made" for these future benefits. Consistent with *Beder,* the trial court therefore exercised its discretion appropriately in approving the revised settlement here.

POINT III

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING APPELLANTS' UNTIMELY DISCOVERY DEMANDS

The third assignment of error by Appellants is that "[t]he trial court erred in denying the motion to compel disclosure of claims information." App. Br. at 18. While Appellants cited no cases on point or from Ohio for their second assignment of error, they cite no authority of any kind on point from anywhere that would support this third assignment of error.

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[10] In *Dunk v. Ford Motor Co.,* for example, the plaintiff sued over allegedly defective doors on Ford Mustang convertibles. 56 Cal. Rptr. 2d at 487. After just six months, the parties in that case agreed to a settlement of all claims involving the doors. *Id.* The sole basis of the settlement was a "coupon redeemable for $400 off the price of any new Ford car or light truck purchased within one year." *Id.* The coupons used for that settlement "were not transferable, were applicable only to a 'big ticket item', . . . and were the only recovery by the consumer." *Wershba*, 110 Cal. Rptr. 2d at 163 (citing *Dunk*, 56 Cal. Rptr. 2d at 490). Yet they were perfectly acceptable.

[11] Professor of Law Gregory M. Travalio of Ohio State University, who authored the *Ohio Consumer Law Handbook*, opined in his testimony to the trial court that the Vouchers in the original proposed settlement are valuable to the Class, that the settlement "provides significant individual and societal benefits beyond the vouchers", and that the "settlement and the terms thereof are in the best interests of the Plaintiff, the Class, and consumers generally." (*See* T.d. 82, ¶¶ 11-13, 16, 18.) The revised settlement will provide even further benefits to the Class.

There are, however, many cases that can be cited against Appellants on the issue of their motion to compel.

First, the trial court had no obligation to consider the merits of Appellants' motion to compel at all because the record indicates that Appellants failed to submit any statement reciting any efforts they had made to resolve the discovery dispute covered by that motion. This statement is required by Ohio Civil Rule 37(E). In the absence of that statement, the trial court could not have abused its discretion in refusing Appellants' motion to compel. *See, e.g., Roth v. Roth*, Cuyahoga App. No. 89141, 2008-Ohio-927, ¶66 ("None of appellant's motions complied with the procedural requirements of Civ.R. 37, therefore, there was no abuse of discretion by the trial court in failing to consider the merits of appellant's motions prior to overruling them.").

Second, the abuse of discretion standard applicable to the trial court's decision on Appellants' motion itself indicates that the decision was correct. As the court held in *513 E. Rich St. Co. v. McGreevy*, "[a] trial court's decision on a motion to compel discovery is within its broad discretion and will not be reversed absent an abuse of such discretion . . . . An abuse of discretion connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." Franklin App. No. 02AP-1207, 2003-Ohio-2487, ¶10 (citing *Stewart v. Seedorff* (1999), Franklin App. No. 98AP-1049, 1999 Ohio App. LEXIS 2375; *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301); *accord, e.g., Witt v. Fairfield Pub. Sch. Dist.* (1996), Butler App. No. CA95-10-169, 1996 Ohio App. LEXIS 1564, at *18-19 (trial court did not abuse discretion in denying motion to compel discovery even though

trial court's reasoning was erroneous).[12] It could hardly be "unreasonable, arbitrary or unconscionable" to deny a motion to compel discovery made months after all applicable deadlines for objections by Class Members, for example.

Third, the discovery sought by Appellants in their motion to compel was not discovery aimed at evidence the trial court was required to consider. The parties provided the trial court ample evidence with which to evaluate the settlement in the Revised Settlement Agreement. The trial court "considered each and every factor required" of the eight factors in *Beder, see* 114 Ohio Misc.2d at 28, before finding "that the Revised Settlement is fair, adequate and reasonable." (T.d. 96 at 17.) *See also, e.g., Sutherland,* 122 Ohio App. 3d at 533. Appellants do not challenge the trial court's findings with respect to these eight factors. Nevertheless, they argue that the trial court should have also considered "claims information" that they, and they alone, considered to be "crucial" to an analysis of the Revised Settlement. *See* App. Br. at 19. But, as noted earlier, such "claims made" information is not a required factor under *Beder.*

In short, the trial court had more than enough evidence and legal argument before it to assess the propriety of the revised settlement. Its decision to rely on the enumerated factors from *Beder*—instead of the Appellants' proposed additional factors—in its evaluation of that evidence and argument cannot constitute an abuse of discretion. *See UAW v. GMC* (C.A. 6 2007), 497 F.3d 615, 635 ("Objecting class members also do not have a vested 'entitle[ment] to discovery'"); *Detroit v. Grinnell Corp.* (C.A. 2 1974), 495 F.2d 448, 464 ("To allow the objectors to disrupt the settlement on the basis of nothing more than their unsupported

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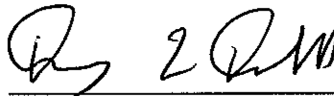
[12] While Appellants first claim the trial court "erred", App. Br. at 18, even they soon concede that that proper standard is actually abuse of discretion. *See* App. Br. at 18 n.8 (citing *Mauzy*, 75 Ohio St.3d at 592, the only case they cite at all on this assignment of error).

suppositions would completely thwart the settlement process."); *In re General Tire & Rubber Co. Sec. Litig.* (C.A. 6 1984), 726 F.2d 1075, 1084 & n.6 ("While objectors are entitled to 'meaningful participation' in the settlement proceedings . . . they are not automatically entitled to discovery or 'to question and debate every provision of the proposed compromise.'") (internal citations omitted). The trial court was right on this issue, too.

CONCLUSION

For the reasons stated above, this Court should affirm the judgment of the trial court in all respects.

Respectfully submitted,



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I hereby certify that on August 25, 2008 I have this day served a copy of the within and foregoing document upon the following counsel of record by mailing them a copy of the same through the United States mail in a properly addressed envelope with sufficient postage affixed to reach its destination:

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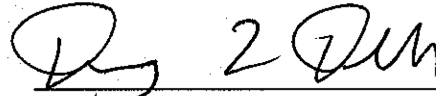

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