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UNITED STATES DISTRICT COURT

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CENTRAL DISTRICT OF CALIFORNIA

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EASTERN DIVISION — RIVERSIDE

14

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JOHN TRUE and Gonzalo M.)
Delgado, individually and on behalf)
of all others similarly situated,)

Case No. EDCV 07-287-VAP (OPx)

16

Plaintiffs,)

**OBJECTIONS OF CLASS MEMBERS
JOSEPH K. GOLDBERG, VALERIE
M. NANNERY, AND KATHERINE A.
BURGHARDT**

17

v.)

Date: January 11, 2010

18

AMERICAN HONDA MOTOR CO.,)
INC.,)

Time: 10:00 a.m.

19

Defendant.)

Courtroom 2

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**OBJECTIONS OF CLASS MEMBERS JOSEPH K. GOLDBERG,
VALERIE M. NANNERY, AND KATHERINE A. BURGHARDT**

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INTRODUCTION

1
2 Because the overwhelming majority of class members would receive no
3 meaningful relief if the proposed settlement in this case is approved, and because the
4 settlement makes arbitrary distinctions among members of the class, class members
5 Joseph K. Goldberg, Valerie M. Nannery, and Katherine A. Burghardt object to the
6 settlement.

7 The settlement's primary relief consists of marketing gimmicks that will benefit
8 Honda more than the class. Most class members would release all of their claims in
9 exchange for (1) a Honda-produced DVD with tips on how to get better gas mileage
10 and (2) the opportunity to participate in a coupon-like rebate program that would
11 require class members to buy one of Honda's less-fuel-efficient models. The DVD,
12 however, is worthless. The information is already available free, will be available for
13 viewing on the settlement website anyway, and does not address the claims in this
14 lawsuit. The coupon-like rebate program is similarly worthless for the overwhelming
15 majority of class members, and suffers from the same flaws that have led to widespread
16 criticism of coupon settlements by Congress, courts, and commentators. The
17 redemption rates will be far lower than predicted by class counsel and the settlement
18 erects unnecessary barriers that will further decrease participation.

19 In addition, fewer than two percent of class members are eligible to make a claim
20 for a \$100 cash payment, and to do so they must complete a series of steps within a
21 60-day window—obstacles that will discourage claims and further lower the
22 redemption rate. Because the proposed settlement would provide no benefit to the vast
23 majority of the class, the settlement should be rejected.

BACKGROUND

A. The Underlying Class Action

24
25
26 This class action alleges that Honda induced consumers to purchase the Honda
27 Civic Hybrid with false or misleading statements regarding the Civic Hybrid's fuel
28 efficiency and cost savings. Doc. 48. The complaint asserts state-law claims under the

1 Unfair Competition Law (UCL), Cal. Bus. & Pro. Code § 17200, *et seq.*, False
2 Advertising Law (FAL), Cal. Bus. & Pro. Code § 17500, *et seq.*, Consumers Legal
3 Remedies Act (CLRA), Cal. Civil Code § 1750 *et seq.*, and for common-law unjust
4 enrichment.

5 According to the plaintiffs, the Civic Hybrid sells for about \$2,500 to \$7,000 more
6 than a comparably equipped standard-engine Honda Civic.^{1/} Consumers paid this
7 “hybrid premium” to purchase the Civic Hybrid because Honda’s advertisements led
8 them to believe that they would enjoy substantially better fuel economy than they
9 actually obtained. In fact, the fuel efficiency and cost savings of the Civic Hybrid are
10 substantially less than that advertised by Honda, and the Civic Hybrid gets only
11 marginally better gas mileage than the standard-engine Honda Civic.

12 After this Court denied Honda’s motion to dismiss the complaint, *True v.*
13 *American Honda Motor Co., Inc.*, 520 F. Supp. 2d 1175, 1183 (C.D. Ca. 2007), the
14 parties took discovery and then entered into settlement negotiations resulting in an
15 agreement that was filed with the Court on March 2, 2009.^{2/} Doc. 91.

16 **B. The Proposed Settlement Agreement**

17 Under the terms of the proposed settlement, class members would release all of
18 their claims in exchange for a DVD with tips on how to improve their gas mileage. In
19 addition, some class members may be eligible to seek additional relief under one of
20 three mutually exclusive options.

21

22

23 ^{1/}In their complaint (Doc. 1), opposition to the defendant’s motion to dismiss (Doc. 19),
24 and first amended complaint (Doc. 48), the plaintiffs alleged that this “hybrid
25 premium” was about \$7,000. In their brief in support of preliminary approval of the
26 settlement (Doc. 97), they say that they can demonstrate through expert testimony that
27 the “hybrid premium” was at least \$2,500. In their supplemental brief (Doc. 105), the
28 plaintiffs further explained that their expert had determined that the Honda Civic EX
was the standard-engine model most comparable to the Civic Hybrid, and that based
on publicly available pricing data, the average hybrid premium for each model year
during the class period ranged from \$2,240 to \$3,090.

^{2/}The settlement agreement has been modified by a letter agreement dated July 9, 2009,
and filed with the Court on July, 13, 2009. Doc. 112-2, Exh. 1.

1 Under “Option A,” a class member who (1) purchased (rather than leased) a new
2 model year 2003-2008 Civic Hybrid, (2) sells or trades it in, (3) purchases an eligible
3 Honda vehicle,^{3/} (4) satisfies the qualifying preconditions for obtaining a claim form,
4 and (5) submits a claim form with proper documentation by October 31, 2011, can
5 obtain a \$1,000 rebate of the money the class member pays for a new Honda. The
6 qualifying preconditions require the class member to access the settlement website,
7 enter the VIN of the Civic Hybrid, watch a video on how to improve gas mileage,
8 obtain a preassigned claim number, and download a claim form. Option A is
9 non-transferable.

10 Under “Option B,” a class member who (1) retains ownership or has a leasehold
11 on a Civic Hybrid and (2) purchases an eligible Honda vehicle, (3) satisfies the
12 qualifying preconditions for obtaining a claim form, and (4) submits a claim form with
13 proper documentation by October 31, 2011, can obtain a \$500 rebate of the money the
14 class member pays for a new Honda. Option B is transferable to certain family
15 members if the transferee submits proof of the family relationship.

16 Under “Option C,” a class member (1) who before March 2, 2009 complained
17 about the fuel economy of the class member’s Civic Hybrid to Honda, an authorized
18 Honda dealer who reported it to Honda, or to class counsel, (2) whose complaint
19 resulted in a written record created in the ordinary course of business, and (3) who
20 satisfies the qualifying preconditions for obtaining a claim form and (4) submits the
21 claim form within 60 days after it becomes available, can receive \$100 from Honda.

22 The agreement provides that class counsel may seek attorney’s fees of up to
23 \$2,950,000, and includes a “clear-sailing” clause providing that Honda will not contest
24
25
26

27 ^{3/}An eligible Honda vehicle is a new model year 2009, 2010 or 2011 Honda or Acura,
28 excluding the Honda Fit, Honda Insight, Civic Hybrid, Honda CRZ or any Honda
Certified Used Car or Acura Certified Pre-Owned Vehicle.

1 class counsel's fee request.^{4/} It also provides for incentive payments of \$12,500 and
2 \$10,000 to the two class representatives, respectively.^{5/}

3 Plaintiffs filed a motion for preliminary approval of the settlement (Doc. 92),
4 which this Court denied (Doc. 100) because the Court lacked "sufficient information
5 to determine whether the proposed class satisfies the requirements of Rule 23 and
6 whether the proposed settlement is fair, adequate, and reasonable." *Id.*, 9:7-10. In
7 particular, the Court held that plaintiffs had failed to meet their burden under Rule
8 23(e) because the Court could not determine the fairness and adequacy of the
9 settlement without additional information concerning the strength of plaintiffs' case,
10 the value of the proposed relief, and the likely number of class members who would
11 take up each of the relief options. Plaintiffs filed a supplemental motion for
12 preliminary approval of the settlement (Doc. 104) and submitted additional
13 information. Following a hearing on the supplemental motion, plaintiffs filed a second
14 supplemental motion for preliminary approval (Doc. 111) to address issues that arose
15 at the hearing. On August 27, 2009, the Court entered an order granting preliminary
16 approval to the agreement. Doc. 114.

17 IDENTITY OF OBJECTORS AND INTENT TO APPEAR

18 These objections are filed on behalf of class members Joseph K. Goldberg, Valerie
19 M. Nannery, and Katherine A. Burghardt. *See* Declarations of Objectors Goldberg,
20 Nannery, and Burghardt, attached as Exhibits 1, 2, and 3. Each objector purchased a

21 _____
22 ^{4/}*See, generally*, William D. Henderson, *Clear Sailing Agreements: A Special Form of*
23 *Collusion in Class Action Settlements*, 77 Tul. L. Rev. 813 (2003).

24 ^{5/}Objectors recognize that reasonable incentive awards are often appropriate to
25 compensate class representatives for the time spent performing duties that are not
26 undertaken by absent class members, including time spent in depositions and
27 responding to other discovery. But because named plaintiffs "may be tempted to
28 accept suboptimal settlements at the expense of the class members," *Weseley v. Spear,*
Leeds & Kellogg, 711 F. Supp. 713, 720 (E.D.N.Y. 1989), courts must carefully
scrutinize incentive awards. *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1148
(11th Cir. 1983). The size of the proposed incentive awards in this settlement
underscore the unfairness of the settlement to the vast majority of class members who
will release their claims in exchange for absolutely nothing of value.

1 new Civic Hybrid in model years 2003 through 2008. The accompanying declaration
2 of each objector contains all of the information required by paragraph 12 of the second
3 revised preliminary approval order (Doc. 114), and the additional information required
4 by paragraph 9.c.(1)(vii) of the class notice (Doc. 112-2, Exh. 3). Objectors intend to
5 appear at the Final Approval Hearing through counsel and present argument in support
6 of their objections. *See* Notice of Appearance. Counsel have executed declarations,
7 attached as Exhibits 4 and 5, setting forth the information required by paragraph
8 9.c.(1)(vii) of the class notice.

9 STANDARDS UNDER RULE 23(e)

10 A district court may approve a class action settlement “only after a hearing and on
11 finding that it is fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2); *see Staton*
12 *v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). The settling parties bear the burden
13 of showing that the settlement meets this standard. *Id.* The purpose of this requirement
14 is “the protection of those class members . . . whose rights may not have been given
15 due regard by the negotiating parties.” *Officers for Justice v. Civil Serv. Comm’n*, 688
16 F.2d 615, 624 (9th Cir. 1982). The proposed settlement here requires a higher level
17 of scrutiny because it was reached prior to class certification, *see Amchem Prods., Inc.*
18 *v. Windsor*, 521 U.S. 591, 620-21 (1997); *In re GM Corp. Pick-Up Truck Fuel Tank*
19 *Prods. Liab. Litig.*, 55 F.3d 768, 787-88 (3d Cir. 1995); *Weinberger v. Great N.*
20 *Nekoosa Corp.*, 925 F.2d 518, 520 (1st Cir. 1991), and because of the inherent tension
21 attributable to class counsel’s self-interest in achieving a settlement that, like this one,
22 involves a substantial fee. *See Staton*, 327 F.3d at 959-60; *see also Powers v. Eichen*,
23 229 F.3d 1249, 1256 (9th Cir. 2000).

24 Although a court may need to balance several factors to determine whether a
25 proposed settlement is fair, reasonable, and adequate, “[t]he relative importance to be
26 attached to any particular factor will depend upon the nature of the claims, the types
27 of relief sought, and the unique facts and circumstances presented by the individual
28 case.” *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291(9th Cir. 1992) (citing

1 *Officers for Justice*, 688 F.2d at 625). The essence of the inquiry is whether the
2 settlement reflects a reasonable compromise in light of the prospects of further
3 litigation. A critical element of this analysis, particularly in cases such as this one
4 where the class seeks a monetary recovery, is consideration of the value of the
5 proposed settlement in comparison to an appropriately discounted valuation of the
6 possible recovery if the case were to proceed to judgment and the fairness of the
7 distribution of any benefits among the class members.

8 Such an analysis is particularly difficult where the value of the in-kind relief, like
9 the DVD provided by this settlement, is not apparent from the face of the agreement.
10 Similarly, coupon settlements, such as the rebate opportunities provided by this
11 agreement, must be carefully scrutinized because their potential value to the class is
12 diminished by low redemption rates. The Court has a responsibility to ensure that the
13 settlement provides real value by offering relief that the class will actually use. *See*
14 2003 Advisory Committee Notes, Fed. R. Civ. P. 23(h) (“Settlements involving
15 nonmonetary provisions for class members also deserve careful scrutiny to ensure that
16 these provisions have actual value to the class.”); Class Action Fairness Act, 28 U.S.C.
17 § 1712(e) (setting standards for judicial scrutiny of coupon settlements). As explained
18 below, the Court should deny final approval of the proposed settlement in this case
19 because the settlement would leave the vast majority of class members with no relief
20 at all, and because it makes arbitrary distinctions among class members.

21 ARGUMENT

22 I. The Fuel Economy Video and DVD Provide No Value to the Class.

23 If the proposed settlement is approved, Honda will produce a “Fuel Economy
24 Video” with “information concerning how Settlement Class Members can drive and
25 maintain their vehicles, including the [Civic Hybrid], in order to maximize and
26 optimize their fuel economy.” Doc. 91, 5:3-6. The video will be posted on the
27 settlement website, where it can be viewed by class members as a precondition to
28 receiving a claim form to pursue the other relief potentially available under Options

1 A, B, and C. *Id.*, 10:13-12. The video will also be put on DVDs that will be mailed
2 to all class members. *Id.*, 15:10-12.

3 **A. The information to be included on the DVD is already available free.**

4 The DVD has not yet been produced, and it will be produced only if the settlement
5 is approved, but the settling parties have submitted a “Preliminary Outline for Fuel
6 Economy DVD” that describes its proposed content. Doc. 104-2, Exh. F-16. That
7 outline describes information that is already widely available free, making it apparent
8 that the DVD will provide no real value to the class.^{6/}

9 Specifically, many free and publicly-available websites contain substantially the
10 same information on how to maximize or optimize fuel economy as the proposed DVD.
11 *See* Declaration of Julian Helisek, attached as Exhibit 7. Similarly, the information
12 listed on the outline that is specific to the Civic Hybrid is information that is already
13 included in each class member’s Civic Hybrid owner’s manual and on Honda’s own
14 websites. *Id.* Thus, the DVD is unlikely to provide class members with any
15 information that is not already available to them. Tellingly, Honda has not asserted
16 that any information that will be included in the video is otherwise unavailable.

17 Anticipating these objections, class counsel argues that the DVD has value to the
18 class because there are “videos currently available for sale on the internet providing
19 instructions and tips for maximizing fuel economy.” Doc. 105, 12:11-12. The mere
20 fact that something is offered for sale on the internet does not demonstrate its value to
21 the class or show that it is not available elsewhere free.

22

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25 ^{6/}In a recent order denying final approval of a proposed class action settlement, Chief
26 Judge Walker of the Northern District of California found that the defendant’s
27 agreement to provide each class member with anti-spam software was of little value
28 because similar software is available to most internet users free. *In Re TD Ameritrade
Accountholder Litigation*, No. 07-2852 (N.D. Cal. Oct. 23, 2009) (order denying final
approval of proposed class action settlement). A copy of Judge Walker’s order is
attached as Exhibit 6.

1 **B. The DVD does not address the claims in the lawsuit.**

2 Plaintiffs allege that class members were induced to pay substantially more for the
3 Civic Hybrid than they would have paid for a conventional Honda Civic because
4 Honda engaged in false and deceptive advertising about the fuel economy of the Civic
5 Hybrid. The lawsuit seeks restitution in the form of a refund of the “hybrid premium.”
6 It does not seek educational materials on how to maximize fuel economy. Because the
7 DVD would not provide restitution, the DVD is not directed toward the claims in the
8 lawsuit, and the DVD cannot be considered adequate consideration for a release of the
9 class members’ monetary claims. *See In re Ford Motor Co. Bronco II Product*
10 *Liability Litigation*, 981 F. Supp. 969, 971-72 (E.D. La. 1997) (refusing to
11 preliminarily approve a proposed settlement that included a safe-driving video because,
12 despite claims that the video would provide an educational benefit, the proposed
13 settlement included none of the monetary relief sought in the complaint).

14 Class counsel cites *Shaw v. Toshiba American Information Systems, Inc.*, 91 F.
15 Supp. 2d 942 (E.D. Tex. 2000), in support of the assertion that “the DVD is of real,
16 economic value, designed to meet the Complaint’s allegations[.]” Doc. 105, 17:24-25.
17 But *Shaw* held that “[a] settlement should not be disapproved simply because it
18 contains an in-kind benefit component if the benefits are of *real, economic value* to the
19 class members.” 91 F. Supp. 2d at 960 (emphasis added). *Shaw* held that the in-kind
20 relief in that case—a software patch, disk drive, and hardware fix—“provided
21 significant value to class members.” *Id.* Moreover, *Shaw* was brought to remedy a
22 particular product defect that the in-kind benefits would cure. As explained above, the
23 DVD in this case has no economic value and does not cure the problem of Honda
24 having misled the class into paying a hybrid premium.

25 Class counsel also cites *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269 (W.D. Tex.
26 2007), as support for the proposition that an education program can, in some
27 circumstances, provide valuable relief. Doc. 105 at 17. But the issue here is not
28 whether any educational program can *ever* be a valuable part of a settlement package.

1 Rather, the issue is whether the fuel economy DVD contemplated by this settlement
2 would provide a benefit that addresses the claims in the lawsuit. *DeHoyos* was a
3 challenge to an insurance company’s use of a particular credit-scoring algorithm that
4 had a disparate impact on minorities. The court found that the total settlement
5 package—which included a new credit-scoring formula, an appeals process, a credit-
6 education program, increased minority marketing, and monetary relief—provided
7 sufficient relief to warrant approval. *DeHoyos*, 240 F.R.D. at 303-10. Further, the
8 credit education program that was part of the settlement package was “not currently
9 available,” but would be “developed and implemented by two leading minority
10 advocacy groups.” *Id.* at 306. In contrast, the information that will be on the video
11 proposed in this settlement is already available, and because it will be produced by
12 Honda for viewing by Honda customers, it will likely promote Honda’s products and
13 provide far more benefit to Honda than to the class.

14 Even if the proposed video was directed towards the claims in this case, class
15 counsel has not presented any evidence that watching the video will actually improve
16 class members’ fuel economy or in what amounts. Although class counsel presents a
17 table to show “[t]he potential economic value to Class Members of the DVD” based
18 on various percentages of improvement in fuel economy “that may be realized after
19 viewing the DVD and following its instructions,” (Doc. 105, 11:5-15), counsel
20 acknowledges in a footnote that the “calculation of savings is for illustrative purposes
21 only[.]” *Id.*, n.23.

22
23 **C. Because the video can be viewed on the settlement website, there is no
reason to send each class member a DVD.**

24 The same video that the settling parties propose to send to each class member will
25 be available on the settlement website. The settlement provides that class members
26 who enter the VIN of their Civic Hybrid and watch the video can obtain a preassigned
27 claim number and download a claim form (Doc. 91, 10:16-19), but the documents filed
28 in connection with the proposed settlement do not indicate whether those who do not

1 enter a VIN will still be able to view the video online. To the extent that the online
 2 video will be available to all class members, or to the general public, there is no reason
 3 to send each class member an individual DVD. The cost of producing and mailing
 4 individual DVDs could be avoided and the savings passed on to the class members.

5 **II. The Potential Rebates Under Options A and B Provide Little or No Value.**

6 **A. In general, coupon settlements are disfavored.**

7 Non-cash coupon settlements, which offer class members a chance to get a
 8 discount or rebate on future purchases from the defendant, have been widely criticized
 9 by Congress, courts, and commentators—and for good reason.^{2/} As Congress noted
 10 when it enacted the Class Action Fairness Act of 2005: “Class members often receive
 11 little or no benefit from class actions, and are sometimes harmed, such as where . . .
 12 counsel are awarded large fees, while leaving class members with coupons or other
 13 awards of little or no value.” Pub. L. 109-2, § 2(a)(3), codified at 28 U.S.C. § 1711,
 14 note (Findings and Purposes at (a)(3)); see *Kearns v. Ford Motor Co.*, 2005 WL
 15 3967998, *1 n.1 (C.D. Cal. 2005) (coupon settlements “produce hardly any tangible
 16 benefits for the members of the plaintiff class, but generate huge fees for the class
 17 attorneys”); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D.
 18 197, 221 (D. Me. 2003) (“[A] settlement is not fair where all the cash goes to expenses
 19 and lawyers, and the members receive only discounts of dubious value.”); *Clement v.*
 20 *Am. Honda Fin. Corp.*, 176 F.R.D. 15, 27 (D. Conn. 1997) (disapproving settlement
 21 that provided coupons as a credit against class members’ next purchase or lease of a
 22 Honda because “the coupons are essentially worthless to class members”); Miller &
 23 Singer, *Nonpecuniary Class Action Settlements*, 60 Law & Contemp. Probs. 97, 108
 24 (1997) (for many class members, “the right to receive a discount will be worthless”).

25 As the National Association of Consumer Advocates, in its *Standards and*

26 _____
 27 ^{2/}Although the rebate opportunities potentially available under Options A and B do not
 28 involve a physical coupon, the nature of the relief is much the same as a traditional
 coupon. Indeed, as explained in section B.3. below, the rebate program here is in some
 ways worse than a typical coupon settlement.

1 *Guidelines for Litigating and Settling Consumer Class Actions*, 255 F.R.D. 215, 235
2 (2009) (“NACA Guidelines”), explains, coupon settlements should be avoided
3 because:

4 1. Except in unusual circumstances, there is usually no principled reason why
5 delivery of cash settlements cannot be achieved, aside from the fact that the
6 defendant prefers not to do so.

7 2. For most of the class, redemption may not be an option, because they are
8 unwilling or unable to make a future purchase from the defendant. Thus the
9 class members are not equally compensated—some get more, others get less.
10 This situation is at its most aggravated when the certificate requires purchase
11 of a new car or other “big ticket” item.

12 3. Even where the coupon is for a small ticket item or is freely transferable,
13 the defendant may be able to use its specialized knowledge of the industry to
14 recover the cost of the coupon in the marketing of the relevant product.

15 4. Policy considerations disfavor rewarding the wrongdoing defendant with
16 new sales from the victims of its illegal practices.

17 All of these factors disfavor the approval of the proposed settlement in this case.
18 Moreover, as discussed below, the rebate program proposed here suffers from
19 additional shortcomings.

20 **B. The wildly optimistic redemption rates predicted by class counsel are
21 based on a flawed analysis, ignore the experience of similar settlements,
22 and do not account for the many obstacles to participation in this
23 settlement.**

24 This Court denied plaintiffs’ first motion for preliminary approval of the
25 settlement because, among other things, class counsel failed to provide estimates of the
26 number of class members who would make use of the rebate opportunities available
27 under Options A and B. Doc. 100, 20:13-21. Unfortunately, although class counsel
28 has now provided an estimate, the predicted redemption rates lack credible support.

1 **1. The Dreze analysis is unsupported and contains multiple errors.**

2 In their supplemental brief, class counsel rely on a declaration from Xavier Dreze
3 (Doc. 104-2, Exh. C) who “estimates that 7% of Class Members will elect Option A,
4 and 6% of Class Members (or an eligible family member thereof) will elect Option
5 B[.]” Doc. 105, 13:2-4. Although Dreze does not explain his methodology, he
6 apparently estimated the number of class members with potential interest in purchasing
7 another Honda during the rebate period and multiplied that number by an estimated
8 response factor of 40% for Option A and 20% for Option B. *See* Declaration of
9 Clarence Ditlow, Exh. 8, 6:19-7:6. Dreze’s methodology suffers from multiple
10 independent errors which are described in the Ditlow Declaration.

11 *First*, Dreze began with an estimate of the number of Civic Hybrids still owned
12 by class members by subtracting the number of trade-ins, but he did not account for
13 vehicles that are out of class member use because they were totaled in crashes or
14 otherwise scrapped. *Id.*, 7:10-15. *Second*, Dreze uses a two-year window for the
15 rebate program, but in fact the program will last no more than 19 months. *Id.*, 7:16-23.
16 *Third*, Dreze fails to account for class member demand for Honda vehicles, other than
17 the Civic Hybrid, that are excluded from the rebate program. *Id.*, 7:24-8:5. Each of
18 these errors inflates Dreze’s estimate of the number of class members who may be in
19 the market for a Honda during the rebate program, and results in an upwardly-skewed
20 estimate of the number of class members with potential interest in purchasing another
21 Honda during the rebate period.

22 The most fundamental flaw in Dreze’s analysis is his use of 40% and 20% as
23 estimated response factors. Dreze does not explain why he chose those percentages
24 and he cites no sources for them. Dreze states only that “[r]edemption rates in class
25 actions have varied widely, ranging from less than one percent to over 90 percent. As
26 a result, estimates of cash back redemption rates were not derived from one source,
27 rather, were based on a review of publically available evidence and scholarly writing
28 on settlements.” Doc. 104-2, Exh. C, 3:18-22. Whatever their source and derivation,

1 the factors used by Dreze that drove his estimate that Options A and B would have a
2 combined redemption rate of 13% are clearly flawed because the actual redemption
3 rates for coupon settlements providing discounts or cash back on the purchase of a new
4 vehicle from a defendant in settlements of the type proposed here are typically 2% or
5 less.

6
7 **2. The GM truck cases and Ford Explorer cases suggest that the redemption rate here will be no more than 2%.**

8 In the GM truck cases, plaintiffs alleged that the trucks had a design defect that
9 increased the likelihood of fuel tank ruptures in side-impact crashes. Identical
10 settlements were reached in two separate cases. One case was in federal court in the
11 Eastern District of Pennsylvania and covered GM truck owners in all states but Texas;
12 the other case was in state court in Texas and applied only to truck owners there. The
13 proposed settlements limited class members' recovery to discount coupons to buy new
14 GM trucks. The proposed coupons were valid for 15 months and provided a \$1,000
15 discount on the purchase of a new GM Truck or minivan. Additionally, class members
16 could transfer the coupon to third parties, but then the coupon was worth only \$500.
17 Although the trial courts in both cases approved the settlements, the settlements were
18 rejected and strongly criticized on appeal. *In re Gen. Motors Corp. Pick-up Truck Fuel*
19 *Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir.); *Bloyed v. Gen. Motors Corp.*, 881
20 S.W.2d 422 (Tex. App.—Texarkana 1994), *aff'd and remanded*, *Gen. Motors Corp.*
21 *v. Bloyed*, 916 S.W.2d 949 (Tex. 1996). One of the major criticisms was that the
22 coupons would have low redemption rates and would leave most class members with
23 no benefit.

24 The GM truck cases were eventually settled in a Louisiana state-court action. In
25 the Louisiana case, the settlement was much improved from the earlier cases because
26 it provided coupons of up to \$1,000 toward the purchase of almost any new GM
27 vehicle, took steps to create a secondary market for the coupons, and more than
28 doubled the life of the coupons. *White v. Gen. Motors Corp.*, 835 So. 2d 892, 896-97

1 (La. App. 1 Cir. 2002). But even with all of these improvements to the coupon portion
2 of the settlement, less than 100,000 of the 5.8 million eligible settlement class members
3 redeemed their coupons, a redemption rate of less than 1.7%. Ditlow Declaration, Exh.
4 8, 4:15-19.

5 In the Ford Explorer class action cases, plaintiffs claimed that Ford concealed a
6 dangerous design flaw that increases the tendency of the vehicles to roll over, causing
7 consumers to buy or lease Explorers, and to pay more than what they should have. The
8 cases were consolidated and a class action settlement approved in *Ford Explorer*
9 *Cases*, J.C.C.P. Nos. 4266 & 4270, California Superior Court, County of Sacramento.
10 The settlement class consisted of about one million consumers. The settlement
11 provided a process by which class members could claim coupons, valid for 12 months,
12 worth \$500 toward the purchase or lease of a new Ford Explorer or \$300 toward the
13 purchase or lease of any other new Ford, Lincoln, or Mercury vehicle. On June 26,
14 2009, class counsel in *Ford Explorer Cases* filed an Interim Report on Settlement
15 Claims and Voucher Redemption (attached as Exhibit 8(a)) showing that only 75
16 discount certificates had been redeemed, representing a redemption rate of about
17 .0075%. Ditlow Declaration, Exh. 8, 5:1-14.

18 The GM Truck cases and Ford Explorer cases provide the best estimate of the
19 likely redemption rates for the rebate program proposed here, but the cases were
20 apparently ignored by Dreze when he made his redemption rate estimate of 13%.
21 Similarly, class counsel apparently ignored the GM Truck and Ford Explorer
22 redemption rates when they opined, without citation, that the figures predicted by
23 Dreze “are consistent with redemption rates in settlements of this nature.” *Id.*
24 Although they expressed support for Dreze’s estimate, class counsel noted that “Honda
25 does not endorse his findings and conclusions and takes no position with respect
26 thereto.” Doc. 105, 10:27-28. This is significant because “the defendant will usually
27 be in a superior position to predict the ultimate redemption rate and benefit to the
28 class[.]” NACA Guidelines, 255 F.R.D. at 236-37.

1 **3. The rebate program here imposes significant obstacles to**
2 **participation beyond those in the GM Trucks and Ford Explorer**
3 **cases.**

4 Based solely on the redemption rates in the GM Trucks and Ford Explorer coupon
5 settlements, it is highly unlikely that the redemption rate here would reach even 2%,
6 much less the 13% estimated by Dreze. But the settlement here presents three
7 *additional* obstacles to class member participation.

8 *First*, although it could easily do so, Honda will not simply mail a discount coupon
9 to each class member. Rather, rebates can be obtained only if the class member (1)
10 goes to the settlement website, (2) enters the VIN of his or her Civic Hybrid, (3)
11 watches the fuel economy video, (4) obtains a preassigned claim number, (5)
12 downloads a claim form, (6) purchases an eligible Honda vehicle, *and* (7) submits all
13 of the required documentation (8) by October 31, 2011. Only if all eight of those
14 requirements are satisfied will the class member receive a rebate check. These
15 requirements present additional barriers to participation that will push redemption rates

16 *Second*, the redemption rate is likely to be significantly reduced by unnecessary
17 restrictions on transferability. The \$1,000 rebate potentially available under Option
18 A is completely non-transferable. The \$500 rebate potentially available under Option
19 B is transferable only to immediate family members.

20 *Third*, the fact that the rebate is limited to class members who purchase particular
21 Honda vehicles will further reduce participation. The rebates cannot be used for the
22 purchase of the Honda Fit, Honda Insight, Civic Hybrid, or Honda CRZ. Class counsel
23 does not explain why these vehicles are excluded, but they are the most fuel-efficient
24 Honda models (Ditlow Decl., Exh. 8, 5:11-6:18) and include the least expensive
25 Honda. *Id.*, 4:24-26. In other words, they are the models with features closest to those
26 that attracted class members to the Civic Hybrid in the first place. The exclusion of
27 these vehicles also highlights an additional shortcoming in Dreze's analysis. Dreze
28 based his estimates, in part, on "the percentage of repeat hybrid customers[.]" Dreze

1 Decl., 3:17-18. But this settlement specifically *excludes* Honda's hybrids from the
2 rebate program. Thus, to the extent that Civic Hybrid owners are interested in buying
3 another hybrid, the rebates offered through the settlement will do them no good.
4 Indeed, the rebates will benefit only the small number of class members who have the
5 means and desire to buy a non-excluded Honda vehicle before October 11, 2011, and
6 offers nothing to the vast majority of class members who are unable or unwilling to do
7 so.

8 **III. The Cash Payment Available Under Option C Potentially Benefits Only A**
9 **Fraction of the Class and Imposes Obstacles that Will Lower the Redemption**
10 **Rate.**

11 The only part of the proposed settlement that offers a cash payment is Option C,
12 but only 2,671 of the 158,639 class members—less than 2% of the class—are even
13 eligible to submit a claim for the \$100 payment. Dreze estimates that 22% of the
14 eligible class members (*i.e.*, 0.37% of the total class) will claim the \$100 payment, but
15 he does not explain how he arrived at that estimate. In fact, the redemption rate for
16 Option C will likely be even lower than Dreze predicts because there are several
17 serious impediments to participation. Specifically, to claim the \$100, an eligible class
18 member must (1) go to the settlement website, (2) enter the VIN of his or her Civic
19 Hybrid, (3) watch the fuel economy video, (4) obtain a preassigned claim number, (5)
20 download a claim form, and (6) submit it to Honda, (7) all within 60 days of the
21 posting of the video. The settling parties appear to have no plans to notify class
22 members when the video becomes operational; rather, the class members must
23 regularly check the website to see if the video is up.

24 Class counsel does not explain the purpose of these requirements, which appear
25 to have been imposed solely to reduce the number of claims. Honda has the names and
26 addresses of every class member eligible for Option C, and could easily mail each such
27 class member a check, which would dramatically increase participation in the
28 settlement.

1 Further, class counsel has not presented any principled reason for restricting the
2 cash option to only those class members who, before March 2, 2009, complained about
3 the fuel economy of the class member's Civic Hybrid to Honda, an authorized Honda
4 dealer who reported it to Honda, or to class counsel, and whose complaint resulted in
5 a written record created in the ordinary course of business. In its order denying
6 preliminary approval of the settlement, the Court directed the parties to explain why
7 Option C is limited to those whose complaints were reduced to writing and maintained
8 by Honda. Doc. 100, 21:16-21. Class counsel's response was that because Honda
9 dealers are independent, complaints to the dealers may not have been communicated
10 to Honda.^{8/} Doc. 105, 14:16-22. But that is no answer to the Court's question. Class
11 counsel has still not explained why certain class members are treated differently based
12 on a factor outside the member's control—whether Honda has a written record of a
13 complaint.

14 Indeed, the proposed settlement creates two subclasses—those who are eligible
15 for Option C and those who are not. The creation of subclasses often raises serious
16 conflict-of-interest issues that may require separate counsel for each subclass. *See,*
17 *e.g., Diaz v. Romer*, 961 F.2d 1508, 1511 (10th Cir. 1992) (upholding district court's
18 order creating subclasses with separate counsel where proposed consent order settling
19 class action created a conflict of interest between two parts of the class); *see also* Fed.
20 R. Civ. P. 23(c)(5) (allowing court to create subclasses “[w]hen appropriate”). The
21 creation of de facto subclasses, especially without adequate explanation of the reasons
22 for treating the subclasses differently, is yet another reason why the proposed
23 settlement is not fair and should be rejected.

24

25

26

27 ^{8/}For example, Objector Goldberg, who took his Honda Civic in for service because of
28 his concern over poor gas mileage, was informed by the Settlement Administrator that
he is not among the class members eligible for Option C. *See* Goldberg Decl., Exh. 1,
2:3-8.

1 **IV. The Strength of Plaintiffs' Case, Compared to the Minuscule Relief Under the**
2 **Settlement, Militates Against Approval.**

3 If this Court agrees with Objectors that the proposed settlement will convey no
4 value to the vast majority of class members, then it need not proceed any further. And
5 even using Dreze's estimates of potential redemption rates, class counsel admits that
6 "the number of Class Members receiving just the DVD is estimated to be 137,148,"
7 representing over 86% of the class. Doc. 105, 12:28. Such a settlement simply cannot
8 be approved, consistent with Rule 23's command that a settlement be "fair, adequate,
9 and reasonable." If, however, the Court believes the settlement delivers some overall
10 net benefit to the class as a whole, then the Court should weigh its valuation of the
11 settlement against the risks and possible rewards of litigation. But such a balancing
12 analysis further highlights the inadequacy of the settlement because, in contrast with
13 the paltry relief under the settlement, the plaintiffs' case is strong and Honda's
14 potential exposure is high.

15 At the time the settlement was reached, the plaintiffs had already survived a
16 motion to dismiss on multiple grounds, including preemption and the sufficiency of the
17 pleadings, *True*, 520 F. Supp. 2d at 1181-83, and a California appellate court had
18 reversed a grant of summary judgment for Honda on two of the state-law claims.
19 *Paduano v. American Honda Motor Co., Inc.*, 169 Cal. App. 4th 1453, 1472-73 (2009)
20 (reversing summary judgment for Honda on false-or-misleading-advertising claims
21 under the CLRA and UCL). These decisions show that plaintiffs have a strong
22 likelihood of getting their case to trial.

23 Moreover, class counsel's primary argument for why the risks of litigation
24 justified settlement has been wiped out by the California Supreme Court. In the
25 preliminary approval motion, class counsel observed that the California Supreme Court
26 had granted review in the *Tobacco II* cases and argued that the "the unknown outcome
27 of these cases poses a significant litigation risk to Plaintiffs and favors settlement."
28 Doc. 105, 7:5-11. Specifically, class counsel said that "[i]f the California Supreme

1 Court holds that *actual* reliance is now required under all circumstances and that
2 reliance cannot be presumed, such a holding could preclude a class claim under the
3 UCL and FAL, eliminating two of the three theories underlying Plaintiffs’ class action
4 Lawsuit.” *Id.* The California Supreme Court has now decided the cases, and,
5 fortunately for plaintiffs, the decision does not undermine the strength of their case.
6 *In re Tobacco II Cases*, 207 P.3d 20, 40-41 (Cal. 2009) (holding that a plaintiff need
7 not plead and prove individualized reliance on specific misrepresentations or false
8 statements that were part of an advertising campaign).

9 As for Honda’s exposure to liability, this lawsuit is directed toward securing a
10 refund of the hybrid premium paid by each class member. With 158,639 class
11 members and an average hybrid premium of about \$2,500, Honda’s potential liability
12 could easily exceed \$400,000,000.

13 The strength of the plaintiffs’ case and the defendant’s potential exposure are thus
14 wildly incommensurate with a settlement consisting chiefly of useless DVDs and
15 coupons.

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CONCLUSION

The Court should deny final approval of the proposed class action settlement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed through the CM/ECF system which will automatically generate a Notice of Electronic Filing (NEF) and send it by e-mail to all attorneys in the case who are registered as CM/ECF users and have consented to electronic service. In addition, and in accordance with second revised preliminary approval order and the class notice, this document was sent to the Settlement Administrator, on December 14, 2009, by U.S. Mail to the following address:

Honda HCH Settlement Administrator
P.O. Box 2709
Torrance, California 90509-2709

/s/ Michael T. Kirkpatrick
Michael T. Kirkpatrick