IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

EDWARD B. WEST, an individual resident of Niles, Trumbull County, Ohio, on behalf of himself and all similarly situated persons and entities, Plaintiff, v. CARFAX, INC., a foreign corporation, and POLK CARFAX, INC., a foreign corporation, Defendants.	Case No. 04-CV-1898 Judge Andrew D. Logan

MOTION OF OBJECTORS ANDERSON, *ET AL.* TO
COMPEL THE SETTLING PARTIES TO DISCLOSE CLAIMS INFORMATION

Ronald Frederick (Bar No. 0063609)
Ronald Frederick & Associates Co., L.P.A.
55 Public Square, Suite 1300
Cleveland, Ohio 44113
Tel. (216) 502-1055
Fax (216) 781-1749
ronf@clevelandconsumerlaw.com

Deepak Gupta (pro hac vice)
Allison M. Zieve (pro hac vice)
Brian Wolfman (pro hac vice)
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
Tel. (202) 588-1000
Fax (202) 588-7795
dgupta@citizen.org, azieve@citizen.org,
brian@citizen.org

Counsel for Objectors Anderson, *et al.*

July 13, 2007

MOTION OF OBJECTORS ANDERSON, ET AL. TO
COMPEL THE SETTLING PARTIES TO DISCLOSE CLAIMS INFORMATION

Objectors Anderson, *et al.* hereby move to compel the settling parties to disclose claims information that the Court needs to properly evaluate the proposed nationwide class action settlement in this case. Specifically, the Court should: (1) order the settling parties to immediately disclose the number of claims made by class members under the original proposed settlement and the total number of class members; (2) hold approval of the settlement in abeyance until the settling parties have disclosed the final redemption rate under the Revised Settlement after the 30-day claims period has run; and (3) in the alternative, even if the Court decides to approve the Revised Settlement, hold class counsel's request for fees in abeyance until the redemption rate under the Revised Settlement is determined. The basis for this request is discussed extensively in the accompanying objections to the Revised Settlement and is set forth in summary below.

A. The Court Cannot Properly Evaluate the Adequacy of the Notice Program Without Knowing the Number of Claims Made.

Carfax begins its defense of the settlement's notice program by arguing that "the very small number of class members who opted out or objected in response is a strong indication that final approval is appropriate now." Defs' Mem. at 21. But the most likely explanation for the small numbers—143 opt-outs and 27 objections out of millions of class members—is that the notice program was grossly inadequate, and thus that most class members never learned of the settlement at all. Carfax conspicuously fails to provide the Court with the numbers that would be most meaningful in evaluating the notice program: the number of claims made and the total size of the class, which, taken together, produce the redemption rate. Those numbers would tell

the Court what percentage of the class actually received notice of the settlement and decided to take advantage of it.

B. The Court Cannot Properly Evaluate the Value of the Settlement Without Knowing the Coupon Redemption Rate.

The settling parties attempt to value the settlement based on the face value of the coupons. Defs.' Mem. 34. "Neither the true economic value of an offered credit to its recipient, nor the true economic cost to its issuer, is equivalent to its face value. If it were, a newspaper containing $10 worth of coupons would be as valuable as a $10 bill. Many customers never cash in coupons." *Strong v. Bellsouth Telecomm., Inc.*, 173 F.R.D. 167, 172 (W.D. La. 1997). For that reason, as discussed at length in the accompanying objections, courts require estimates of the likely redemption rate to evaluate whether coupon settlements provide real or merely illusory value to the class. *See, e.g., Cooper v. Musicland Group, Inc.*, 2005 WL 1618791, at *2 (Minn. Dist. Ct. 2005) ("[T]he only evidence before the Court concerning the redemption of merchandise coupons indicates that the standard redemption rate for coupons ranges from 1-3% in the marketplace. The Court has serious reservations about the adequacy of this redemption rate given the large number of estimated class action members."); *see also* National Association of Consumer Advocates, *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, 176 F.R.D. 375, 383-84 (1997) ("Class counsel and defendants should submit to the court and all counsel of record detailed information about redemption rates and coupon transfers during the entire life of the coupon."). The parties' reluctance to disclose the redemption rate strongly suggests that few coupons have been redeemed and that few coupons are likely to be redeemed under the proposed settlement.

C. The Court Should Not Award Attorney's Fees Until the Final Coupon Redemption Rate Is Disclosed.

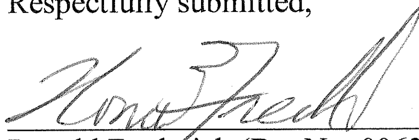
For the reasons given in the objections, the Revised Settlement should not be approved at all. But if the Court decides to approve the settlement, it should hold in abeyance any decision on attorney's fees until the 30-day claims period has run. Where, as here, evidence about the likely redemption rate has not been presented or there is reason to believe the rate will be low, attorney's fees should not be awarded in a coupon settlement until the Court can ascertain that the coupons have actually provided some value. *See In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 292 F. Supp. 2d 184, 190 (D.Me. 2003) (Because it was "not confident of the redemption rate that has been projected and thus of the settlement's total value," the court decided to "delay award of attorney fees until experience shows how many vouchers are exercised and thus how valuable the settlement really is."); *see also In re Domestic Air Transp. Antitrust Litigation*, 148 F.R.D. 297, 348 (N.D. Ga. 1993) (rejecting suggestion that "the economic value to the class of the settlement from which to calculate the appropriate fee is equivalent to the face value of the certificates" and adjusting attorneys' fees "to account for the likely redemption rate of the certificates"). Otherwise, the risk is too great that the lawyers will walk away with cash, and the class will get nothing. To rectify this very serious problem, Congress just two years ago required that "any attorney's fee award to class counsel that is attributable to the award of coupons shall be based on the value to class members of the coupons that are redeemed." 28 U.S.C. § 1712(a); *see* Jennifer Gibson, *New Rules for Class Action Settlements: The Consumer Class Action Bill of Rights*, 39 Loy. L.A. L. Rev. 1103, 1115-16 (2006). Although that federal statute applies only in federal court, this Court should adopt the same general approach to ensure that the settlement has real value before awarding fees.

CONCLUSION

The Court should (1) order the settling parties to immediately disclose the number of claims made by class members under the original proposed settlement and the total number of class members; (2) hold approval of the settlement in abeyance until the settling parties have disclosed the final redemption rate under the Revised Settlement after the 30-day claims period has run; and (3) in the alternative, even if the Court decides to approve the Revised Settlement, hold class counsel's request for fees in abeyance until the redemption rate under the Revised Settlement is determined.

Dated: July 13, 2007

Respectfully submitted,



Ronald Frederick (Bar No. 0063609)
Ronald Frederick & Associates Co., L.P.A.
55 Public Square, Suite 1300
Cleveland, Ohio 44113
Tel. (216) 502-1055
Fax (216) 781-1749
ronf@clevelandconsumerlaw.com

Deepak Gupta (pro hac vice)
Allison M. Zieve (pro hac vice)
Brian Wolfman (pro hac vice)
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
Tel. (202) 588-1000
Fax (202) 588-7795
dgupta@citizen.org
azieve@citizen.org
brian@citizen.org

Counsel for Objectors Anderson, *et al.*

CERTIFICATE OF SERVICE

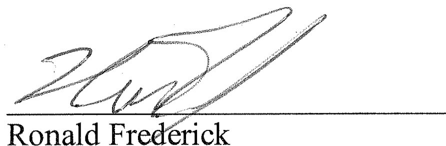
I hereby certify that on this 13th day of July, 2007, I served the foregoing MOTION TO COMPEL SETTLING PARTIES TO DISCLOSE CLAIMS INFORMATION on all parties required to be served by causing a true and correct copy thereof to be sent by email and overnight mail to counsel at each of the following addresses:

William B. Federman
Jenny L. Evans
Federman & Sherwood
10205 N. Pennsylvania, Suite 200
Oklahoma City, Oklahoma 73102

Curtis J. Ambrosy
144 North Park Avenue, Suite 200
Warren, Ohio 44481

Christopher M. Mason
Nixon Peabody LLP
437 Madison Avenue
New York, New York 10022

Hugh E. McKay
Tracey L. Turnbull
Porter Wright Morris & Arthur
925 Euclid Avenue, Suite 1700
Cleveland, Ohio 44115



Ronald Frederick