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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

Coordination Proceeding Special Title (Rule 1550(b))	JUDICIAL COUNCIL COORDINATION PROCEEDING No. 3158
COMPUTER MONITOR CASES	Hearing: June 30, 1997 Time: 10:30 a.m.

OBJECTIONS TO COMPUTER MONITOR SETTLEMENT

Class members David Halperin and David C. Vladeck file the following objections to the settlement and request for attorneys' fees and costs. Objectors intend to appear at the Fairness Hearing on June 30, 1997, at 10:30 a.m. to present their objections.

Before turning to the substance of their objections, Objectors wish to draw the Court's attention to a difficulty they have encountered in preparing their objections. Under the settlement, objections from class members must be filed no later than June 9, 1997. However, other than the pro forma submissions when the settling parties filed their motion for preliminary settlement approval, the settling parties do not intend to file

their papers setting forth their arguments and evidence in support of the settlement until at least June 13, 1997.

Therefore, Objectors have not had an adequate opportunity to examine proponents' evidence or arguments before submitting these written objections. This order of presentation of evidence and arguments places Objectors in a particularly difficult position in preparing their opposition to the settlement and especially to class counsel's fee request because they have not had an opportunity to review class counsel's time records, hourly rates, or their reasons for requesting a multiplier. For these reasons, Objectors reserve the right to file responsive papers after reviewing the settling parties' submissions and ask this Court to consider any further counter-evidence or arguments at that time.

SUMMARY OF OBJECTIONS

The Agreement of Settlement should not be approved. Rather than being a fair and just resolution of the claims of the class, the heart of the settlement is essentially a marketing scheme designed to induce new purchases of the defendant companies' computer monitors or computer systems without providing any real value or discount to class members in exchange for the release of their rights. Putting aside the injunctive relief, which Objectors contend may not be fairly attributed to the class action lawsuit, the Settlement can be viewed as either a cheap resolution of class members' valuable claims or else a convenient vehicle for churning essentially worthless claims into a gargantuan fee of $5.8 million for the plaintiffs' attorneys. The $13 rebate option is essentially worthless: It requires class members to make an

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expensive purchase to realize any value, it is easily made worthless if defendants raise their prices even slightly, and it has such severe restrictions on transfer and redemption that it will be practically impossible for a market in rebate options to emerge. The $6 refund option suffers from the same, and even worse, restrictions. Neither form of relief is a proper use of the class action mechanism and, under either scenario, the Settlement does not deserve this Court's approval.

RELEVANT FACTS

The Agreement of Settlement filed with this Court on March 6, 1997, proposes to settle a consumer class action arising out of misrepresentations made by the computer company defendants of the actual viewable size of the screens of computer monitors and computer systems advertized, sold, or marketed by defendants. The plaintiff class consists of all persons and business or other entities in the United States who, between May 1, 1991 and May 1, 1995, purchased a monitor or system advertized, sold, or marketed under a brand name or trademark of any of the defendants.

Although the Master Consolidated Complaint sought certification of three plaintiff classes, the "California Class," "the Nationwide Class," and the "Song-Beverly Class," the settlement agreement purports to treat all members of the plaintiff class identically regardless of their geographical location or the relative strength of their legal claims. Defendants are over fifty of the most well-known computer manufacturers and distributors. These defendants presumably control the vast majority of the market share in the production

and sale of computer monitors within the United States.

CHRONOLOGY

This lawsuit is a follow-on suit to a consumer protection action brought by a coalition of District Attorneys and the California Attorney General to stop the widespread practice in the computer industry of misrepresenting computer monitor screen size and to force disclosure of the actual viewable size of computer monitor screens. See People v. Acer Peripherals, Inc., et al., Merced Superior Court No. 123614. The complaint in Acer Peripherals was filed in Merced County Superior Court on March 27, 1995. The California Attorney General's office, consulting with the Federal Trade Commission, negotiated a settlement with the computer company defendants. See Declaration of Michael Botwin ¶¶ 3-4. The Merced Superior Court entered a Stipulated Final Judgment (hereinafter "Acer Judgment") on or about September 28, 1995. See Ex. A to Botwin Decl.

Under the Acer Judgment, the defendant computer companies are enjoined from misrepresenting the viewable image size of their computer monitors in any "product, package or label, advertisement, brochure, sign, sales presentation or sales literature of any kind" directed to consumers in California. Id. ¶ 4. As a result, the defendant computer companies cannot refer to a computer display as 15-inches unless the viewable image size is also disclosed in the immediate proximity of that representation. Id. ¶ 4A. Moreover, the defendant computer companies may not make any representation about the computer display's viewable image size that is not consistent with the

viewable image size in the computer system. Id. ¶¶ 4B-C. And, the defendant computer companies may not use any model number or brand name on a new monitor model (for example, Ajax Brand "15") in a way that inaccurately presents that number as corresponding with the viewable image size of that monitor. Id. ¶ 4D. In addition, under the Acer Judgment, the defendant computer companies agreed to contribute $1,500,000 worth of computer equipment to public schools under a cy pres theory of restitution.

Meanwhile, certain state court class actions had been filed making similar allegations to those presented in the Acer Peripherals litigation. In December 1995, the California Judicial Council consolidated the California state court class actions. On March 26, 1996, the Master Consolidated Complaint in this case was filed, alleging that, defendants consistently misrepresented the dimensions of the usable picture areas of the computer monitors they manufactured, distributed and/or marketed. ¶ 81. The Complaint asserts that the overstatement of monitor size constituted unlawful, unfair and fraudulent business acts and practices, false and misleading advertizing, violations of the California Consumers Legal Remedy Act, fraud, breach of warranty, and negligence, and seeks equitable relief, restitution, disgorgement, and damages. Id. ¶¶ 98-136. Virtually all of the defendants from the Acer Judgment were also subsequently named in the Master Consolidated Complaint for the instant class action suit and the Master Consolidated Complaint names several additional defendants.

Defendants filed demurrers to the Master Consolidated

Complaint and in the summer of 1996, this Court granted judgment to defendants in part. See Order Sustaining Demurrer Without Leave to Amend By "Acer" and "Non-Acer" Defendants on Grounds of Res Judicata, July 3, 1996. This Court reasoned that the injury alleged in the Master Consolidated Complaint, at least for California plaintiffs, was the same as that already successfully resolved by the Acer Judgment. Some months after this Court's ruling, this nationwide settlement agreement was submitted to this Court for preliminary approval on March 6, 1997. The Settlement Agreement names as defendants at least five additional entities (Matsushita Electric Corp., Mitsubishi Electronics America, Sony Electronics, Toshiba America Electronic Components, and Wyse Technology, Inc.) that had been named neither in the Master Consolidated Complaint or in the Acer Judgment.

THE SETTLEMENT AGREEMENT

The Settlement Agreement has five key elements:

(1) Rebate Program. Class members are entitled to receive a $13 rebate if they purchase either a new computer monitor with a viewable image size of 12 inches or greater, a new computer system, or any other personal computer hardware item with a unit purchase price of $250 or more during a three-year period starting September 8, 1997. Settlement Agreement ¶ VII.B.1(a). The class member may only request the rebate if he or she purchases a new monitor, system or other hardware sold or marketed under the brand name or trademark of the same company under whose brand name or trademark their original monitor was purchased. Id. ¶ VII.B.1(b). Personal computer hardware may not be aggregated for

purpose of reaching the $250 minimum purchase price, so that a class member must purchase at least one item costing more than $250 to redeem the rebate. Id. ¶ VII.B.1(c). To receive the rebate, after making the new purchase, the class member must submit a rebate form to the Settlement Administrator along with proof of the qualifying purchase.[1]

Special provisions govern rebates for certain class members. Class members who previously purchased NEC monitors or systems must purchase one of three NEC hardware models: "Multisync," "Multispin," or "Silentwriter." Id. ¶ VII.B.1(d). Class members who previously purchased Tandy brand monitors or systems may use the rebate on any product as long as it is purchased at a Radio Shack store owned by the Tandy Corporation. Id. ¶ VII.B.1(e). Class members who previously purchased Compudyne Monitors or Systems may use their rebate for a purchase at a CompUSA store, and the hardware need not be a Compudyne brand name or trademarked item. Id. ¶ VII.B.1(f).

The rebate form may be transferred one time for value to another qualifying purchaser but this transfer option extends only to class members who purchased ten or fewer computers. Id. ¶ VII.C.1. Therefore, volume buyers such as businesses or governmental entities are precluded from using the transfer option at all. A maximum of one rebate may be requested for each monitor

[1] Class members who purchased their monitors from Gateway 2000, Inc. or from Tandy Corporation must follow an alternative rebate procedure. Gateway customers must phone Gateway and place an order with the qualifying purchase and identify themselves as class members. Id. ¶ VII.D. Tandy customers must complete a rebate form at any Tandy location. Id. ¶ VII.E.

or computer system the class member purchased and each such rebate must be claimed on a separate new purchase. Only one rebate may be claimed on any new purchase. Id. ¶ VII.B.1(g).

Rebates may be redeemed on new purchases of no more than ten monitors or systems. Id. ¶ VII.B.2(a). Otherwise, if the class member wishes to receive the rebate on more than ten purchases, he or she must submit a proof of purchase for two new monitors or systems above the limit of ten to obtain each $13 rebate. Id. ¶ VII.B.2(b). In effect, this provision converts the $13 rebate into a $6.50 rebate. A class member is capped at claiming rebates on no more than 190 new monitors or systems or a maximum of 100 such rebates. Id. ¶ VII.B.2(c).

(2) The Six Dollar Cash Refund. The six dollar cash refund is available only to a subset of the class -- class members defined as "Consumer Settlement Class Members" who did not purchase their monitors for business use. See ¶ II.D (defining "Consumer Settlement Class Member"). If the Consumer Settlement Class Member does not purchase new computer hardware during the three-year rebate period he or she received three years previously, each such class member may, within the next six months beginning on September 9, 2000, complete the Rebate Form he or she received three years previously and request a $6 cash payment for each computer monitor or system previously purchased. Id. ¶ VII.C.4. Claims for the cash payment may not exceed $30 total for each class member; the Rebate Form requesting the $6 refund may only be submitted after the expiration of the rebate period; and claims for the cash refund are not transferable and the proceeds not

assignable. Id. ¶ VII.C.4(b)-(d).

(3) The "Injunction." Paragraph VIII of the Agreement of Settlement states that the defendant companies, for a minimum of three years, "agree to abide by the order in the California actions establishing and implementing . . . a protocol for advertisement and promotion of the actual viewable image size for Monitors or Systems," i.e. the Acer Judgment. Id. ¶ VIII.A-B. There is no substantive difference between the obligations that had already been imposed on the defendant companies under the Acer Judgment, and the class action settlement.[2]

(4) Attorneys Fees and Expenses. The settling parties agree that defendants will not oppose payment to class counsel of $5.8 million in fees and $250,000 in expenses. Id. ¶ X.A

(5) Release of Claims. The settlement includes a broad release protecting defendant computer companies from all variety of claims arising out of the alleged misrepresentations and their failure to disclose the actual viewable size of computer monitors and systems. ¶ II.I.

THE REBATE FORMS

Rebate forms dated September 7, 2000, have already been mailed to class members, even in advance of settlement approval. See Ex. A. The Rebate Form differs markedly from the Settlement Agreement in at least one important respect: While all class members are entitled under the Settlement Agreement to transfer

[2]The settlement provides for a third party, Barrels Advertizing Analysis Service, to review written advertizing and identify to settlement class counsel any advertisements not in compliance. Id. ¶ VIII.C.

the rebate option if they purchased ten or fewer monitors or systems, the Rebate Form requires the class member to verify that they did not deduct the monitor as a business expense "if transferring." Thus, the Rebate Form directly contradicts the actual terms of the settlement and creates a variance which, intentional or not, is likely to cause much confusion among class members and to significantly reduce the number of transfers and redemptions. In addition, the Rebate Form states at the top that it must be completed and returned on or before September 7, 2000. Only by carefully reading the fine print further down the page does one realize that if one wishes to obtain the $6 cash payment, the Rebate Form must be submitted after September 8, 2000. See Ex. A.

DISCUSSION

I. THE PROPOSED SETTLEMENT IS UNFAIR AND SHOULD NOT BE APPROVED.

The burden of proving the fairness of a settlement rests squarely on its proponents. See 2 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 11.42 (3d ed. 1992); see also 3B Moore's Federal Practice § 23.80 [4] (2d ed. 1987). "To prevent fraud, collusion or unfairness to the class, the settlement or dismissal of a class action requires court approval." Malibu Outrigger Bd. of Governors v. Superior Court (1980) 103 Cal.App.3d 573, 578-79. The Court must determine whether the settlement is fair, reasonable and adequate. Officers for Justice v. Civil Serv. Comm'n (9th Cir. 1982) 688 F.2d 615, 625.[3] The purpose of

[3] In the absence of definitive California authority, California courts have looked to the judicial interpretations of the federal class action rule, Federal Rule of Civil Procedure 23. See Vasquez v.

this requirement is "the protection of those class members including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties." Id. at 624. See also In re Oracles Securities Litig. (N.D.Cal. 1993) 829 F. Supp. 1176.

Moreover, the fact that class certification was deferred here until after the case settled requires that the Court's scrutiny be especially rigorous. Newberg on Class Actions § 11.60. So too, in-kind settlements, like the rebate option under this settlement, create an even more difficult situation where the Court must act as a "blindfolded fiduciary" because the likelihood of redemption of the rebate option, and thus the likely value of the settlement to class members, is not apparent from the face of the settlement. Note, In-Kind Class Action Settlements, 109 Harv. L. Rev. 810, 811 (1996); see also Mars Steel Corp. v. Continental Illinois Nat'l Trust Co, (7th Cir. 1984) 834 F.2d 677, 681.

All that class counsel has submitted thus far in support of the settlement is their application for preliminary approval. That application does not provide any evidence that the presumed relief offered under the settlement -- the $13 rebate and the $6 cash refund -- actually provide value to class members. Moreover, the preliminary approval memorandum does not attempt to value the class's damages claims under a restitution theory, or a warranty/expectation theory, or any other theory, to provide a benchmark against which to measure the value of the settlement.

(..continued)
Superior Court (1971) 4 Cal.3d 800, 821; Daar v. Yellow Cab (Sup. Ct. 1967) 67 Cal.2d 695.

In other words, at the present time, the settling parties have presented no evidence that class members will receive value under the settlement commensurate with the value of their underlying claims. See C.Wright, A.Miller, & M.Kane, 7B Federal Practice & Procedure § 1797.1, at 392 (1986) (settling parties must offer evidence to demonstrate fairness and adequacy of settlement). This is not surprising because there is no evidence that could possibly justify so flimsy a settlement as the one now before this Court.

Nonetheless, even if the settling parties attempt to prop up this settlement over the next month, it is not fair, reasonable or adequate for the following reasons.

1. The injunctive relief cannot be claimed to be a benefit of the settlement. As this Court recognized when it gave the Acer Judgment preclusive effect, the injunctive relief allegedly sought in this case, at least for California consumers, effectively was obtained by the Acer Judgment. That judgment was carefully negotiated between the California Attorney General and the computer company defendants using the FTC guidelines as a prototype. See Botwin Decl. ¶¶ 2-4. That there are some new defendants named in the class action settlement that were not named in the Acer Judgment is of no practical consequence. In a highly competitive industry like the computer industry, one would expect that the changes in marketing practices brought about by the Acer Judgment would, in short order, cause a ripple effect throughout the industry and make the restrictions on misrepresentation and mandatory disclosure of actual viewable size

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under the Acer Judgment the industry norm. Thus, adding defendants under the class action settlement provides little or no valuable consideration to the class. After all, the "injunction" is essentially a promise not to misrepresent the viewable image-size. See Norman v. McKee (9th Cir. 1978) 431 F.2d 769, cert. denied, (1971) 401 U.S. 912 (rejecting settlement in which plaintiffs' counsel secured nothing more than had government regulators); Jamison v. Butcher & Sherrerd (E.D. Pa. 1975) 68 F.R.D. 479 (same). So too here, where the class action settlement has a nationwide scope and the Acer Judgment was limited to marketing in California, is also of no practical consequence. There is no evidence that after the Acer Judgment was entered in September 1995 computer companies sought to differentiate in their advertizing between computers destined for California and those heading for other parts of the country. After all, one would expect computer companies to adopt a uniform system of labeling boxes and other advertising because it would be far more costly and burdensome to label computer monitors boxes differently depending on their geographic destination or to take the risk that a computer monitor destined for Georgia actually ends up in California. And, because of the reality that computer monitors are sold and distributed through national chain stores and advertized in magazines and newspapers with national circulation as well as on the Internet, it would be impossible for a company to ensure compliance with the Acer Judgment if it attempted to tailor its advertising depending on the happenstance of where the computer would end up or where an ad would be shown

geographically.

This Court should reject any attempts to defend this settlement on the grounds that it secures injunctive relief for the class.

2. The $13 rebate option is unlikely to provide any value to the vast majority of class members. There are certain key features of the settlement that demonstrate its lack of value.

A. Restrictions on Use

First of all, the only way a class member can obtain value from the rebate option is by purchasing a new computer monitor or computer system with a unit purchase price of at least $250. Thus, the settlement will, at least within the first three years, provide no value to the estimated forty million class members who are unable to afford or are uninterested in buying a new computer monitor or computer system within the next three years. And, even as to those class members who may wish to purchase a new computer monitor or other computer system, a $13 rebate offer is of little value relative to the overall price of the equipment.

Moreover, the requirement that in order for class members to take advantage of the rebate option they must purchase their new computer monitors or systems from the same company from whom they had previously purchased a monitor, makes it even less likely that most class members will obtain value. A $13 cash rebate is unlikely to be a decisive factor in influencing a class member in the market for a new monitor or computer system who otherwise would evaluate all of the factors -- cost, features, reliability -- in choosing a brand. See Declaration of David Vladeck ¶ 3;

Declaration of David Halperin ¶ 3.

This Court should scrutinize carefully any overblown attempts by the settling parties to defend the settlement by predicting high redemption rates. More helpful to the Court would be learning about the actual experiences with coupon settlements, a far more sobering story. For instance, in Buchet v. ITT Consumer Fin. Corp. (D. Minn. 1994) 845 F. Supp. 684, modified 858 F. Supp. 944, the district court rejected a proposed settlement between ITT, a consumer loan business, and class members who had previously obtained loans from ITT, whereby the class was to receive a discount coupon worth as much as $39 for the purchase of property insurance or related products. Id. at 945. As a basis for rejection, the Court cited actual redemption rates ranging from 0.002% (2 coupons redeemed out of 96,754) to 0.110% (489 coupons redeemed out of 445,465) for similar coupons. Id. "Opportunity to use and actual use of coupons cannot be equated." 16 Class Action Reports 369, 488 (1993) (Ex. B).

In addition, the defendant companies represent a large portion of the computer industry. Certainly, these companies control a substantial portion of the market share. Therefore, if a significant number of class members sought to claim the $13 rebate, all defendants would have to do to avoid sustaining a loss would be to raise the prices slightly and thereby remove any benefit from the rebate option.

B. Restrictions on Transfer and Redemption

There are also some more subtle aspects of this settlement that make the $13 rebate option unlikely to provide adequate value

to class members. As explained in greater detail in the Declaration of James C. Tharin, President, Certificate Clearing Corporation, in order for a coupon or rebate settlement such as this one to give any value to consumers, there must be a secondary market for sale of the coupon or rebate option.[4] Because it is unlikely that any given class member will use the $13 rebate option for him or herself or be able to transfer it for value to an interested purchaser directly, great care must be given to the transferability and redemption aspects of the coupon or rebate procedure. See 16 Class Action Reports 369, 485-87 nn.2-8 (surveying many coupon settlements) (Ex. B); see also Barry Meier, Fistful of Coupons, N.Y. Times, May 26, 1995, at D1 (Ex. C) ("[W]ithout the opportunity to sell coupons to a broker, few recipients will use scrip to buy big-ticket items."). The settlement imposes numerous restrictions which will have the practical effect of preventing creation of a market in either the $13 rebate option or the $6 cash refund.

1. Transferability. The rebates have a one-time transfer option but the transfer option is good only for those who purchased ten or fewer monitors or computer. Settlement Agreement ¶ VII.C.1. Those entities which purchased ten or more computers may not transfer their rebate option. Id. Therefore, volume purchasers, such as businesses or governmental entities, are restricted from transfers at all which, in turn, makes the emergence of a market in rebate options much less likely. See Tharin Decl.

[4] Tharin Declaration will be filed June 10, 1997.

So too, the mechanism of transfer is severely restricted so as to preclude the participation of a "Market Maker." "In order to be valid, a transferred Rebate Form must contain the information required from the transferor Settlement Class Member and a certification that the rebate form was provided to the transferee directly by a Settlement Class Member." Settlement Agreement ¶ VII.C.1. The "directly" language, in effect, prohibits the participation of a middle-man "Market Maker" and, thereby, drastically reduces the chance that the rebate form will ever be redeemed. See Tharin Decl.

Although the Settlement Agreement affords class members the right to transfer the rebate option, the Rebate Form states that he or she must verify "if transferring" that he, she or it did not take a business deduction for purchase of the original computer. See Ex.A; see also Halperin Decl. ¶ 3. This additional, and presumably inadvertent, barrier to transfer makes it even more likely that the rebate options will not be transferred for value.

2. Redemption. The purpose of a "Market Maker" is to facilitate transfer of rebates from a willing seller to a willing buyer and to identify end-users who will redeem large numbers of coupons. See Tharin Decl. For every class member who seeks to benefit from the Settlement by transferring his rebate option, there must be a buyer who intends to redeem it. The efficiency with which the seller can find the buyer and the buyer can use the coupon will determine the selling price for the rebate option. Volume end-users enable Market Makers to buy large numbers of coupons from class members. The presence of such buyers increases

not only the number of class members who are able to sell, but also the price they will obtain. Id.

In this case, however, there are severe restrictions on the use of rebate options by those likely to be bulk purchasers of computer monitors and systems. Each class member is limited to claiming redemption of the rebate on no more than ten monitors. Settlement Agreement ¶ VII.B.2(a). Otherwise, if the class member purchases more than ten new monitors or computer systems, he or she or it only receives the same $13 rebate for two purchases, reducing it in value to a $6.50 rebate option per $250 purchase. Id. ¶ VII.B.2(b). As a drastic limit upon volume purchasers, each entity may redeem no more than 100 rebates. Id. ¶ VII.B.2(c). In addition, the fact that the rebate is limited to use with a purchase from the same company that the previous monitor or computer system was purchased, id. ¶ VII.B.1(b), puts another severe restriction on use of the rebate. This makes it extremely unlikely that class members will receive any value unless a Market Maker is available to facilitate transactions between class members who hold rebates good for a particular computer company. See Tharin Decl.; see also Vladeck Decl. ¶ 3; Halperin Decl. ¶ 3.

All of these limitations on redemption make it much more difficult for a market to be created. See Tharin Decl. Otherwise, volume buyers would be prime secondary market participants. But, under the Settlement Agreement, volume buyers cannot transfer their rebate options, cannot redeem more than ten rebates at $13 or more than 100 total, and cannot ever redeem for

a cash payment. Thus, under the present scenario, for every rebate option that cannot be used by a volume buyer because of the redemption restrictions, a class member loses an opportunity to transfer his rebate option for value. Id. Moreover, the class member loses a buyer whose volume use of coupons otherwise would allow for efficiency in both the transfer and redemption processes, enabling the class member to receive a relatively high price from the sale of her coupon. Id. By eliminating an efficient end-user (or volume purchaser), the settlement makes infeasible the participation of a Market Maker, thereby leaves the class members with a practically worthless rebate option.

Unless the promise of transferability is made real, most of the class will not benefit from the proposed settlement. A settlement that claims to provide a freely transferable option while simultaneously foreclosing the development of an organized mechanism for transferability, is illusory.

> Offering a certificate of this type is unfair unless . . . consumers are given the option of selling the certificates outright and there is an active "secondary market" for those certificates. In other words, consumers should have the ability to obtain cash for their certificates rather easily, and they should not be forced to spend more money prior to receiving the benefits for which the certificates were issued.

Bloom & Gerson, "The Use of 'Scrip' for Obtaining Consumer Redress in Antitrust Cases," in P.Bloom, ed., 1 Advances in Marketing and Public Policy 93-106 (1987). "The existence of a secondary market is of particular significance when a settlement proposes to offer coupons valid towards the purchase of expensive goods." In-Kind Class Action Settlements at 824.

In sum, without a market, the vast majority of class members

are left with worthless scrip. At the same time, the limitations on redemption and use of the rebate option illustrate Objectors' fundamental point: that the settlement is, in effect, a sales incentive program designed to benefit the participating defendants rather than a fair exchange of consideration to support the release of class members' claims. See In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig. (3d Cir.) 55 F.3d 768, cert.denied, (1995) 116 S. Ct. 88; see also In re Ford Motor Co. Bronco II Prods. Liab. Litig. (E.D. La. 1995) 1995 U.S. Dist. LEXIS 3507, *19. It therefore should come as no surprise that additional defendants joined the settlement, even defendants who had not been named in the complaint, because not to do so would risk being left out of a potentially lucrative sales promotion for the defendant computer companies.

C. Intra-Class Conflicts and Nationwide Class Certification

These barriers to creating a market can also be viewed from another angle. As noted earlier, the volume purchasers of computer monitors or systems are likely to be businesses and governmental entities. They are injured twice under this scheme: first, as class members who are treated disparately through the restrictions on redemption, and second, as secondary market participants who are most likely to purchase the rebate options from a market maker and to use them in volume purchases. Not only do these limitations make the settlement inadequate and unfair, but they also may create an intra-class conflict between consumers and businesses sufficient to create a legal defect in the

settlement. General Motors, 55 F.3d at 808.

In similar fashion, the settling parties fail to explain why nationwide class relief is appropriate in this case even though this Court previously ruled that the California class members no longer had any claims, at least against the Acer Defendants. This prior ruling meant that while consumers in other states may have had valuable claims, the California claims were worth less or, in another way of thinking at it, were available for defendants at a discount. The settlement, however, treats all class members identically regardless of differences in state law governing the class members' claims. Two prerequisites to maintaining a class action are the existence of an ascertainable class and a well-defined community of interest. Occidental Land, Inc. v. Superior Court (1976) 18 Cal.3d 355, 360-61. California courts have recognized that such choice-of-law difficulties may preclude certification of a national class in consumer litigation. See Osborne v. Subaru of America, Inc. (1988) 198 Cal.App.3d 646, 654-62; Baltimore Football Club, Inc. v. Superior Court (1985) 171 Cal.App.3d 352, 362-63; see also Phillips Petroleum Co. v, Shutts (1985) 472 U.S. 797, 814-23 (due process forbids application of forum state's law to class members in other states, unless out-of-state class members have significant contacts with forum state).

Disparate treatment of class members may be sufficient reason in and of itself to disapprove the proposed settlement. Petruzzi's Inc. v. Darling-Delaware Co. (M.D. Pa. 1995) 880 F. Supp. 292, 299-300. While different relief may be afforded to different members of the class if the strength of their claims

vary, to the extent that the settlement treats all members of the class the same, it may create an irreconcilable intra-class conflict, and thus preclude certification of a nationwide class.

At a minimum, to make this settlement confer any adequate value upon class members one would need to see genuine transferability, remove restrictions on redemption, and adequate opportunities for a market in transferring and redeeming the rebate options. See Tharin Decl. It would be legal error to approve this settlement without the settling parties having presented sufficient evidence concerning the settlement's value to all segments of the class. See General Motors, 55 F.3d at 807 (suggesting redemption figures for coupon settlement offered by plaintiffs' counsel's expert were arbitrary and inflated). Therefore, the settlement should be tested against the class members' varying rights under state law. And, to the extent that this Court determines that the prerequisites for class certification are not met, a nationwide class should not be certified.

3. The $6 cash refund option is extremely unlikely to provide any significant value to the vast majority of class members. Perhaps recognizing that the $13 rebate option is vulnerable to the criticism that it is nothing more than a sales inducement designed to benefit the defendant computer companies, the settling parties agreed to a $6 refund option available to "Consumer Settlement Class Members" -- not businesses, governmental entities or non profits -- for six months after the

expiration of the three year rebate period. See Halperin Decl. ¶ 3 (no benefit to him because purchased computer for business use). The impediments to receiving the $6 refund, however, make it unlikely that it will be redeemed at any significant rate. First of all, the present value of the $6 refund is not $6 because of the time value of money. But more importantly, the $6 refund can only be claimed if the class member holds on to the Rebate Form for three years and then remembers to send it in during the six-month window. Plus, the Refund Form enclosed with the notice of settlement is very misleading. See Ex. A. The Refund Form makes it appear as though it applies only to the $13 rebate option and only when one examines it very closely does one realize that it is the same form that must be submitted for the $6, albeit three years hence. Indeed, the large print on the top of the form indicates that the class members must act prior to September 7, 2000 when, in fact, if the $6 refund is desired, the class member must act after that date.

Finally, as explained in more detail in Mr. Tharin's Declaration, a market could be made from the $6 cash refund option if he were permitted to buy the options now at a discount and then redeem them or sell them to a third party for redemption three years from now. See Tharin Decl. But the absolute bar on transfer of the $6 refund option makes a market in them impossible.

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The Settlement Agreement is a clever marketing scheme designed to encourage customers to purchase new computer monitors or systems while severely restricting them in their purchasing

options if they attempt to use the rebate. These restrictions reveal the true purpose of the settlement -- to encourage new purchases while minimizing redemption of rebates. Similarly, the restrictions impose numerous impediments to creating an efficient market out of the rebate options such that consumers may realize value. For these reasons, the proposed settlement as presently conceived should not be approved.

II. THE ATTORNEYS' FEES SHOULD NOT BE AWARDED

The class notice states that the parties have agreed to a $5.8 million award in attorneys' fees and $250,000 in costs. As stated above, Objectors reserve the right to present more specific objections to the fee award once they receive the settling parties' papers that are to be filed on June 13, 1997.

As an initial matter, for purposes of judicial review of the amount of the fee award, it is of no import that fees were negotiated separate from the terms of the settlement, as plaintiffs' counsel are likely to argue. For many years, courts have recognized the dangers of allowing side-settlements of attorneys' fees. See, e.g. Weinberger v. Great Northern Nekoosa Corp. (1st Cir. 1991) 925 F.2d 518, 522. Judicial scrutiny serves as a crucial monitor of excessive or undeserved fee awards in class actions. Id. at 524 (citing Furtado v. Bishop (1st Cir. 1980) 635 F.2d 915, 919). Because of the risk that class lawyers will sacrifice the interests of absent class members in exchange for a large fee award, there can be no substitute for judicial scrutiny and application of an accepted fee method. A settlement in which a defendant has not objected to an exorbitant fee request and in which plaintiffs' claims are being compromised for no or merely speculative consideration gives rise to at least the appearance of impropriety on the part of class counsel. In re Ford Motor Co. Bronco II, 1995 U.S. Dist LEXIS at *25.

It is well-established under California law that fee awards must be independently scrutinized from the fairness of the settlement. Rebney v. Wells Fargo Bank (1990) 220 Cal.App.3d 1117, 1143 n.8. Because the divergence in financial incentives between class lawyers and class members creates the danger that class action lawyers will urge a class settlement at a low figure or a less-than-optimal basis in exchange for a handsome fee award, thorough judicial review is required for all class action settlements. See Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794 (adopting test for review of fees from General Motors, 55 F.3d at 819-20).

Moreover, although class counsel will no doubt seek to distinguish the class's coupon recovery from "their" cash fee award, in a class action, the entire liability of the defendant, including fees, is the property of the class. "Any settlement represents a total value figure that one party is willing to pay to end the controversy. Attorneys' fees, even though they may not be technically deducted from the amount paid to the litigants, represent an integral part of the overall amount that the settling party is willing to pay, and as such, they have a direct effect on the net amount that will be ultimately paid to the litigants." Bloyed v. General Motors Corp. (Tex. App. 1994) 881 S.W.2d 422, 435, aff'd (Tex. 1996) 916 S.W.2d 949. In essence, then, the court must decide what portion of the overall liability the class should "pay" its lawyers. Thus, the fee award should not be viewed as separate from the class relief or as a matter negotiated separately between the defendant and plaintiffs' counsel.

Turning to the proper method for determining a fee if one is to be had at all, it is objectors' understanding that plaintiffs' counsel will agree that use of a "percentage of fund" or "common fund" approach to calculating attorneys' fees in this case would be improper under California law. Objectors agree. In Serrano v. Priest (1977) 20 Cal.3d 25, the Supreme Court acknowledged that a "percentage of the fund" award may be used in common fund cases, but concluded in that case that the doctrine was inapplicable where there was no evidence that the parties intended fees to be paid out any common fund. Id at 37-38. Later California cases have also questioned the validity of a common fund award in determining attorneys' fees in class actions. See People ex rel. Dep't of Transport. v. Yuki (1995) 31 Cal.App.4th 1754, 1769; Salton Bay Marina, Inc. v. Imperial Irrigation Dist. (1985) 172 Cal.App.3d 914, 954; Jutkowitz v. Bourns, Inc. (1981) 118 Cal.App.3d 102, 110. Similarly, just last year the California Court of Appeals for the Fourth Appellate District, concluded in a class action settlement in which class members received coupons, that a common fund award would be inappropriate because the lawyers were not to be paid out of a percentage of the "coupon fund" but in a separately negotiated amount. Dunk, supra.

Thus, California courts have unequivocally chosen the "lodestar" or "touchstone" method for class action fee awards. Id. (citing Rebney v. Wells Fargo Bank (1991) 232 Cal.App.3d 1344, 1347). Fees are awarded not according to the often speculative value conferred upon the class members, but according to the reasonable value of the legal services performed. Serrano, 20

Cal.3d at 48. A trial court must first determine a "touchstone" or "lodestar" figure based on a "careful compilation of the time spent and reasonable hourly compensation . . . involved in the presentation of the case." Press v. Lucky Stores (1983) 34 Cal.3d 311, 321. That figure may then be "increased or reduced by the application of a 'multiplier' after the trial court has considered other factors concerning the lawsuit." Id. These factors include the (1) novelty and difficulty of the questions involved and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; (3) the contingent nature of the fee award, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award. Serrano, 20 Cal.3d at 48-49.

In this case, as explained above, there was no reasonable risk of non-recovery and no evidence that the settlement has a significant enough value that class counsel are entitled to any kind of reward by way of a multiplier. Neither the factual or legal questions were particularly difficult. The Acer Judgment stood as proof that defendants had already agreed to change their advertizing practices. There was little uncertainty at the time of filing the Master Consolidated Complaint that defendants would settle.

Finally, even if this Court accepted class counsel's explanation for the fee award, it still must ensure that the overall award is a reasonable one. And $5.8 million is not a reasonable award here. Just as a party receiving an award of

attorneys' fees under a fee-shifting statute must show that he has substantially prevailed and achieved some degree of success on the merits, Maher v. Gagne (1980) 448 U.S. 122, 129, it is not enough for class counsel to show only the work they performed. They must also prove that the results of the litigation warrant the fee. The Court is entitled to apply the principles well-established under fee-shifting statutes. A plaintiff is not entitled to fees if it obtained only a technical or insignificant victory, and "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties." Farrar v. Hobby (1992) 506 U.S. 103, 113. If a party is deemed prevailing, courts generally apply the two-step approach first established in Nadeau v. Helgemoe (1st Cir. 1978) 581 F.2d 275, 281, to determine whether a plaintiff should be awarded fees. The plaintiff must show that the suit was a causal factor in obtaining the relief. Id.; see Hewitt v. Helms (1987) 482 U.S. 755, 760-61. And plaintiff must show that the legal premise of the suit was not frivolous, unreasonable, or groundless, Nadeau, 581 F.2d at 281 (citing Christianburg Garment Co. v. EEOC (1978) 434 U.S. 412, 422).

Cheap coupon settlements have come under increased criticism in recent years both in the courts, see, e.g., General Motors, supra, and in the press. See Ex. C ("Class Actions' Big Winners: The Lawyers," The Washington Post, May 25, 1997, at A1; "Going to the Head of the Class Action Settlement," The Washington Post, April 9, 1996; "The Latest Class Action Scam," The Wall Street Journal, December 27, 1995, at 11). And with good reason. Only

by carefully policing fee awards in consumer class actions can the Court ensure that the claims of the class are not sacrificed on the alter of class counsel's fees.

CONCLUSION

For the reasons given, Objectors ask that this Court reject the proposed settlement and the award of attorneys' fees.

Respectfully Submitted,

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