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,	)	Case No. 04-CV-1898 Judge Andrew D. Logan
v.	)	
CARFAX, INC., a foreign corporation,	)	
and	)	
POLK CARFAX, INC., a foreign corporation,	)	
Defendants.	)	

OBJECTIONS OF CLASS MEMBERS ANDERSON B. BROWN, N. BROWN, CRABTREE, EVANS, FAULKNER, FRIEDBERG, LAU, MOSELEY, PAULSON, RHEINGOLD, STEINBACH, THURMAN, THUSS, UECHI, WOLFE, WOLFMAN, AND THE CENTER FOR AUTO SAFETY TO REVISED PROPOSED CLASS ACTION SETTLEMENT

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July 13, 2007

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INTRODUCTION

Class action settlements—particularly nationwide consumer class action settlements like this one, in which the claims of millions of absent class members across the country are at risk of being released without their knowledge or consent—are unlike settlements in ordinary civil litigation, in which settlement is always favored. Rather, the inherent conflict between the interests of the class and those of the lawyers "requires [trial] judges to exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions." *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279-80 (7th Cir. 2002). The "judge in the settlement phase of a class action suit" acts as "a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries." *Id.*; *see also Romstadt v. Apple Computer*, 948 F. Supp. 701, 705 (N.D. Ohio 1997) (judge "acts as a fiduciary who must serve as guardian of the rights of absent class members.").

A class action settlement can be approved only if it is fair, adequate, and reasonable. Ohio Civ. R. 23(E). Before approving a class action settlement, "a court must 'independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished.'" *Romstadt*, 948 F. Supp. at 705 (quoting 2 Newberg & Conte, *Newberg on Class Actions* § 11.41 at 88-89 (3d ed. 1992)). The burden is on the settling parties to show that the settlement is fair, adequate, and reasonable. *Id.* (citing *In re GM Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995)).

In response to the objections of class members Anderson, et al. ("Objectors"), the settling parties have come back to the Court with a Revised Settlement Agreement. That agreement

contains a number of improvements to the settlement that were the direct result of Objectors' efforts. These include Carfax's agreement to (1) make the coupons for Carfax reports freely transferable, (2) expand the scope of the vehicle inspection coupons to cover inspections by certified local mechanics and service stations rather by a single company, (3) expand the period for the inspections from six months to two years, (4) include supplemental notice that includes a plain-English notice drafted by Objectors' counsel, (5) place on a separate page on Carfax's website a disclosure of the limitations of its database, and (6) place disclosure language on the coupon claim form.

Nevertheless, an improved settlement is not necessarily an approvable settlement. The list of improvements mentioned above is more a reflection of the inadequacy of the original settlement than anything else. At the end of the day, the improvements are not enough to transform the grossly inadequate original proposal into a fair, adequate, or reasonable settlement that can or should be approved by the Court. In several key respects the settling parties have failed to meet their burden. These failings include:

I. Notice: Failure even to *attempt* to notify a majority of the class, in violation of both Ohio's Rule 23 and the requirements of constitutional due process. As a result, approval of the Revised Settlement would mean that most class members would release their claims for nothing—not even the knowledge that they have released their claims.

II. Value of Coupons: Failure to provide the Court with any assurance, in the form of an estimated coupon redemption rate, that the class will receive emailed notices or obtain any value from the settlement—a failure that is all the more apparent because the settling parties

actually *know* how many claims have been made but are withholding that information from the Court.

III. Disclosure: Failure to provide clear and meaningful disclosure of the limitations of the Carfax database.

IV. Fees: Despite the inadequate representation reflected by both the original settlement and the Revised Settlement, class counsel demands a fee of $566,000, a request that should be rejected along with the rest of the settlement. Even if the Court were to approve the settlement in its current form (which it should not), the fee request should be rejected because it is based on a wildly exaggerated valuation of the benefits of the settlement and is unsupported by proper documentation.

ARGUMENT

I. The Revised Notice Program Violates Ohio Rule 23, Does Not Satisfy Due Process, and Perpetuates an Unacceptably High Risk That a Majority of Class Members Will Never Know That They Have Released Their Claims.

The notice program under the proposed Revised Settlement is inadequate for the same reasons as the notice program in the original settlement. Under the original settlement, Carfax (1) provided no mailed notice at all, (2) attempted email notice for only a small fraction of the class, from an unfamiliar email address, and (3) employed one-time publication notice that was calculated to reach at best 2.41% of the class (assuming that every one of those 2.41% are avid readers of the fine print in the back of the newspaper). Although the proposed Revised Settlement would send email notice to an additional two years' worth of Carfax customers, Rev. Sett. Agmt. 9 (¶ III.D), the class includes *all* former Carfax customers. Thus, many years' worth of customers—customers who are giving Carfax an unconditional release of their claims—would

be excluded from the notice progam. In this way, the settling parties propose to release claims of thousands of prior customers without making any attempt at individual notice. For this reason, the proposed notice program violates Ohio Rule 23 and due process, and ensures that a large percentage of the class will receive no benefit from the settlement.

A. Carfax Cannot Justify Its Failure to Provide Individual Notice to A Majority of the Class.

1. As explained in our original objections, Rule 23's requirement is clear: Notice of a proposed settlement "*shall* be given to *all* members of the class." Ohio R. Civ. P. 23(E) (emphasis added). And where, as here, a court has conditionally certified a settlement class in a consumer fraud case under Rule 23(B)(3), the notice must be "the best notice practicable under the circumstances, including *individual notice to all members who can be identified through reasonable effort.*" Ohio R. Civ. P. 23(C)(2) (emphasis added); *see Gross v. Standard Oil Co.*, 45 Ohio Misc. 45, 50, 345 N.E.2d 89, 93 (Ohio Ct. Com. Pl. 1975) (describing the additional "heavy notice requirements" that apply where the complaint is framed as an action under Rule 23(B)(3)); *see also Mullane v. Central Hannover Bank & Trust Co.*, 339 U.S. 306, 315 (1950) ("[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("The notice must be the best practicable.").

Like the settling parties' original proposal, the revised notice program cannot be reconciled with these standards. The revised notice program continues to rely exclusively on email notice to only a portion of identifiable class members. The email itself is not designed to

maximize the likelihood that recipients will open the messages. And the reliance exclusively on email, as opposed to mailed notice has not been justified.

The Revised Settlement arbitrarily cuts off notice to most of the class. It replaces the original arbitrary cutoff (only one years' worth of customers) with another arbitrary restriction (only three years' worth of customers). Because the Revised Settlement would release the claims of consumers nationwide who have done business with Carfax over a period of at least *ten years*—from 1996 through October 27, 2006. *See* http://carfax.com/about/press/pr_timeline.cfm (visited July 11, 2007) (Carfax started marketing to dealers in 1984 and to individual consumers in 1996), the law requires Carfax to make a reasonable attempt to notify *all* class members. As before, even if every email reaches every intended recipient, which is unlikely, only a fraction of the class will receive notice. That outcome cannot be reconciled with Ohio's Rule 23.

Carfax, however, asks the Court to set aside the plain meaning of the Ohio rules; it spills a great deal of ink arguing that the law "does *not* require direct notice to all persons who can be identified" and that the Supreme Court's holding in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974), is not binding on this Court. Defs' Mem. at 23 n. 26. As explained in our initial objection papers, however, *Eisen*'s holding—that "[i]ndividual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort," even where most of the 2.25 million class members in that case had small claims—was based on language in Federal Rule 23 that is identical to Ohio's Rule 23. Moreover, *Eisen*'s holding is reinforced by the fact that Rule 23 effectively incorporates the *Mullane* due process standard. *Id.* at 173-75. Carfax offers no reason why Ohio courts should interpret language that is identical to Federal Rule of Civil Procedure 23 in a radically different way. If there is a meaningful difference

between providing "individual notice to all members who can be identified through reasonable effort" (Ohio Rule 23(C)(2) and Fed. R. Civ. P. 23(c)) and providing "individual notice . . . to all class members whose names and addresses may be ascertained through reasonable effort" (*Eisen*), Carfax has not explained what it is.

2. In addition, the supplemental notice provision in the proposed Revised Settlement perpetuates some of the more easily remedied flaws in the original program. For example, as the original objections explained, the email notices pursuant to the original proposed settlement were not sent by "Carfax," a sender that class members likely would have recognized, but by "settlement@tgcgi.com." *See* Hilsee Aff. ¶ 24.f. "Because that sender was unknown to the Class members, and *did not even mention Carfax*, the email would very likely have been deleted unread by many recipients, who would assume that the message was spam (if indeed the email was not caught in the class members' automated spam filters)." *Id.* (emphasis added). The Revised Settlement does specify from what address the supplemental emails will be sent. It likewise does not specify what the subject line of the emails will be.

3. Although Carfax cites isolated decisions in which notice other than mailed notice has been approved, it does not address the specific problems with email notice discussed in our original objections or explain why regular-mail notice would not be feasible under the circumstances. Carfax states cryptically that its systems are not "designed to" collect mailing address information, Defs' Mem. 22 n.24, but it never says directly whether its systems do or do not contain customer address data. At the very least, Carfax cannot be coy on the question of whether it has address data, while at the same time avoiding any duty to use mailed notice. Moreover, Carfax offers no response to the point, highlighted in our original objections, that one

of the defendants in this case, R.L. Polk, is in the business of selling lists of names and addresses culled from motor vehicle records for the specific purpose of creating and updating class action notice mailing lists for use in other cases. Hilsee Aff. ¶ 19.a. "Carfax could have cross-tabulated the names of those people in its customer records" with the data from R.L. Polk to obtain the best address information and "the result could have been individual notice provided to a large percentage of the class." *Id.*[1]

Based on both Ohio's Rule 23 and the parallel Federal Rule, addressed in *Eisen*, state and federal courts in Ohio have explained that compiling a mailing address list is a critical step in providing effective class notice. *See Toledo Fair Hous. Ctr v. Nationwide Mutual Ins. Co.*, 94 Ohio Misc. 2d 127, 130, 704 N.E.2d 648, 650 (Ohio Com. Pl. 1996) (under *Eisen* and Ohio's Rule 23, "individual notice is required for those class members whose names and addresses can be determined by reasonable effort"); *see also Thompson v. Midwest Found. Indep. Physicians Ass'n*, 124 F.R.D. 154, 157 (S.D. Ohio 1988) (where "the names and last known address of all class members were available from [the defendant's] business records," mailed notice was "the best notice practicable under the circumstances"). In other words, "some effort is required to

[1] Instead of addressing these and other points made by Mr. Hilsee in his affidavit and highlighted in our original objections, Carfax attempts to dismiss Mr. Hilsee's entire testimony by questioning his motives. *See* Defs' Mem. at 23 n. 25 (stating that Mr. Hilsee "is trying to create a market for his services"). Carfax's *ad hominem* attack is at odds with the statements of numerous courts praising Mr. Hilsee's expertise on class action notice issues and by the decisions of institutions such as the Federal Judicial Center to rely on Mr. Hilsee's advice in crafting best practices standards for class action notice. *See, e.g., Turner v. Murphy Oil*, --- F. Supp. 2d ---, 2007 WL 283431, at *6 n.10 (E.D. La. 2007); *Carnegie v. Household Int'l, Inc.*, 445 F. Supp. 2d 954, 1034. n.2 (N.D. Ill. 2005). The suggestion that Objectors rely on legal conclusions by Mr. Hilsee, moreover, is simply not true. Rather, Mr. Hilsee's detailed affidavit—which Carfax never counters with its own evidence—is valuable because it is based on considerable expertise and experience about the best practices employed in class action notice programs throughout the country.

develop a mailing list of class members to receive individual notice." *Toledo Fair Hous. Ctr*, 94 Ohio Misc. 2d at 131, 704 N.E.2d at 651. The settling parties made none.

Despite its insistence on email as an acceptable substitute, Carfax fails entirely to address the unreliability of email as a means of notice in light of the ever-increasing volume of unwanted commercial email, or "spam," which has been growing at an exponential rate in recent years. *See* Objections at 22-23; Hilsee Aff. ¶ 24.[2] As explained in our original objections, despite attempts by Congress to regulate spam, unwanted commercial email now accounts for more than 90% of all email sent and the filters used to eliminate spam often eliminate desirable mail as well. *See* Arora, *The CAN-SPAM Act: An Inadequate Attempt to Deal with a Growing Problem*, 39 Colum. J.L. & Soc. Probs. 299 (2006); Zeller, *Law Barring Junk E-Mail Allows a Flood Instead*, N.Y. Times, Feb. 1, 2005, at A1; Kelman, *E-Nuisance: Unsolicited Bulk E-mail at the Boundaries of Common Law Property Rights*, 78 S. Cal. L. Rev. 363, 394 (2004). For that reason, email is an increasingly unreliable tool for class action notice, particularly if employed in the absence of an adequate regular-mail notice program.

In short, "[b]ecause of the tremendous volume of junk or spam email messages sent today, it is too much to suppose that un-requested non-personal email messages, *sent by entities unknown to class members*, are actually received, opened, or read." Hilsee Aff. ¶ 24.c & n. 8 (citing statistics showing that spam constituted 88.7% of all emails sent in October 2006 and 93% of all emails sent in February 2007) (emphasis added). Email notice, if it is employed at

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[2] Carfax relies heavily on an unpublished Ohio trial court order that approved an email notice program (Defs. Mem. at 22), but that spare two-page order provides no discussion or analysis of the issue, and there is no evidence that anybody even objected to the notice program in that case. The order, in any event, is ten years old, and was thus issued well before the onslaught of spam rendered email unreliable as a means of class notice.

all, must be employed as a supplement to mailed notice. And regardless of the method used, it must be attempted for *the entire class*, not an arbitrarily-defined subset of the class.

B. One-Time Publication Notice Cannot Make Up for the Many Inadequacies in the Notice Program.

Carfax's memorandum also speculates that notice by publication alone might have been adequate. Defs' Mem. at 24. For reasons explained in our initial objections (at 23-24), that assertion is wrong as a matter of law and is irreconcilable with the unequivocal individual notice requirement of Ohio Rule 23(C)(2). Moreover, Carfax never challenges the analysis in Todd Hilsee's affidavit, which shows that audited circulation and audience readership data, combined with demographic and media usage data for adults who purchased used cars, indicates that one-time publication notice in *USA Today* and *Investor's Business Daily* would reach at best only 2.41% and 0.18% of used car purchasers, respectively—assuming, charitably, that every one of those used car purchasers scans every fine-print notice buried in his or her daily newspaper. Hilsee Aff. ¶ 26. The publications selected by class counsel were not only certain to reach no more than a minuscule percentage of class members, but were also particularly poor selections to reach the demographic audience of used car buyers. *Id.* ¶ 28 (*USA Today* "generates much of its readership among business travelers" and *Investors' Business Daily* serves "one of the more upscale audiences" compared to other publications).

As the U.S. Supreme Court reiterated last year in *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 1720 (2006), publication notice alone is constitutionally sufficient only when other measures are unavailable—for example, when there is no way to obtain someone's mailing address. The Court explained that "'[c]hance alone' brings a person's attention to 'an advertisement in small type inserted in the back pages of a newspaper,' and that notice by

publication is adequate only where 'it is not reasonably possible or practicable to give more adequate warning.'" *Id.* (internal citations omitted) (quoting *Mullane*, 339 U.S. at 315, 317). Here, Mr. Hilsee's analysis shows that the small "chance" that the publication advertisements in this case would have come to a class member's attention is not a matter of pure speculation, but a scientifically-verifiable fact. As in *Jones*, such ineffective "publication was not constitutionally adequate under the circumstances presented here because . . . it was possible and practicable to give" more adequate notice. 126 S. Ct. at 1720.

* * *

In summary, the notice program in this case is "woefully inadequate." Hilsee Aff. ¶ 34; *see id.* ¶ 36 ("I have studied numerous communication efforts [in class actions]. . . . Of all these experiences, the communication of Class members' rights and options in the *West* settlement is among the least effective."). The failures in notice compound the inadequacy of the settlement because they ensure that most of the class members release their claims in exchange for nothing at all—not even the knowledge that they have released their claims.

C. Although the Number of Opt-Outs and Objections Suggests a Grossly Inadequate Notice Program, the More Meaningful Figure Is the Number of Claims Made.

Carfax defends its proposed notice program by contending 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; *see also id.* at 26-27. Quite the opposite. The most likely explanation for the small numbers—143 opt-outs and 27 objections out of as many as ten million

class members—is that the notice program was grossly inadequate, and thus that most class members did not know that the settlement existed.

Carfax conspicuously fails to provide this Court with the numbers that would be most meaningful in evaluating the notice program (and, as explained in the next section, the settlement as a whole): the number of claims made and the total size of the class. Knowing the number of people in the class would allow the Court to assess the percentage of the class for which email notice was even attempted. Based on the rough estimate of ten million provided by class counsel, that figure would be *less than 20%*. Equally important, knowing the size of the class together with the number of claims made would allow the Court to determine what portion of the class to which email notice was sent decided to take advantage of the original settlement. If, as we suspect, the claims rate was exceedingly low, that fact would belie Carfax's contention that the email notice was adequate and suggest that the additional notice would likewise be insufficient.

II. In the Absence of Any Information Concerning the Likely Redemption Rate, There Is a Serious Risk that the Coupons Will Provide No Real Value to the Class.

Carfax's lengthy memorandum devotes comparatively little attention to the central question before the Court—whether the terms and conditions of the Revised Settlement itself are fair, adequate, and reasonable. Carfax (at 18) begins by mischaracterizing the Revised Settlement as providing "economic benefits" and goes on to claim that, "even before the Revised Settlement Agreement, Class Members could receive either *cash*" or coupons. Defs.' Mem. 19 (emphasis added). That is not correct. Both under the original settlement and the Revised Settlement, class members who submit an approved claim form are entitled only to receive one

of four vouchers—either two free Carfax Vehicle History Reports redeemable within one year, one free report within two years, an unlimited number of reports for half-price during a 30-day period within three years of final approval, or a coupon for $20 off a vehicle inspection. Rev. Settl. Agmt. 8 (¶ I.X.1).

In response to our objections, Carfax has agreed to improve these vouchers in two ways. Carfax has agreed to make the Carfax coupons transferable, and it has agreed to expand the scope of the inspection coupon so that the coupons may be used at local service stations and for multiple purposes, and to extend the period of the inspection coupons from six months to two years. These are significant improvements, but they are meaningless if, because of poor notice, few class members redeem the coupons.

1. Carfax repeatedly touts the relatively low number of opt-outs and objections (Defs' Mem. at 1, 8, 21, 26-28), as if silence were tantamount to assent.[3] But the parties are noticeably reticent concerning the two numbers that would be most useful to the Court in evaluating

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[3] In fact, that assumption is quite wrong. The truth is that "[t]he vast majority of class members have no ability to evaluate the fairness of the proposed settlement. The court must thus rely upon its own investigation and the input of the few objecting class members who do have the resources to provide the court with pertinent information." *In re Ford Motor Co. Bronco II Prods. Liab. Litig.*, 1994 WL 593998, at *5 (E.D.La. 1994). "[A] combination of observations about the practical realities of class actions has led a number of courts to be considerably more cautious about inferring support from a small number of objectors to a sophisticated settlement." *In re GM Trucks*, 55 F.3d at 812.

"If silence were acceptance, then we would expect the silent class members to actually participate in the settlement after it is approved. We do not see this. . . . There are so many examples of shockingly low participation rates that what used to be extreme is becoming ordinary. . . . Response rates are particularly low in coupon-based settlements, where settlement coupon redemption rates are as low as 0.002%. In most coupon settlements, the vast majority of class members received absolutely nothing from the class action settlement. It would simply be irrational to infer that these class members embraced the settlement." Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 Fla. L. Rev. 71, 119-120 (2007). Similarly, "a failure to opt out proves neither knowledge nor endorsement of the proposed settlement" and "[t]he same inadequate notice" that suppresses objections may also lower the opt-out numbers, not to mention the claims rate. *Id.* at 122.

whether the settlement provides value to the class—(1) the total number of class members and, more importantly, (2) the total number of claims made by the class thus far. To the extent that Carfax is correct that "[t]he Revised Settlement Agreement is largely the same as the original Settlement Agreement," (Defs. Mem. at 2), the number of claims made under the original settlement should give the Court a good sense of the likely number of claims that would be made under the Revised Settlement and, thus, a good sense of whether the settlement would provide any real value to the class.

Carfax provides no excuse for its decision to withhold the redemption rate. Instead, citing the coupons' face value, it asserts that "[t]here is no doubt that Vouchers" have value. Defs' Mem. at 34. But the main reason that so-called "coupon settlements" are so widely criticized by courts and commentators is that coupons are worth less—often far, far less—than cash of the same value because many class members will not use the coupons. *See, e.g., Synfuel Tech., Inc. v. DHL Express*, 463 F.3d 646, 654 (7th Cir. 2006) (vacating approval of class action settlement); *Strong v. Bellsouth Telecomm., Inc.*, 173 F.R.D. 167, 172 (W.D. La. 1997) ("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.") (internal citation omitted), *aff'd*, 137 F.3d 844 (5th Cir. 1998); *NACA Guidelines*, 176 F.R.D. at 383 ("For most of the class, redemption may not be an option, because they are unwilling or unable to make a future purchase.").

For this reason, coupons and discounts may provide only "illusory benefits." *Turner v. Murphy Oil*, 2007 WL 283431, at *30; *Kearns v. Ford Motor Co.*, 2005 WL3967998, *1 n.1

(C.D. Cal. 2005) (coupon settlements "produce hardly any tangible benefits for the members of the plaintiff class but generate huge fees for the class attorneys"); *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 240 (D.N.J. 2005) (contrasting "real relief" with "a coupon"); *see* Miller & Singer, *Nonpecuniary Class Action Settlements*, 60 Law & Contemp. Probs. 97, 108 (1997) (for many class members, "the right to receive a discount will be worthless"). Indeed, in the Class Action Fairness Act of 2005, Congress equated settlement coupons with "awards of little or no value." Pub. L. 109-2, § 2(a)(3) ("Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where—(A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value"); *cf. In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 328 (3d Cir. 1998) ("[W]e are impressed with the nature and extent of the relief provided under the settlement. . . . Rather than offering 8 million class members a small refund or a coupon towards the purchase of other policies (which we believe would have failed the fairness evaluation), the ADR process responds to the individual claims of the class and provides compensation based on the harm they have suffered.").

Because of the serious risk that coupons will provide little real value to the class, courts reviewing proposed class settlements routinely consider the aggregate monetary value of a settlement, based on an estimated redemption rate. *See, e.g., In re Mexico Money Transfer Litig.*, 267 F.3d 743, 748 (7th Cir. 2001) (although coupons to be distributed to settlement class had a "face value" of $400 million, "[e]xperts estimated that about half of the coupons would be claimed, and 20% to 30% of those claimed would be used, implying a net value of $40 million to $60 million."); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197,

220 (D. Me. 2003) (rejecting settlement where, among other things, value to class had not been quantified); *Buchet v. ITT Consumer Finance Corp.*, 845 F. Supp. 684, 693-96 (D. Minn.), *amended*, 858 F. Supp. 944 (D. Minn. 1994) (discussing at length likely rate of coupon redemption to ascertain settlement's value to the class); *Cooper v. Musicland Group, Inc.*, 2005 WL 1618791 (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.").

Here, the Court is unable to place a value on the settlement because counsel have offered no evidence that would enable the Court to make an informed estimate of how many class members will redeem them. The settling parties' failure to offer an estimate is particularly striking because, unlike in most cases, the parties here already *know* the total number of claims that were made under the original, similar settlement. There is no excuse for withholding this information from the class or the Court, and that information should be filed immediately.

2. Echoing the concerns of the courts discussed above, the National Association for Consumer Advocates has issued the following guidelines for courts considering coupon or certificate settlements: [4]

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[4]Carfax criticizes the *NACA Guidelines* and states that "as far as Defendants know, no court has ever adopted these guidelines." Defs. Mem. at 33 n.42. In fact, many trial and appellate courts have relied on the *Guidelines*. *See, e.g., In re New Mexico Indirect Purchasers Microsoft Corp. Antitrust Litig.*, 149 P.3d 976, 998 (N.M. App. 2007); *In re Educational Testing Service Praxis Principles of Learning and Teaching*, 447 F. Supp. 2d 612, 634 (E.D. La. 2006); *In re Compact Disc*, 216 F.R.D. at 204 n.12 (D. Me. 2003); *State v. Homeside Lending, Inc.*, 826 A.2d 997, 1010 (Vt. 2003). *Milkman v. American Travellers Life Ins. Co.*, 2002 WL 778272, at *8 (Pa. Com. Pl. 2002) and *Moody v. Sears*, 02-CVS-4892 (N.C. Sup. Ct. May 7, 2007), for example, each quoted extensively from the *Guidelines* on coupon settlements and analyzed whether each of the guidelines was satisfied. In any event, Carfax offers no reason why this Court may not consider the *Guidelines* to the extent they are persuasive.

- Certificate settlements should never be proposed to the court unless it is apparent that the defendant is providing greater true value (i.e., not just the face value of the certificates or their potential value) to class members than would be available from an all-cash settlement . . . The beginning assumption should always be that the defendant prefers a non-cash to a cash settlement because it believes the true value to be less. Since the defendant will usually be in a superior position to predict the ultimate redemption rate and benefit to the class, its preference for a non-cash settlement should be viewed with skepticism.

- A settlement involving certificates should require a minimum level of redemption by the class members within a reasonable period of time. In the event actual redemption does not meet this minimum level, the defendant should provide alternative relief in the form of a common fund. This requirement protects against the use of a meaningless certificate settlement that has little or no impact on a defendant, and little or no compensatory value to the plaintiff class.

- 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. By doing so, a public record will be made of what works and what does not work in non-cash settlement cases.

NACA, *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, 176 F.R.D. 375, 383-84 (1997). Each of these guidelines is relevant here. The Court should (1) approach the defendants' preference for coupons with skepticism, (2) require a minimum level of redemption, and (3) require the parties to submit all evidence relating to redemption rates, both under the original settlement and the proposed Revised Settlement.

Carfax strenuously disagrees (at 33) with the suggestion that coupon settlements be required to provide a minimum level of redemption. But particularly where, as here, there are compelling reasons to believe the rate may be very low, such a requirement is essential to protect against a settlement that in reality provides no value to most class members. Thus, some class action settlements have provided that if a minimum number of coupons are not used, the value of unused coupons up to that minimum will be distributed to the class in another form or will be awarded as *cy pres*. *See, e.g.*, *In re Motorsports Merchandise Antitrust Litig.*, 112 F. Supp. 2d

1329 (M.D. Ga. 2000) ("Defendants participating in the coupon program have agreed to continue issuing coupons until the face value of each of the settlements is reached in redemptions. . . . Only if several years elapse and the redeemed value has not reached the limit of the Defendants' obligations may Defendants discharge their liability at that time by making donations to charitable organizations. They are, therefore, not completely freed from liability by lapse of time."); *States of N.Y. & Md. v. Nintendo of Am.*, 775 F. Supp. 676, 679 (S.D.N.Y. 1991) ("If fewer than a million purchasers redeem the coupons, Nintendo will pay the difference up to $5 million to the Attorney Generals."); *see also Henry v. Sears Roebuck & Co.*, 1999 WL 33496080, *2 (N.D. Ill. 1999) ("There is no requirement that Class members submit a proof of claim form or take any other action in order to obtain the benefits of the Settlement, thereby ensuring 100% distribution of the Settlement consideration.").

In this case, there is no minimum and no *cy pres*. At least one court has noted that the lack of a minimum pay-out by the defendant suggests that the defendant is assuming that the coupon redemption rate will be low—in other words, that the settlement will provide little value to the class. *See Buchet*, 845 F. Supp. at 696; *see also Clement v. Am. Honda Fin. Corp.*, 176 F.R.D. 15, 28 (D. Conn. 1997) (disapproving settlement) ("The value of these coupons is too speculative. Absent a transfer option or other guaranty of some minimal cash payment, there is a strong danger that the settlement will have absolutely no value to the class.").

At the very least, where the evidence about the redemption rate is lacking or there is reason to believe the rate will be low, no attorneys' fees should be paid out until the Court can ascertain that the coupons have 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.").

The parties' reluctance to disclose the redemption rate strongly suggests that few coupons have been redeemed and few coupons are likely to be redeemed under the proposed settlement, meaning that most class members would get no value from the settlement, although Carfax would get its broad release. The bottom line is that "a settlement is not fair where all the cash goes to expenses and lawyers, and the members receive only discounts of dubious value." *In re Compact Disc*, 216 F.R.D. at 221.

III. The Proposed Claim Form Language Would Not Provide Sufficiently Clear and Meaningful Disclosure of the Limitations in the Carfax Database.

The failings of coupon settlements generally are heightened in cases, like this one, involving allegations of misrepresentations or omissions about the limitations of a product. In misrepresentation or failure-to-warn cases, there is a serious risk that a coupon settlement not only may fail to compensate the class, but may actually result in class members becoming subject to the very problems identified in the complaint—the problems that the case was presumably intended to prevent. *See In re GM Trucks*, 55 F.3d at 811 (rejecting settlement because, among others reasons, the relief would "not address the safety defect that formed the central basis of the amended complaint filed barely four months before the settlement"). To guard against that perverse result, it is essential that the failure to warn be remedied and, at the very least, that class members be warned of the problem before they choose to redeem a coupon for the product.

In this case, the complaint is based on Carfax's misrepresentations and omissions concerning the scope of the information in its database. For example, the complaint alleges that Carfax "purports to conduct accident report searches for used vehicles on a nationwide basis," but that it "does not and cannot perform accident vehicle report searches in almost half of the states," and that "Carfax goes to great lengths to avoid specifically" identifying the states for which it does not have the accident data. Am. Complaint & 8, 10. In response to Objectors' insistence that the settlement include meaningful disclosure about the limitations in the Carfax database to be placed on the claim form and the Carfax website, Carfax has now agreed in principle to include such disclosure. However, the disclosure that would be provided under the Revised Settlement is not sufficiently clear or meaningful. The Revised Settlement provides that Carfax will place the following language on the claims form:

> CARFAX does not have the complete history of every vehicle. A CARFAX Vehicle History Report is based only on information supplied to CARFAX. Other information about the vehicle, including problems, may not have been reported to CARFAX. Use a Vehicle History Report as one important too, along with a vehicle inspection and test drive, to make a better decision about a used car.

Rev. Settl. Agmt. at 10 (¶ III.F). This language is too vague to be of much use to anyone. The statement that Carfax lacks the "complete history of every vehicle" is akin to saying that the database is not perfectly omniscient, and the statements that follow are similarly vague and unhelpful.

Objectors suggest instead that the claim form contain language, derived largely from Carfax's own website, that directly states specific information likely to affect class members' decision about whether to claim Carfax reports as opposed to an inspection voucher:

> CARFAX receives accident data updates on a regular basis. The frequency of these updates varies by source and by state, and ranges from monthly to

> annually. Once the information is delivered to CARFAX, it becomes available on the CARFAX Vehicle History Report within a couple of days.
>
> CARFAX receives accident records from police reports in most States. CARFAX also receives other accident indicators from many other sources, such as DMVs. Insurance companies do not supply CARFAX with most insurance claim information.

This information, again, is derived from Carfax's own website. And in place of vague generalities, the paragraph would provide class members with a concise summary of some of the key limitations and state-to-state variations in the coverage of the Carfax database. Additionally, the disclosure should provide a link to the page on the Carfax website containing a fuller listing of the sources and limitations of the database, stating that "A list of CARFAX sources is available at [the address of the web page]."

IV. Class Counsel's Fee Request Should Be Rejected Because Counsel's Representation Was Inadequate and the Request Is Unsupported by Proper Documentation.

Class counsel have done a poor job of representing the class. They agreed to a settlement under which most of the class would receive no benefit in exchange for releasing their claims. They agreed to injunctive relief that would perpetuate the misrepresentations on which the lawsuit was based. And they agreed to a settlement with a grossly inadequate notice program under which most of the class would not even learn of the settlement's existence. The fact that Objectors' counsel were able to achieve the improvements reflected in the Revised Settlement with a comparatively far smaller investment of time only underscores the inadequacy of class counsel's representation.

Despite their demonstrably inadequate representation of the class, counsel seek an award of $566,000 in cash for themselves. It is well-established that "[t]he determination of attorneys' fees in class action settlements is fraught with the potential for a conflict of interest between the

class and class counsel." *In re Rite Aid Corp. Securities Litig.*, 396 F.3d 294, 307 (3d Cir. 2005). Careful scrutiny is required to prevent excessive fees and, thus, public aversion toward the judicial process and class actions in particular. *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 216, 225 (2d Cir. 1987). If the Court decides to approve the settlement as it stands—which, we reiterate, it should not—the Court should reject class counsel's fee request because it is based on an inflated valuation of the settlement, is unsupported by adequate documentation and, based on the minimal documentation submitted, appears to be excessive.

First, class counsel relies on a wildly exaggerated valuation of the settlement to support the fee request. Class counsel not only estimates the value of the settlement to the class based on the *face value* of the coupons, but also assumes a *100% redemption rate*. *See* Pl's Mtn. in Support of Final Approval at 21 (stating that "[t]he value of this Settlement" is calculated by multiplying the face value of a coupon by the number of class members, and concluding that a fee of half a million dollars is therefore less than a standard contingency fee). Both assumptions are badly mistaken. As discussed above (Part II, *infra*), the value of a class action settlement consisting of coupons is far less than the face value of those coupons because the redemption rate, which depends on the adequacy of the notice program and the desirability of the coupons, is inevitably less than 100%. In this case, the redemption rate is likely far, far lower, as the settling parties' unwillingness to disclose the number of claims made to date suggests.

Accordingly, even if the Court is inclined to approve the settlement, no fees should be awarded until complete redemption-rate information is disclosed. *See In re Compact Disc*, 292 F. Supp. 2d at 190 (declining to award attorneys' fees until after coupon redemption period ended, at which point court consider fees based on valuation of the settlement); *In re Domestic*

Air Transp. Antitrust Litig., 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"). Indeed, in response to widespread criticism of coupon settlement abuses, Congress recently required that contingent attorney's fees in federal court settlements involving coupons be tied to the actual redemption rate. *See* 28 U.S.C. § 1712(a) (requiring 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.").

Second, the fee request is not supported by adequate documentation. Although the bulk of the fees and expenses are claimed for the Federman & Sherwood firm, the fee request actually encompasses eight different law firms. One of those firms is Federman & Sherwood's local counsel, Ambrosey & Fredericka. Aside from a vague reference to the various actions litigated by the other six firms, however, class counsel does not explain why those firms—who had no involvement in this case and do not appear to have participated in settlement discussions—are entitled to fees, and on what basis the amount of fees claimed by them was determined. Nor do they explain how any award would be distributed among the various firms. *See In re Agent Orange*, 818 F.2d at 226 (holding that, in class actions, "counsel must inform the court of the existence of a fee sharing agreement at the time it is formulated," to "diminish many of the dangers posed to the rights of the class"). A 'sunshine' rule is essential to protect the interests of the public, the class and the honor of the legal profession." *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1452, 1454 (E.D.N.Y. 1985) (Weinstein, J.) ("fee arrangements among

attorneys in class actions . . . must be revealed to the court and members of the class as soon as possible").

The only documentation for the fee request is contained in the Declaration of William B. Federman. Exhibit A to the declaration contains a chart listing a whopping twenty different employees of Mr. Federman's firm alone, each of whom claim to have spent compensable time on this case. The chart provides nothing more than the name of the employee; a notation indicating whether that person is an attorney, paralegal or paralegal assistant; the number of hours claimed; the rate claimed; and the lodestar derived from multiplying the two numbers. Thus, for example, Mr. Federman claims a lodestar of $136,757.50 and his colleague William P. Wasson claims a lodestar of $256,185.00. But, amazingly, no further detail is provided to substantiate those claimed amounts. There are no contemporaneous time records, no descriptions of the tasks performed—nothing, in short, other than the bare number itself.

It is well-established that "documentation offered in support of the hours must be of sufficient detail and probative value to enable the court to determine with a high degree of certainty that such hours were actually and reasonably expended in the prosecution of the litigation" *United Slate, Tile & Composition v. G & M Roofing and Sheet Metal Co.*, 732 F.2d 495, 502 n.2 (6th Cir. 1984); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) ("The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly."). The spreadsheet in class counsel's affidavit falls far short of that standard. *See In re Painewebber Ltd. P'ships Litig.*, 2003 WL 21787410, at *4 (S.D.N.Y. 2003) (refusing to grant class counsel's fee request where counsel "failed to submit any contemporaneous time

records. Instead, in support of its fee application, [counsel] merely provides the Court with a single-paged spreadsheet summarizing the amount of time spent by various attorneys and staff members on each of eight, broadly-defined matters pertaining to this action."). Under *Hensley*, an "applicant seeking fees bears the burden of proving entitlement to an award by contemporaneously documented records of the hours expended." *Reed v. Rhodes*, 934 F.Supp. 1492, 1516 (N.D. Ohio 1996). At the very least, an "applicant should maintain accurate contemporaneous time records in a manner that will enable a reviewing court to identify distinct claims, identify issues addressed, justify the participation of multiple counsel, and distinguish between redundant, unnecessary, and duplicated work effort and proper utilization of time." *Id.*; *see New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136 (2d Cir. 1983). Given the potential conflicts of interest, the need for detailed information in support of fees applications is particularly compelling in class actions. As Judge Posner has explained, concealing fees information "paralyzes objectors, even though inflated attorney' fees are an endemic problem in class action litigation and the fee applications of such attorneys must therefore be given beady-eyed scrutiny by the district judge." *Reynolds v. Beneficial Nat'l*, 288 F.3d at 286.

Third, the minimal documentation provided in support of the fee request suggests that the request in this case may be inflated or unsupported. For example, the Federman firm requests $682,173.30 in fees and $44,854.17 in expenses, representing twenty different staff members at the Federman firm alone—nine of them attorneys and eleven paralegals or paralegal assistants. But nowhere does class counsel explain what tasks were performed by any of the attorneys or paralegals. One paralegal alone claims $55,340.55 in fees for her time. To the extent that the

paralegal or paralegal assistant hours include purely clerical work, such work is part of overhead, and thus included in the attorneys' hourly billings, not separately compensable under a lodestar formulation. *See Bowling v. Pfizer*, 927 F. Supp. 1036, 1042 n.14 (S.D. Ohio. 1996) ("Class counsel's [claimed number of] hours in 'staff' time,' for instance, may well not be compensable at all and certainly would not be billable at the rates claimed in the application"); *Mississippi State Chapter, Operation PUSH v. Mabus*, 788 F. Supp. 1406 (N.D. Miss. 1992); *Martin v. Mabus*, 734 F. Supp. 1216, 1226 (S.D. Miss. 1990) (holding that clerical tasks are never separately compensable, even at a minimal rate, even if performed by a lawyer); *Held v. Bruner*, 496 F. Supp. 93, 100 (D.N.J. 1980); *see generally Hensley*, 461 U.S. at 434 ("Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission."). Lawyers do not charge their clients for their time on an hourly basis and then charge an hourly rate for their paralegal or paralegal assistant's time in answering the phone, typing a brief, organizing the client's file, or delivering a document. To charge separately for such overhead costs in assessing a lodestar fee would therefore constitute double dipping. Without documentation of how the paralegals or attorneys spent their time, the Court cannot address the propriety of the fee request.

To reiterate, class counsel's fee request need not be entertained at all because the settlement should be rejected. But to the extent that the Court is inclined to approve the settlement and consider the request, class counsel must at the very least attempt to justify the request with a valuation of the settlement based on the redemption rate and supplementary

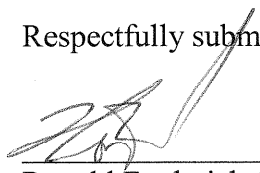
documentation of the hours expended and expenses incurred. In the event that class counsel provides supplemental information, we reserve the right to respond to such a submission.

CONCLUSION

The proposed settlement should be rejected.

Dated: July 13, 2007

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July, 2007, I served the foregoing OBJECTIONS OF CLASS MEMBERS ANDERSON, *ET AL.*, TO REVISED PROPOSED CLASS ACTION SETTLEMENT 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:

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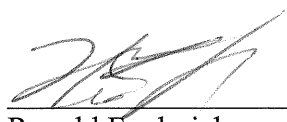

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