ANTHONY TALALAI, et al., Plaintiffs, v. COOPER TIRE & RUBBER COMPANY, Defendant.	)))))))))))	SUPERIOR COURT OF NEW JERSEY MIDDLESEX COUNTY LAW DIVISION DOCKET NO. L-008830-00-MT CIVIL ACTION CASE CODE 249

MEMORANDUM OF LAW IN SUPPORT OF OBJECTIONS OF MATTHEW G. KAISER AND FRANCIS X. SULLIVAN

Objectors Matthew G. Kaiser and Francis (Frank) X. Sullivan submit this memorandum of law in support of the Summary of Objections of Matthew G. Kaiser and Francis X. Sullivan [hereinafter "Summary of Objection"] that was filed in this Court on January 15, 2002. Objectors Kaiser and Sullivan object to the proposed class settlement as currently structured because the settlement is virtually worthless to owners of tires manufactured by Cooper Tire & Rubber Company (Cooper Tire), who are members of the settlement class; does little to address the serious safety concerns regarding Cooper tires that have been raised in the complaints filed in thirty-three pending class actions across the country, all of which would be resolved by this settlement; and accomplishes a tremendous transfer of wealth from Cooper Tire to class counsel without any conferring any commensurate benefit on members of the class.

Bonnie Robin-Vergeer, lead counsel for objectors Kaiser and Sullivan, wishes to address this Court at the fairness hearing on January 29, 2002. She would like to speak for fifteen minutes.[1]

[1] Ms. Robin-Vergeer has moved for admission pro hac vice. In the event that the motion is not granted, New Jersey counsel, Baher Azmy, will present the argument.

ARGUMENT

I. THE PROPOSED CLASS SETTLEMENT IS OF VIRTUALLY NO VALUE TO THE CLASS.

It is black-letter law under R. 4:32-1 and Federal Rule of Civil Procedure 23, on which the New Jersey rule is modeled, that a trial court evaluating the fairness of a proposed class action settlement "acts as a fiduciary who must serve as a guardian of the rights of absent class members." In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 785 (3d Cir. 1995); see also In re Orthopedic Bone Screw Prods. Liab. Litig. (Sambolin), 246 F.3d 315, 321 (3d Cir. 2001) (trial court "plays the important role of protector of the absentees' interests, in a sort of fiduciary capacity") (citation omitted); Chattin v. Cape May Greene, Inc., 216 N.J. Super. 618, 627, 524 A.2d 841, 845 (N.J. Super. Ct. App. Div. 1987) ("The evident purpose of these requirements [of R. 4:32] is to protect class members from a settlement which is not in their best interests.").[2] The basic test for court approval of a settlement is whether it is fair and reasonable to the members of the class. Chattin, 216 N.J. Super. at 627, 524 A.2d at 845; see also General Motors, 55 F.3d at 785 ("[T]he court cannot accept a settlement that the proponents have not shown to be fair, reasonable and adequate.") (citation omitted).

The burden of proving the fairness of a proposed settlement is on the proponents. In re Matzo Food Prods. Litig., 156 F.R.D. 600, 605 (D. N.J. 1994); Bowling v. Pfizer, Inc., 143 F.R.D. 141, 151 (S.D. Ohio 1992). That burden is particularly high when, as here, settlement

[2] Because the New Jersey rule governing class actions was modeled after the federal rule, Delgozzo v. Kenny, 266 N.J. Super. 169, 179, 628 A.2d 1080, 1086 (N.J. Super. Ct. App. Div. 1993), New Jersey courts "have consistently looked to the interpretations given the federal counterpart for guidance." Id. at 188, 628 A.2d at 1090.

negotiations precede the certification of the class, and notice of the class action is sent simultaneously with the notice of the settlement itself. "The danger of a premature, even a collusive, settlement is increased when . . . the status of the action as a class action is not determined until a settlement has been negotiated, with all the momentum that a settlement agreement generates," and "class members are presented with what looks like a fait accompli." Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co., 834 F.2d 677, 680-81 (7th Cir. 1987); see, e.g., Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997) (noting that class actions "demand undiluted, even heightened, attention in the settlement context"); General Motors, 55 F.3d at 805 ("We affirm the need for courts to be even more scrupulous than usual in approving settlements where no class has yet been formally certified."); Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982) (demanding "a clearer showing of a settlement's fairness, reasonableness and adequacy and the propriety of the negotiations leading to it" in cases involving settlement classes); Mars Steel, 834 F.2d at 682 (requiring that the inquiry be "especially careful and penetrating" where class certification is deferred to the settlement stage).

The class action settlement proposed here cannot survive any meaningful review, let alone the heightened scrutiny that is required here. The proposed settlement has three main components of alleged benefit to the class: (1) an enhanced warranty program; (2) an enhanced finishing inspection program; and (3) a consumer education program. None of these features is of meaningful value to the class, and none, whether taken singly or in combination, can justify the astronomical $30 million in attorneys' fees and costs that class counsel seek.

A. Safety Concerns Regarding Tires Manufactured by Cooper Tire

The fairness and adequacy of the proposed settlement must be judged in light of the claims alleged and the relief requested in the original complaints. General Motors, 55 F.3d at 810; In re Ford Motor Co. Bronco II Prods. Liab. Litig., No. MDL-991, 1995 WL 222177, at *4 (E.D. La. Apr. 12, 1995). The complaints filed in almost three dozen class action complaints across the country allege that Cooper Tire (1) engaged in a practice in which it used an awl to puncture bubbles or blisters that were visible in its tires in order to conceal these bubbles or blisters from consumers, see, e.g., Talalai v. Cooper Tire & Rubber Co., No. L-008830-00-MT, First Amended Class Action Complaint and Jury Demand ¶¶ 12-24 (N.J. Super. Ct.) (nationwide class action complaint); and (2) engaged in manufacturing processes and used components that led to the production of tires with adhesion problems in various layers of the tire. See, e.g., Coggin v. Cooper Tire & Rubber Co., Master File No. MDL-1393, No. C2-01-180, Plaintiff's Amended Class Action Complaint ¶ 12 (class action complaint on behalf of a Florida class). These practices, the plaintiffs claim, have led to the production of steel belted radial tires with latent defects that weaken the structure of the tire and can potentially cause life-threatening tread and belt separations.

As Rex Grogan, a forensic scientist and international expert in tire manufacturing and safety, avers, the allegations made in these class action complaints are well founded. See Certification of Rex J. Grogan ¶¶ 8-17 [hereinafter "Grogan Certif."], which accompanies this memorandum.[3] In the course of performing forensic examinations of failed tires, Mr. Grogan has

[3] Mr. Grogan has more than fifty years of experience working with tires, has engaged in more than 150 tire investigations in the United States over the past decade, and has been retained as an expert on behalf of the plaintiffs in the Firestone class action pending in Indianapolis,

examined tires manufactured by Cooper Tire. Many of the Cooper tires he has examined have experienced tread and belt separations—where layers of the rubber interfaces of the tires have peeled away from other layers of rubber and from the steel belt itself while the vehicle is being driven. In other words, many of the Cooper tires Mr. Grogan has examined have sustained the type of failure that kills people. Grogan Certif. ¶ 8. As Mr. Grogan explains, tread and belt separations, where the tire separates between the steel belt components, "can lead to serious injuries and death when they occur at high speeds." An ordinary driver cannot control his vehicle once one of his tires has experienced a tread and belt separation. Id. ¶ 7. As the National Highway Traffic Safety Administration recently wrote: "Belt-leaving-belt tread separations, whether or not accompanied by a loss of air from the tire, reduce the ability of a driver to control the vehicle, particularly when the failure occurs on a rear tire and at high speeds. Such a loss of control can lead to a crash." Engineering Analysis Report and Initial Decision Regarding EA00-023: Firestone Wilderness AT Tires ¶ 12, at 30 (October 2001), available at http://www.nhtsa.dot.gov/ hot/firestone/firestonesummary.html (quoted in Grogan Certif. ¶ 7).

Based on his forensic examinations of and his familiarity with Cooper tires, Mr. Grogan is concerned that Cooper tires may be subject to a heightened risk of tread and belt separation because of shoddy manufacturing practices and poor quality control that fall significantly below U.S. industry standards.

First, one major cause of delamination, or separation, of Cooper tires that Mr. Grogan has observed is Cooper Tire's use of stale rubber stock in its tires. To obtain proper adhesion

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Indiana, In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., No. IP-00-9373-C-B/S (S.D. Indiana). See Grogan Certif. ¶¶ 2-7. Mr. Grogan's curriculum vitae is attached as Exhibit A to his Certification.

between the layers of the tire, the stock used for the tread and the inner liner must be fresh and sticky; stale stock develops a film on its surface, loses its tackiness, and will not stick together properly even after the tire has been vulcanized, or "cooked." Grogan Certif. ¶ 9. Tire manufacturers place materials, such as canvas or plastic with a textured surface, in between layers of stock before it is used, to keep the layers of rubber from sticking together. In several Cooper tires that Mr. Grogan examined, the layers of rubber originally vulcanized together had peeled apart, and the imprint of the textured materials actually remained on the surface of the delaminated rubber. A properly vulcanized tire made with fresh stock would contain no such imprint. Id. ¶ 10.

Second, Cooper Tire's evident use of old stock is also consistent with the allegation that the company uses solvents on the surface of old stock in an attempt to rejuvenate it and enhance its stickiness, a practice in which Cooper Tire's employees admit they have engaged. Grogan Certif. ¶ 11. As Mr. Grogan explains, using a solvent on the stock degrades the material. The rubber deteriorates even as it becomes more sticky. As a result, the final product has been built with degraded material at the interfaces that comprise the tire. Such a tire is more prone to separate over time. Id. Although the chemical evidence of the use of solvents disappears when the tire is vulcanized, Mr. Grogan's assessment that Cooper Tire has been using old stock in manufacturing tires is consistent with the use of solvents, because without solvents, the old stock would be almost unusable because it would not be sticky. Id. ¶ 12.

Third, with respect to the allegations regarding the use of an awl to puncture blisters in its tires, Cooper Tire admits that it engaged in that practice, though it denies that the practice has continued to the present. Talalai v. Cooper Tire & Rubber Co., No. L-008830-00-MT,

Defendant Cooper Tire & Rubber Company's Answer to Complaint ¶¶ 20, 23 (N.J. Super. Ct.). As Mr. Grogan explains, Cooper Tires on the road that have been punctured by an awl are subject to an increased risk of tread and belt separation. Mr. Grogan has studied the consequences of awling extensively and has found that the use of an awl to release trapped air from blisters in the tire creates long-term problems for the tire and increases the risk of tread and belt separation. Grogan Certif. ¶ 14. The reason for this heightened risk is that once a hole is made in the tire, it does not seal itself. That hole allows air, moisture, and contaminants to enter the tire, which in turn causes the steel belt to rust. As the steel belt rusts, the steel belt, the rubber, and the brass plate that helps bond the steel to the rubber, begin to come apart. Id. ¶ 15. That Cooper Tire was inclined to engage in awling in the first place, moreover, is further evidence that the company engaged in sloppy manufacturing practices because the bubbles or blisters that the awl is used to remove are themselves manifestations of a faulty manufacturing process. That Cooper Tire has allegedly prohibited the practice of awling only confirms that it is a dangerous practice that should not be sanctioned. Id.

Finally, one other example Mr. Grogan has observed of Cooper Tire's shoddy manufacturing practices is a failure to bond the rubber properly to the steel belt. The usual method is to plate the metal with brass and apply a rubber compound containing a high level of sulphur. During the vulcanization process, if done properly, the brass plating fuses with the sulphur in the rubber, forming copper sulphide, which is black in color. There should be no residual trace of the brass. The brass plating will oxidize very rapidly if exposed to the atmosphere, and this oxidization will impede proper adhesion between the steel belt and the rubber. Mr. Grogan has examined Cooper tires where the shiny brass plating has remained,

which establishes that proper adhesion was not achieved during vulcanization. Grogan Certif. ¶ 16.

In short, Cooper Tire's practices of using old stock, solvents to rejuvenate that old stock, awls to puncture blisters in its tires, and failure to ensure that the brass plate properly bonds the steel belt and rubber together cause Mr. Grogan grave concern regarding the safety of its product. Grogan Certif. ¶ 17. The Cooper Tire tread and belt separations Mr. Grogan has observed are potentially more catastrophic than other separations he has witnessed in tires built by other U.S. manufacturers because the entire interfaces of the rubber in the Cooper tires frequently have simply peeled apart, often with fatal consequences. Id. ¶ 10.

These concerns, unfortunately, have been borne out by the accounts of Cooper Tire failures in recent years. More than a year ago, a review of accident reports and court records showed that early tread separation in Cooper tires has been named as the cause of accidents that led to at least 35 deaths over the last six years. David Barboza, Cooper Tire May Become Focus of a Safety Investigation, N.Y. Times, Sept. 22, 2000, at C5. Only last week, the Supreme Court of Mississippi affirmed a verdict against Cooper Tire in excess of $3 million in a product liability case arising out of the death of a motorist who was killed in a rollover accident following a tread and belt separation of a Cooper tire that the jury found to be defective. See Cooper Tire & Rubber Co. v. Tuckier, No. 2000-CA-00404-SCT, 2002 WL 24605 (Miss. Jan. 10, 2002).

B. Components of the Proposed Settlement

The fairness, adequacy, and reasonableness of the proposed settlement must be judged against the backdrop of this enhanced risk of tread and belt separations caused by latent defects Cooper Tire is alleged to have fraudulently concealed from purchasers. Each element of the

proposed settlement is discussed in turn.

1. The Enhanced Warranty Program

a. Free Replacement Tires

The so-called enhanced warranty program is the only aspect of this proposed settlement that purports to provide a remedy to the members of the class, and it lies at the crux of the parties' calculation of the value of this settlement to the class. As explained below, the enhanced warranty program is of almost no benefit to class members because it does little to ensure that Cooper tires are safe, affords no meaningful remedy to those owners whose tires contain latent defects that make them more prone to catastrophic tread and belt separations, and is of insignificant economic value to the class.

i. Safety Concerns and Notice

First and foremost, under this proposed settlement, Cooper Tire owners are entitled to a free replacement tire (which undoubtedly will also be another Cooper tire), only at the point that their tire has actually suffered a separation, which is defined by the settlement as follows:

> "Adjustable separation" shall mean an adjustable condition determined by and in accordance with Defendant's standard adjustment policies, procedures and manuals which consists of: a separation between plies, a separation between belts, a tread separation, a separation between the liner and the body, a separation in the sidewall, a separation at wind and tread junction, a separation at ply turn-up, a separation between ply and belt, a separation at rim flange, a distorted tread (radial tires), and/or pick cordwicking.

Stipulation of Settlement and Release, Part I (Definitions) [hereinafter "Stipulation"]. The paramount defect with this proposed settlement is that for the most part, a Cooper Tire owner is entitled to a replacement tire only if his tire *actually separates*. To wait until a tread separates before providing a new tire, however, is to risk serious bodily injury and death. Grogan Certif.

¶ 19. Those Cooper tires with latent defects are ticking time-bombs that present an unacceptable level of risk to their owners, to passengers, and others on the roads, and it is an insufficient response from a safety standpoint to wait until a tire separates to replace it—if, indeed, the driver is fortunate enough to make it to the dealer—to replace it. Grogan Certif. ¶ 19.

Second, even if a Cooper tire tread does separate, Cooper Tire remains free, under this proposed settlement, to refuse to replace the tire if the company determines that the tire has not experienced an "adjustable" separation—with adjustability to be determined in accordance with *Cooper Tire's "standard adjustment policies, procedures and manuals,"* none of which are disclosed in the settlement documents. Stipulation, Part I (Definitions). This enhanced warranty effects no change whatsoever in the *rights* to be afforded Cooper Tire owners, despite the serious allegations in the class complaints that Cooper Tire knowingly manufactured and sold defective tires. The eligibility of class members for adjustments will governed by the exact same "adjustment policies, procedures and manuals" that pre-existed the filing of the class actions; only the remedy will be different, insofar as class members with eligible tires will receive a free replacement tire, rather than a pro-rated rebate to be applied to the purchase of a new tire. In other words, the plaintiffs have failed fundamentally to "change[] the legal relationship between itself and the defendant." Texas State Teachers Ass'n v. Garland Indep. School Dist., 489 U.S. 782, 792 (1989).

Significantly, the definition of "adjustable separation" leaves it up to Cooper Tire, the very company that is accused of knowingly selling tires with an increased risk of tread separation, to decide when to replace a tire. Evidently, the proposed settlement contemplates that Cooper Tire will not provide a free replacement tire for all separations, but will pick and choose,

depending on whether it considers the separation to be the fault of the manufacturer or that of the consumer. As Mr. Grogan puts it, the proposed settlement makes Cooper Tire "both judge and jury" in deciding whether a separated tire should be replaced. Grogan Certif. ¶ 20.

An excerpt from Cooper Tire's adjustment manual, which is attached as Exhibit B to the Certification of Rex Grogan, provides the product condition codes that determine whether Cooper Tire and its dealers will find a problem with a tire to be "adjustable" or not. Codes 30 through 39, for example, list various types of separations that Cooper Tire deems to be adjustable. These ten conditions, with minor variations, are listed in the class settlement definition of "adjustable separation" quoted above. Grogan Certif. ¶ 21. The list of non-adjustable conditions set forth in Cooper Tire's adjustment manual is so extensive that it provides unfettered discretion for Cooper Tire to claim that even a bona fide separation attributable to a manufacturing defect will not be treated as "adjustable" under this settlement. One non-adjustable condition, Code 105, "Separation with Puncture," is particularly ironic, given that a central allegation in this class action is that Cooper tires have an increased risk of tread and belt separation *because Cooper Tire punctured them* and then concealed what it had done. Id. In other words, this proposed settlement has a gaping loophole in it because it permits Cooper Tire to refuse to provide a replacement tire when a class member brings in the exact type of tire that is the subject of this class action—a tire that has been punctured by an awl and is subject to an increased risk of separation—on the ground that the separation is attributable to a road hazard rather than a manufacturing defect. Id. Nothing in this settlement prevents Cooper Tire from engaging in such an abuse; indeed, the settlement gives its blessing to Cooper Tire to reject precisely these claims.

Nor is there any doubt about Cooper Tire's intent to refuse to replace tires that have suffered a variety of separations. As an attorney working in class counsel's office admitted in correspondence to Bruce Kaster, who represents other objectors to this settlement:

> Your point regarding rejection as road hazard is a good one and one we raised with Cooper. Given the subjective nature of the adjustment process, the only other option for determining whether the separation was adjustable was to make all separations, regardless of the cause, adjustable. For obvious reasons, this was unacceptable to Cooper.

Objections to Proposed Class Settlement, filed on behalf of Liza Mosley, Tammy Edwards, and Kelly Comfort, Ex. D, at 2 (Nov. 12, 2001 letter from Cynthia Green to Bruce Kaster).

Moreover, the very premise of the qualification that Cooper Tire be required to provide replacement tires only for "adjustable" separations—that many of these separations are the consumer's, not the manufacturer's, fault—is itself flawed. A properly made tire does not suddenly separate, even if it sustains a puncture. Grogan Certif. ¶ 21. As Mr. Grogan explains, almost all tread and belt separations are attributable to the manufacturer. Id. ¶ 22. The exclusion of an ill-defined number of separations from this settlement, alone, should bar approval of this settlement.

Equally troubling, however, is that the full list of adjustment codes has not been provided either in the settlement documents or in the class notice; thus, class members have not been given a clear picture of the criteria by which the eligibility of their tires for replacement will be judged. Indeed, the short "legal notice" that was published is misleading when it states that the proposed settlement includes "an enhanced warranty that provides a free replacement tire or an alternative dispute resolution system if you experience an 'Adjustable Separation.'" See Stipulation, Ex. H. That term is then defined in the short notice with the list of separations quoted above. The short

notice contains no caveats, no disclosure that there are separations that would not be covered by the enhanced warranty, and no list of criteria or codes that would govern the eligibility determination. See id. The failure to disclose the extent and nature of this exclusion to class members, likewise, cannot be sanctioned. See Bowling, 143 F.R.D. at 160 ("The notice provided to class members must include enough information to allow the class members to make an informed choice of whether to approve or disapprove the settlement.").[4]

ii. Valuation

The parties claim that this "enhanced" warranty confers a benefit of $850 million to $1.19 billion to the class, based on a calculation that there are 170 million qualifying Cooper tires on the road multiplied by the alleged value of this enhancement, which the parties peg at $5 to $7 per tire. To put it charitably, this is nothing more than wishful thinking. The valuation is inflated beyond belief—in all likelihood, to lend credence to the outsized attorneys' fee award that class counsel seeks. As far as one can tell from a review of the settlement documents, the $5 to $7 valuation has been pulled out of thin air and cannot possibly be justified. It is difficult to imagine how there can be any market at all for a "warranty" that applies only when a tire owner has suffered a separation—a highly unlikely event—and, even then, only when the manufacturer decides, on the basis of its own, pre-existing subjective and undisclosed criteria, that it should be held accountable for that separation. Courts routinely refuse to approve class settlements that are "based on numbers that are mere guesses." Schwartz v. Dallas Cowboys Football Club, Ltd., 157 F. Supp. 2d 561, 574 (E.D. Pa. 2001) (finding parties' $3 million estimate of the value of

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[4] Additional failings in the notice provided to class members are discussed below in connection with the consumer education component of the settlement.

merchandise discounts to be provided in class settlement to be unsubstantiated); see also Petruzzi's Inc. v. Darling-Delaware Co., 880 F. Supp. 292, 297, 298 (M.D. Pa. 1995) (court cannot give its imprimatur to non-cash settlement without "some basis for estimating the *real* value of the settlement," and not just its "face value"); Buchet v. ITT Consumer Financial Corp., 845 F. Supp. 684, 692 (D. Minn.) (concluding that proposed scrip settlement was "simply too tenuous and speculative in nature" to warrant approval), as amended 858 F. Supp. 944 (D. Minn. 1994).

For starters, the enhanced warranty is of little value because, as discussed above, almost no Cooper Tire owner will qualify for a replacement tire. The settling parties have provided no estimate, based on Cooper Tire's adjustment data, as to the number of tires they expect will qualify for replacement under this settlement. Although from a safety standpoint, any number higher than zero is too large, see Grogan Certif. ¶ 10 ("Let me emphasize . . . that there is no safe level of tread and belt separation in a tire."), the fact remains that the number of Cooper tires that will qualify for replacement under this proposed settlement is extremely low. Although Mr. Grogan is not privy to data establishing the overall rate of separations among Cooper tires, he is confident from the numbers that he has seen that their failure rate is lower than 1/4 of 1 percent, and is probably dramatically lower than that. Id. ¶ 24. As Mr. Grogan argues, for purposes of illustration, assume that even 1/4 of 1 percent failed (which, again, is likely too high a figure). That would mean that 425,000 Cooper tires (170 million tires x 1/4%) covered by this class action would suffer separations, some portion of which Cooper would not replace under this settlement because they were not "adjustable." Assuming that a new tire cost Cooper $50 to manufacture (again, too high because the tires frequently retail for not much more than that), that

would mean that if *every* qualifying class member tried to collect, Cooper would pay out at most $21,250,000 (425,000 tires x $50/tire). Id.

For those class members whose tires do not experience an "adjustable separation," the enhanced warranty has no cash value and is not transferrable, and there is no minimum cash payment that will be awarded to members of the class who do not qualify for that replacement tire. Where, as here, only a fraction of class members stand to benefit from a class settlement, it should not be approved. See, e.g., General Motors, 55 F.3d at 809 ("[T]he relative inability of class members to use the certificates militates against settlement approval."); Petruzzi, 880 F. Supp. at 299 (disapproving settlement in part because 50 percent of the class would receive no certificates, but their claims would still be discharged).

Of course, not every Cooper tire owner who qualifies for a free replacement tire would know or take advantage of his right to that new tire. The parties have provided no estimate as to the likely utilization rate—information critical to a calculation of the enhanced warranty's value. See id. at 297 (rejecting settlement in part because the parties presented no evidence concerning likely redemption rates of certificates); Buchet, 845 F. Supp. at 693 (rejecting the face value of scrip certificates as an accurate measure of their value and concluding that "the true value of the certificates to the class depends on when the certificates will be used, how they will be used, and who will be using them") (quoting In re Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 322 (N.D. Ga. 1993)). From his industry experience, Mr. Grogan estimates that fewer than 10 percent of tire owners tend to take advantage of opportunities to go back to their original manufacturer or dealer to replace failed tires—if for no other reason than that they would prefer to switch to a tire manufactured by a different company. Grogan Certif. ¶ 25. That is, fewer than

10 percent of the already low number of Cooper tire owners who would qualify for a replacement tire under this settlement are likely to take advantage of the opportunity to obtain a free replacement Cooper tire. The utilization of this enhanced warranty may be even lower, still, in light of the poor notice that class members have received to date regarding this settlement (as discussed below) and the lack of any plans for supplemental notice, or point-of-purchase notice, if this Court were to approve the settlement as currently structured.

Given the meager number of class members who would qualify for a replacement tire, coupled with the likely low utilization rate even among the few who would qualify, the cost to Cooper Tire of this "enhanced" warranty—which the objectors submit is a far superior measure of its value to the class—is likely to be at most in the low millions, not billions, of dollars, and shamefully less than the award of fees and costs that class counsel seeks. Indeed, Cooper Tire has reported in its most recent quarterly report filed with the SEC that this class action settlement will cost it only $55 million in pre-tax dollars, $5 million of which has already been spent in 2001 on the notice program, and $30 million of which is allocated to attorneys' fees and costs, leaving less than $20 million for the benefit of class members because the expenses for administering the settlement are included in this amount. See Cooper Tire's SEC Quarterly Report (Sept. 30, 2001), available at http://www.coopertires.com/investor/sec.html. And although Cooper Tire has agreed to pay attorneys' fees and administrative expenses, the fact remains that none of these big ticket items will "result in a direct benefit to the class." Schwartz, 157 F. Supp. 2d at 575. The true economic value of this settlement reflects that the decision to settle on these terms does not represent "a good value for a relatively weak case," but rather, "a sell-out of an otherwise strong case." General Motors, 55 F.3d at 806.

iii. Proposed Improvements to the Enhanced Warranty

This is not to suggest that there is no room for a settlement short of a recall in a case such as this. Although a product recall is the safest and best response to a situation in which a potentially large number of tires have latent manufacturing defects that may lead to tread and belt separations, there is an intermediate measure that, although imperfect, would still provide a meaningful remedy for the class. As Mr. Grogan outlines in his Certification, such a remedy would include a full-fledged inspection program, whereby Cooper Tire would actively encourage class members to go to their dealer and get their tires inspected, coupled with the provision of new replacement tires whenever (1) the tire has exhibited any separation, regardless of cause, as discussed above; and (2) whenever the tire exhibits indicia of an impending separation. See Grogan Certif. ¶ 28.

Three precursors to separation merit inclusion in an expanded category of tires that would be subject to replacement: (1) sudden vibration during the ride, often referred to as ride disturbance, that would be reported by the driver to the dealer; (2) localized accelerated wear on the tire; and (3) a scooped out, concave groove that rings the tire. Grogan Certif. ¶ 29. Each of these indicia is readily observable, is a strong predictor of an impending separation, and could be communicated by Cooper Tire to its dealers as conditions meriting a replacement tire under the class settlement. To the extent necessary, Cooper Tire could arrange for additional training for its dealers, though many knowledgeable dealers already have the experience to recognize these particular indicia if they are instructed by Cooper Tire to provide replacement tires when these precursors to separation are presented. Id. Indeed, these precursors to separation are already listed as adjustable conditions in Cooper Tire's adjustment manual, under Codes 14, 17, and 25.

See Exhibit B to Grogan Certif. The fact that one of the goals of the consumer education component of the settlement is to educate consumers regarding "vehicle ride indicators which would predict potential tire disablement," Stipulation, Ex. E. ¶ 1(b), only confirms that the parties agree that there are certain symptoms of tire failure that can be identified in time to take remedial action. To wait until a separation actually occurs to replace a defective tire, exposing class members to grave risk, when observable precursors to separation can readily be identified, is unjustified. Grogan Certif. ¶ 29.

b. Alternative Dispute Resolution Mechanism

Class members Sullivan and Kaiser also object to the alternative dispute resolution (ADR) mechanism outlined in the settlement documents. First, the description of the ADR remedy is so hopelessly vague as to be of almost no benefit to class members, as they will understand neither what they would need to do to avail themselves of the ADR remedy, which sort of claims might be entertained, nor what type of relief they might hope to recover. The description of the ADR mentions claim forms and other documentation and the fact that class members will not be able to recover punitive damages, but there is no description of the type of recovery that would be available through this procedure. See Stipulation ¶ 8(b)(ii) (ADR Option). Would class members invoking ADR receive cash? If so, how would the amount of cash be measured? Would it be limited to the value of a new tire? Would the owner be entitled to prove other damages? Would treble damages and attorneys' fees, which are available under the New Jersey Consumer Fraud Act, see N.J. Stat. Ann. 56:8-19, likewise be available through this ADR mechanism? It is difficult to imagine that any class member (or anyone else, for that matter) would understand what this ADR alternative is, let alone avail himself of this remedy.

See Grogan Certif. ¶ 27.

Second, even assuming that a tire owner could recover something of value through this process, *the ADR option applies only to a tire owner with an adjustable separation*. Stipulation ¶ 8(b)(ii) ("Alternatively, at the occurrence of an Adjustable Separation on an Eligible Cooper Tire, Settlement Class Members may choose to participate in an ADR process, as set forth herein, in lieu of accepting a replacement tire at no charge."). For the reasons outlined above, this is no remedy. ADR is worthless unless the settlement provides—which it does not—that any Cooper tire owner who requests, and is denied, a free replacement tire under this settlement is entitled to participate in the ADR process. The settlement should encompass appeals from the denial of replacement tires and require that the dealer notify the class member *in writing* of his right to participate in ADR when he is denied a replacement tire.

This enormous gap in the scope of the ADR remedy is all the more egregious because the settlement does *not* provide a grievance procedure whereby class members who have sought and been denied a replacement tire can seek an independent assessment of their claim to relief. The settlement contemplates the selection of a Compliance Special Master (with duties that have not been defined), but the settlement agreement expressly provides that the compliance monitor will oversee only Cooper Tire's compliance with the enhanced finishing inspection and consumer education components of the settlement, and not Cooper Tire's compliance with the enhanced warranty/ADR component. See Stipulation, Part I (definition of "Compliance Special Master," which cross-references ¶¶ 8(a) and (c), but not ¶ 8(b)); id. ¶ 8(a) (Enhanced Finishing Inspection Program will be overseen by a compliance monitor); id. ¶ 8(c) (Consumer Education Program will be overseen by a compliance monitor); id. ¶ 8(b) (no mention of a compliance monitor with

respect to the Enhanced Warranty). The absence of a grievance procedure or any monitoring whatsoever of Cooper Tire's compliance with the enhanced warranty—a warranty that places all judgments as to eligibility in the hands of Cooper Tire—cannot survive judicial scrutiny.

2. The Enhanced Finishing Inspection Program

The second feature of the proposed settlement is the Enhanced Finishing Inspection Program, in which Cooper Tire promises to follow good practices regarding its inspection of tires at the finishing stage—which it already should be doing—and makes vague and unenforceable promises that it will improve "where possible" its inspection procedures and protocols and will add inspectors and over-inspectors "as necessary." See Stipulation, Ex. C. As Mr. Grogan explains in his Certification, this feature, too, is of no value to class members.

First, current owners of Cooper tires will not benefit from any improvements that Cooper Tire makes regarding inspections during the manufacturing of *new* tires. At best, these improvements would benefit future owners of Cooper Tires, who are not involved in this case. Moreover, the description of the enhanced finishing inspection program leaves it entirely up to Cooper Tire to decide which improvements are "possible" or "necessary" to make. Grogan Certif. ¶ 31.

More fundamentally, however, from a safety perspective, this enhanced finishing inspection program will do nothing to rectify the manufacturing defects and quality control lapses that have been identified in this class action and which Mr. Grogan has confirmed from his examination of Cooper tires. These manufacturing defects—the use of old stock, the use of solvents, awling, and a failure to bond the steel belt properly to the rubber—are all latent defects that increase the risk of a tread and belt separation over time. This is a fatigue effect. Such latent

defects in the tire cannot be detected at the finishing stage, which follows vulcanization of the tire. The inspectors are looking at a finished product; they cannot see how the tire was put together on the inside. In general, a finishing inspector would not be able to observe the beginnings of separation at the rubber interfaces within the tire, which would arise because of poor adhesion. Grogan Certif. ¶ 32.

All a finishing inspector can see are gross defects in the tire—such as a tire that has been run over by a fork lift; a tire that, for some reason, had not been cured; or a tire that was cooked with some large foreign object inside. It is particularly ironic that in a case that is about hidden defects in tires that only *finishing* inspectors and over-inspectors are proposed to be added. The only inspections that might be of some benefit to avoid the types of problems that have surfaced with Cooper tires would be those that would occur much earlier in the manufacturing process, when the tires are actually being built. Grogan Certif. ¶ 33.[5]

In short, the enhanced finishing inspection program would effect only a cosmetic change that provides no benefit to class members. Indeed, the practices described only restate what every manufacturer in the industry *already* is doing at the finishing stage. It will do nothing to address the allegations made in this class action by the owners of Cooper tires. Grogan Certif. ¶ 34.

3. The Consumer Education Program and Notice

[5] Mr. Grogan notes that a finishing inspection might be able to detect <u>some</u> separations if the tire is inspected immediately after it has been vulcanized, while the tire is still extremely hot. Separations within a tire are accentuated and more readily detectable with a visual inspection when the rubber is hot. The proposed enhanced finishing inspection program outlined in the settlement, however, says nothing about the required temperature of the tire at the time of the inspection. Grogan Certif. ¶ 33.

Finally, the proposed consumer education program would be of little benefit either to the class or to future Cooper tire owners. See Stipulation, Ex. E. First, again, the proposed tire and driving safety guide obviously will do nothing to help current Cooper tire owners, who are members of the class. Unless these tire owners happen to go to a dealer (which is likely to occur only if they have problems with their Cooper tires or are ready to replace them) or unless the owners happen to access the Cooper Tire website (which is not very likely), they will not receive the information Cooper Tire plans to disseminate. Grogan Certif. ¶ 35.

Second, the proposed consumer education program does not focus on the problems with Cooper tires identified in this class action—namely, that Cooper tires may contain latent defects that increase the risk of tread and belt separation. The proposed education program appears to be a pitch for tire owners to be responsible, "to check pressure, alignment, rotation and tread wear." Although this may be sound advice, it is advice that has little bearing on the possibility of tread and belt separation, unless the program plans to provide consumers with specific information about the kinds of tread wear that may indicate impending tread and belt separation, a goal that is not stated in the description of the program. Grogan Certif. ¶ 37. See Ford Bronco, 1995 WL 222177, at *4-*5 (rejecting settlement which, among other things, would have provided a company video on safe driving practices, but which did not address the particular vehicle rollover problems alleged by the class).

Unfortunately, the consumer education program is more of a marketing opportunity for Cooper Tire than a serious effort to deal with the problems in its manufacturing process. Cooper Tire has already advertised this consumer education program on its website even though the settlement has not yet been approved. See Objections to Proposed Class Settlement, filed on

behalf of Liza Mosley, Tammy Edwards, and Kelly Comfort, Ex. K (Cooper Tire's website announcement). The description of the program states, among other things, that Cooper will offer consumers the ability to purchase from Cooper Tire a "Tire Safety Kit," undoubtedly at a profit to Cooper Tire. Stipulation, Ex. E ¶ 3. That Cooper Tire has announced its consumer education program regardless of whether this settlement is approved suggests that this element of the class settlement furnishes no consideration to the class. In other words, whether this settlement is approved or not, Cooper Tire owners will receive whatever benefit they can derive from Cooper Tire's planned consumer education program. See, e.g., Jamison v. Butcher & Sherrerd, 68 F.R.D. 479, 482 (E.D. Pa. 1975) (no consideration for class settlement where class members will receive nothing beyond the amount to which they are already entitled). The National Safety Council, with whom Cooper Tire is partnering in implementing the consumer education program, is an industry-funded organization. The conclusion that the consumer education feature of the proposed settlement is purely cosmetic is again inescapable. Grogan Certif. ¶ 38.

To make matters worse, the consumer education program represents a missed opportunity to rectify some of the serious defects with the class notice that has been provided to date. The Due Process Clause guarantees "that individuals whose property interests are at stake are entitled to 'notice and an opportunity to be heard.'" Dusenbery v. United States, -- S. Ct.--, 2002 WL 15403, at *4 (2002). Before a forum state, such as New Jersey, may bind absent plaintiffs to a judgment, "it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or though counsel." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985); see also

Strawn v. Canuso, 140 N.J. 43, 69, 657 A.2d 420, 433 (N.J. 1995) ("Because any judgment 'will bind all members [of the class] who do not request exclusion,' the class notification will have to inform potential class members of the claims that they may either surrender or maintain in the class action.") (quoting R. 4:32-2(b)(2)). "[T]he notice procedures utilized in class actions are of constitutional significance and must themselves be viewed in due process terms." Greenfield v. Villager Indus., Inc., 483 F.2d 824, 833-34 (3d Cir. 1973).

Notice of a proceeding which is to be accorded finality comports with due process if it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); accord Shutts, 472 U.S. at 812 ("The notice must be the best practicable . . . [and] should describe the action and the plaintiffs' rights in it."). The notice that members of the class have received to date misses that mark.

First, as discussed above, the content of both the short and full class notices are insufficient because their description of the settlement fails to alert class members to one of the settlement's fatal defects—that class members will not receive a free replacement tire for any separation, but only for those separations that Cooper Tire deems "adjustable" according to its own undisclosed criteria. As the Supreme Court of the United States has said: "The notice must be of such nature as reasonably to convey the required information." Mullane, 339 U.S. at 314. The failure to cover *all* separations is so significant a weakness in the settlement that the notice to class members must disclose it so that they can make an informed choice whether to approve, object to, or exclude themselves from the settlement. Id. ("The right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to

appear or default, acquiesce or contest."); Bowling, 143 F.R.D. at 160.

Second, the notice is not reasonably calculated to inform members of the class that they own Cooper tires and therefore will be affected by the settlement. The problem is that at least half of the tires manufactured by Cooper Tire are sold under private labels, rather than under the name Cooper Tire. Objector Sullivan, for example, owns a Patriot Viper brand tire; objector Kaiser owns a Viper. See Affidavits of Matthew G. Kaiser and Francis X. Sullivan, appended to the Summary of Objections. These tires nowhere suggest that they were manufactured by Cooper Tire. The short notice that was published advised readers that Cooper tires are sold under other brand names and stated that a list was available on Cooper Tire's class action website, but did not provide a list of the brand names in the notice. See Stipulation, Ex. H. The full class notice likewise does not include such a list. See Stipulation, Ex. G. It is highly unlikely that owners of an inexpensive commodity like a tire, one that they have no reason to believe is connected to Cooper Tire, will go to the trouble of accessing the Cooper Tire website to retrieve a list of brand names. Grogan Certif. ¶ 36. Certainly the parties have made no effort to establish that consumers will respond in the manner they suggest. Indeed, as Cooper tires are among the less expensive tires sold in the United States, it is quite possible that many Cooper tire owners do not own and have no access to a computer to check the Cooper Tire class action website.

Although it is true that the short notice informs readers that they can determine whether or not they are members of the class by checking the DOT numbers on their tires, it is, again, highly unlikely that most tire owners would go to that trouble, especially if they own a brand of tire—a Patriot Viper, for instance—that they have no reason to believe is manufactured by

Cooper Tire. Grogan Certif. ¶ 36. An additional problem with relying solely on DOT numbers in the short notice, rather than on brand names, as a means of notifying tire owners that they are class members, is that close to half of all tires are mounted on vehicles with the DOT numbers facing inward, rather than outward, making it exceedingly difficult for a tire owner to check whether he owns a tire manufactured by Cooper Tire. Id.

"[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." Mullane, 339 U.S. at 314. Anyone actually "desirous" of informing Cooper Tire owners that their property interests are at stake in the instant settlement would have included a list of brand names manufactured by Cooper Tire—if not in the short notice published in papers and magazines, then in the full notice to which class members were directed. See Twigg v. Sears, Roebuck & Co., 153 F.3d 1222, 1227 (11th Cir. 1998) (holding that class member was not bound by class settlement because even if he had received the class notices, "their language was insufficient to notify him that claims like his were being litigated in the action"). The provision of a list of brand names here was all the more critical in providing "the best notice practicable" given that (1) no individual notification of class members was attempted, and (2) the breadth of the constructive notice provided, which included publication once or twice in Parade and USA Weekend and a handful of magazines, but no radio or television ads or public service announcements, was modest, to say the least. See Sambolin, 246 F.3d at 327 & n.11 (finding that the district court abused its discretion in excluding claimant from sharing in the settlement because he failed to meet the registration deadline in part because of the "minimal constructive notice" provided by the parties where individual notice was limited,

the content of the notice could have been improved, and the parties ran no radio or television announcements or undertook a free media campaign involving public service announcements).

The nature of this class action only exacerbates the problem of class members' potential ignorance of both the class action and the settlement. This settlement excludes Cooper tire owners who have suffered personal injury or property damage as a result of defects in their tires. By definition, then, the class includes owners of Cooper tires who, to date, have experienced no problem with their tires and are likely unaware of the types of safety concerns regarding Cooper tires that have been identified in this class action. As the Third Circuit commented regarding a similar class action, "the absentees may not fully appreciate the size of their potential claims since, by excluding those owners whose trucks have already experienced some mishap related to the fuel tank design, the class may include only those who have no reason (outside of media coverage) to know of the latent defect or the claim based on the alleged existence of that defect." General Motors, 55 F.3d at 812.

"[T]he vice of inadequate notice," the Third Circuit has explained, is that it "makes it impossible for any court to determine whether an interested and uninformed absentee would have raised an objection to the settlement, elected to file a verified proof of claim, or opted for exclusion." Greenfield, 483 F.2d at 833. That this settlement does not require class members to do anything, such as file a claim, to bring themselves within its coverage is an additional complicating factor, making it difficult for this Court to receive feedback regarding the efficacy of the notice program. The skimpiness of the notice is likely one explanation for the flurry of last-minute objections that we understand this Court has received. Although the Court preliminarily approved this settlement in late October, many class members did not see the notice

until close to the deadline for objecting or opting out, and many, no doubt, never saw it.[6]

Some of these deficiencies can be corrected through an effective consumer education campaign—which this campaign, assuredly, is not. The settlement contemplates no follow-up or supplemental notice to class members to inform them that the settlement has been approved (which it should not be, as currently structured) or to instruct them as to what they need to do in order to obtain a free replacement tire or to pursue ADR. Because there are no claim forms to complete *unless and until* a Cooper tire owner submits his tire for replacement, see Stipulation, Ex. D, it is up to the class member to take the next step to avail himself of the relief provided by the settlement. Yet there are few instructions included in the notice provided to date and no information regarding the logistics. Can any class member bring in his Cooper tire to a dealer for a free inspection to see if he has a separation that qualifies for a free replacement or permits him to participate in the ADR process? Is the inspection free only if the tire qualifies, and if it does not, does the class member have to pay a fee? Will the dealer make a decision on the spot as to whether the tire qualifies for a free replacement, or will the dealer have to send the tire to Cooper Tire for an eligibility determination? If the dealer provides a free replacement tire and Cooper Tire subsequently decides that the dealer was in error, would the class member be liable to pay for the new tire? Perhaps most important, if a class member who does not realize he is a class member and who is not aware of the settlement, goes to a dealer with a Cooper tire that merits replacement under this settlement, will the dealer inform him of the settlement and provide him a free replacement tire and/or inform him of the ADR option, or does the Cooper tire owner have

[6] The proposed settlement was not brought to Public Citizen's attention until well into December.

to specifically mention the class action settlement? Nothing in the settlement requires Cooper to ensure that its dealers inform class members that they are covered by the enhanced warranty. Neither the settlement nor the notice answers any of these basic questions. All of these questions should be answered in a supplemental notice to be published across the country and provided to Cooper Tire dealers following the approval, if any, of this settlement.

At a minimum, the settlement should also require Cooper Tire, as part of its consumer education campaign, to ensure that a point-of-purchase notice is prominently displayed by all dealers who sell Cooper Tires. This notice should be displayed for the full five-year enhanced warranty period and should inform class members of their rights under the settlement. Cooper Tire also should ensure that dealers have copies available so that class members can take the notice with them. In addition, the settlement should provide that Cooper Tire will provide a link from the Cooper Tire home page (www.coopertire.com), to the class action website (www.coopertirelitigation.com). There is no such link now. In short, the notice program that has been implemented to date has ensured that the fewest possible Cooper tire owners have been informed of this class action and the resulting settlement.

C. Discussion of the Inadequacies of the Settlement Overall

In exchange for a settlement that is essentially worthless to the class, Cooper Tire would receive in exchange a full release of all possible federal and state-law claims—with the exception of claims for personal injury or property damage—that class members (who have not opted out) might bring against Cooper Tire for consumer fraud, breach of warranty, misrepresentation, and other related theories. See Stipulation, Ex. B. If they had prevailed on these claims, class members would have been entitled to recover not only the value of their defective tires, but also,

possibly, treble or punitive damages, depending on the state. "[A] defendant would normally be expected to pay a premium for this type of global peace." Clement v. American Honda Finance Corp., 176 F.R.D. 15, 29 (D. Conn. 1997) (quoting Buchet, 845 F. Supp. at 697)). Instead, class members here will be relinquishing their claims for little to no consideration. See Ford Bronco, 1995 WL 222177, at *6 (disapproving settlement where class members are releasing their claims "for no or highly speculative consideration"); Jamison, 68 F.R.D. at 482.[7]

The casebooks are full of proposed class action settlements that fortunately never saw the light of day because careful analysis revealed that they provided no real value to class members. See, e.g., General Motors, 55 F.3d at 808, 811 (rejecting settlement where the value of the coupons was illusory because of their relative inability to be converted into cash); Schwartz, 157 F. Supp. 2d at 574 (rejecting settlement because proposed merchandise discounts did nothing to

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[7] Yet another troubling aspect of this settlement and the accompanying memorandum of law that purports to justify it, is the parties' failure to analyze the differences in the laws of the 50 states, the District of Columbia, and affected territories, for purposes of making a choice-of-law determination. Instead, the memorandum brushes off this complex issue, stating that "there are no material differences between the remedies offered by these [consumer protection] statutes and those available under New Jersey law." Plaintiffs' Memorandum of Law in Support of Joint Motion for Preliminary Approval of Proposed Class Action Settlement at 24. Such a perfunctory analysis is not permissible under New Jersey law. As the court explained in Carroll v. Cellco Partnership, involving another class action under the Consumer Fraud Act: "This court has determined that conflict of law issues do not per se foreclose certification of a multistate class. However, this does not imply that an analysis of the different state laws and the effect on the predominance of common legal issues is not necessary." 313 N.J. Super. 488, 497, 713 A.2d 509, 513 (N.J. Super. Ct. App. Div. 1998) (citation omitted). Indeed, in In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., which involved claims under state consumer protection laws similar to those here, the district court concluded that "the relevant substantive laws of the different states involved are sufficiently different to require a choice of law analysis." 155 F. Supp. 2d 1069, 1078 (S.D. Ind. 2001). As for the pronouncement in the plaintiffs' memorandum's that "[t]o the extent that there are any variations between the standards for determining liability, such distinctions are immaterial in the context of settlement, since liability is no longer at issue," Plaintiffs' Memorandum at 24, that assertion was squarely rejected by the U.S. Supreme Court in Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620-29 (1997).

address the alleged antitrust violation and were not redeemable for cash); Polar Int'l Brokerage Corp. v. Reeve, 187 F.R.D. 108, (S.D.N.Y. 1999) (rejecting "virtually worthless" proposed settlement that gives class members "nothing of value"); Clement, 176 F.R.D. at 27 (rejecting settlement that would have provided to class members "essentially worthless" coupons with "no cash value"); Petruzzi, 880 F. Supp. at 299 (rejecting settlement where the parties furnished no estimate of the actual value of the settlement, and 50 percent of the class would not receive certificates); Buchet, 845 F. Supp. at 692, 694 (rejecting settlement where the value offered to the class under the terms of the proposed scrip settlement was "too tenuous and speculative in nature" and where only fifty percent of the class members could take advantage of the certificates). In some respects, even a "coupon" settlement would be superior to the relief provided here because coupons, at least, might be transferrable. See National Ass'n of Consumer Advocates: Standards and Guidelines for Litigating and Settling Consumer Class Actions, 176 F.R.D. 375, 382-84 (1998) (only coupon settlements in which the coupon has a cash redemption value or the settlement includes the participation of a secondary market-maker—in other words, a settlement that actually broadly benefits the class—warrants serious consideration).

In the class action context, the relief sought in the complaint serves as a useful benchmark in evaluating the reasonableness of a settlement. General Motors, 55 F.3d at 810. Many of the class complaints that will be resolved by this global settlement seek compensatory damages, statutory damages, and punitive damages. See, e.g., Talalai v. Cooper Tire & Rubber Co., No. L--008830-00-MT, First Amended Class Action Complaint and Jury Demand ¶ 56 (N.J. Super. Ct.). Others seek injunctive relief ordering a recall of Cooper tires and/or enjoining Cooper Tires from selling defective tires. See, e.g., Justice v. Cooper Tire & Rubber Co., No. 00-CVS-03863

(N.C. Super.) (removed and transferred to MDL 1393). None of the relief sought by the class is provided in the proposed settlement, and, equally important, the proposed settlement does little to address the safety defect in Cooper Tires that formed the centerpiece of all of these complaints. As in General Motors, "the dramatic divergence of the settlement terms from the relief originally sought," coupled with "the failure of this settlement to abate the lingering safety problem," demonstrates that this settlement is not fair, reasonable or adequate. 55 F.3d at 810, 819; see also Ford Bronco, 1995 WL 222177, at *5 ("[T]he proposed settlement provides none of the relief sought in the underlying complaints. The value of the settlement to the plaintiffs based on their original complaints is thus effectively zero."). As the district court observed in rejecting the proposed class settlement in Schwartz: "When compared to the plaintiffs' ambitious goals set out in the complaint . . . the relief obtained is minimal at best." 157 F. Supp. 2d at 573.

Class counsel might be tempted to respond to this point by emphasizing the risks of litigation and the difficulty of establishing liability. More than one court has responded to these precise points in rejecting meager settlements, especially those, like this one, that are accompanied by hefty attorney fee requests. In rejecting the coupon settlement proposed in Clement, the court expressed its concern regarding the "wide gap between the size of fee awards and the judgments won for individual class members." 176 F.R.D. at 25. "If the plaintiffs' case is as weak as the parties claim," the court concluded, then the named plaintiffs are not entitled to receive incentive awards "and the plaintiffs' attorneys are not entitled to be so handsomely compensated for bringing the suit." Id.. The same point was made by the court in Polar, when it observed:

> The implication is that plaintiff's counsel . . . has uncovered no evidence of wrongdoing by defendants. This argument, taken to its logical conclusion, is that the claims have no merit. If this is true, counsel is now seeking compensation in the form of attorney's fees for pursuing a meritless case. If the conclusion is not correct, and the case does have merit, the class has received virtually nothing of value in exchange for releasing any claims arising out of the transaction.

187 F.R.D. at 119. As the court summed it up in Schwartz: "The court rejects the notion that, given the weaknesses of plaintiffs' claims, 'a bad settlement is better than no settlement at all.'" 157 F. Supp. 2d at 572.

II. A $30 MILLION ATTORNEYS FEE AWARD IS GROSSLY DISPROPORTIONATE TO THE RELIEF PROVIDED THE CLASS.

Finally, the proposed class settlement also is unfair to the class because it is accompanied by a grossly excessive request for $30 million in attorneys' fees and costs ($27.5 million for prosecution of the action and $2.5 millions for implementation of the settlement), one that likely dwarfs the real value of this settlement to the class. Yet again, class members are forced to speculate about the basis for this portion of the settlement because, to the best of our knowledge, no attorneys' fee petition has yet been filed with this Court. See Ford Bronco, 1995 WL 222177, at *10 n.26 ("[E]valuation of any agreement for payment of attorneys' fees is an integral part of evaluating the fairness of a proposed settlement."). Class counsel's failure to file such a petition prior to the January 15 deadline for objections and exclusions is yet one more example of the manner in which the ball has been hidden from class members attempting to evaluate the fairness of this settlement.

As courts have recognized, "the integrity and fairness of class settlements is threatened by excessive attorneys' fee awards." In re Cendant Corp. Prides Litig., 243 F.3d 722, 732 (3d Cir.), cert. denied, 122 S. Ct. 202 (2001). The threat is particularly acute with respect to settlements

that, as here, provide non-pecuniary relief to the class, coupled with a sizeable award of fees to class counsel. See General Motors, 55 F.3d at 803 ("[T]he fact that the settlement involves only non-cash relief, which is recognized as a prime indicator of suspect settlements, increases our sense that the class's interests were not adequately vindicated."); In re Oracle Sec. Litig., 132 F.R.D. 538, 544 (N.D. Cal. 1990) ("The classic manifestation of the problem in a class action involves a non-pecuniary settlement (e.g., injunctive relief), 'expert valued' at some fictitious figure, together with arrangements to pay plaintiffs' lawyers their fees."); accord Polar, 187 F.R.D. at 119.

That class counsel seeks attorneys' fees pursuant to a statutory fee-shifting provision, see N.J. Stat. Ann. 56:8-19, does not relieve counsel of the burden of justifying the size of that fee. The possibility of a conflict of interest between class counsel and the class is not alleviated simply because the defendant pays the fee. The Third Circuit recognized the economics of class settlement negotiation in a case where fees were sought pursuant to statute: "a defendant is interested only in disposing of the total claim asserted against it . . . allocation between the class payment and the attorneys' fees is of little or no interest to the defense." General Motors, 55 F.3d at 819-20 (quoting Prandini v. National Tea Co., 557 F.2d 1015, 1020 (3d Cir. 1977)). As the First Circuit has explained:

> The problem has two aspects: extortion (that is, the prosecution of strike suits) and collusion (that is, the tension which necessarily arises between class members and class counsel when settlements and attorneys' fees are negotiated simultaneously). While the conflict between a class and its attorneys may be most stark where a common fund is created and the fee award comes out of, and thus directly reduces, the class recovery, there is also a conflict inherent in cases like this one, where fees are paid by a quondam adversary fro its own funds—that danger being that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees.

Weinberger v. Great Northern Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991). Restricting the court's discretion to a perfunctory review where the defendant will pay the attorneys' fees from its own funds "would disregard the economic reality that a settling defendant is concerned only with its total liability." Strong v. BellSouth Telecomm. Inc., 137 F.3d 844, 849 (5th Cir. 1998) (upholding district court's refusal to enhance the lodestar in light of the benefits obtained for the class).

Because no fee petition has yet been filed, we do not know whether the fee class counsel seeks here is based on a straight lodestar calculation—which would seem remarkable—or whether a multiplier has been used. Either way, in our view, class counsel should receive an attorney fee that is based on a lodestar calculation (reasonable hours x reasonable rate), discounted to reflect the low level of success achieved. Such an approach is consistent with that adopted by both the U.S. Supreme Court and the New Jersey Supreme Court with respect to federal and state fee-shifting statutes, respectively.

In the seminal decision Hensley v. Eckerhart, 461 U.S. 424 (1983), the U.S. Supreme Court discussed how to determine the amount of a reasonable fee for purposes of a statutory fee award. "The most useful starting point," the Court explained, "is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Id. at 433. Without the fee petition, we are not in a position to comment on whether class counsel's request is based on a reasonable number of hours at a reasonable rate. The lodestar rate does not end the inquiry, however. Other considerations may lead the trial court "to adjust the fee upward or downward, including the important factor of the 'results obtained.'" Id. at 434. If "a plaintiff has achieved only partial or limited success," the Court explained, "the product of hours reasonably expended

on the litigation as a whole times a reasonable hourly rate may be an excessive amount. . . . Again, the most critical factor is the degree of success obtained." Id. at 436. In adjusting the fee downward in such situations, the trial court "may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." Id. at 436-37; accord Texas State Teachers Ass'n v. Garland Indep. School Dist., 489 U.S. 782, 789-90 (1989).

The New Jersey Supreme Court has adopted the same approach to statutory fee cases, holding that "a trial court should reduce the lodestar fee if the level of success achieved in the litigation is limited as compared to the relief sought." Rendine v. Pantzer, 141 N.J. 292, 336, 661 A.2d 1202, 1227 (N.J. 1995)) (citing Hensley, 461 U.S. at 436). Neither the New Jersey courts nor the federal courts have shied away from reducing the lodestar amount commensurate with the results achieved in the litigation. See, e.g., Gallo v. Salesian Soc'y, Inc., 290 N.J. Super. 616, 660, 676 A.2d 580, 602 (N.J. Super. App. Div. 1996) (upholding reduction of the lodestar); see also Scales v. J.C. Bradford & Co., 925 F.2d 901, 910 (6th Cir. 1991) (45 percent reduction of lodestar amount); Davis v. Southeastern Pennsylvania Transp. Auth., 924 F.2d 51, 55 (3d Cir. 1991) (upholding two thirds reduction of lodestar because of "the extraordinary difference between plaintiff's claims and her modest verdict"); Blakey v. Continental Airlines, Inc., 2 F. Supp. 2d 598, 607-08 (D.N.J. 1998) (30 percent reduction of lodestar to reflect limited success, with a 5 percent contingency enhancement); McDonnell v. United States, 870 F. Supp. 576, 589 (D.N.J. 1994) (60 percent reduction) (citing other lodestar reduction cases); Field v. Haddonfield Bd. of Educ., 769 F. Supp. 1313, 1323 (D.N.J. 1991) (50 percent reduction).

In short, "Chevrolet-type results do not warrant Cadillac-size, legal fees." Schwartz, 157 F. Supp. 2d at 579.

CONCLUSION

For the foregoing reasons, Objectors Matthew Kaiser and Francis Sullivan respectfully urge this Court to disapprove the class settlement as currently structured.

Respectfully submitted,

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January 18, 2002

CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 18th day of January, 2002, he caused to be served by both facsimile and Federal Express one copy of the foregoing Memorandum of Law in Support of Objections of Matthew G. Kaiser and Francis X. Sullivan and one copy of the Certification of Rex J. Grogan, with attachments, upon counsel for the parties:

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