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

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

In a letter brief filed on January 29, 2002, and at the fairness hearing held on that same date, objectors Matthew G. Kaiser and Francis X. Sullivan requested leave to file a supplemental memorandum and evidence responding to the voluminous submissions filed shortly before the fairness hearing by plaintiffs and Cooper Tire in support of final approval of the proposed settlement. This Court granted objectors Kaiser and Sullivan leave until February 14, 2002, to make that supplemental submission. Accordingly, the following memorandum and attached Certification of Bonnie Robin-Vergeer, and Certifications of two expert witnesses, H.R. Baumgardner, a tire expert, and Paul N. Bloom, a marketing expert, are submitted in response to the settling parties' submissions in support of the motion for final approval of the proposed class action settlement, the plaintiffs' attorney fee petition, and the plaintiffs' reply to objections, which was filed after the fairness hearing.

Mr. Baumgardner's Certification corroborates the Certification submitted by Rex Grogan on key points disputed by the settling parties concerning the utility and benefit of the enhanced warranty to Cooper Tire owners. Professor Bloom's Certification rebuts the expert valuations submitted by the settling parties and concludes that the enhanced warranty component of the settlement is at best worthless and at worst harmful to class members.[1] And this memorandum responds to the settling parties' various legal contentions.

I. RESPONSE TO RECURRING POINTS MADE IN DEFENSE OF THE SETTLEMENT

In their various submissions and presentations during the fairness hearing, plaintiffs and Cooper Tire repeatedly advanced several overarching arguments: (1) objectors and their counsel have ulterior motives and are simply looking for a "buy out"; (2) objectors are obviously insincere because they would be better served by opting out of the class rather than pressing objections; and (3) this is not a safety case, but a consumer fraud case, and therefore criticisms of the remedies that would be provided by the settlement are off-base. Each of these points is designed to distract attention from the critical question here—whether this settlement is of any meaningful value to class members or whether it should be relegated to the list of abusive settlements rejected because they confer little to no benefit on the class, but provide a substantial reward to class counsel. Accordingly, this memorandum first will address each of these arguments and then will turn to a discussion of the value and utility of the settlement and the reasonableness of the requested award of attorneys' fees.

A. The Objectors' Motivations and Decision to Object Rather than Opt Out

There are two strands to plaintiffs' effort to discredit the objectors and their counsel: first, that this Court should reject their criticisms of the proposed settlement because the

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[1] Counsel for objectors Kaiser and Sullivan retained these two experts. Counsel for objectors Suzanne Colvin, Robert Reznick, Jeanine Schweinberg, Paul Tenney, and Douglas J. Elmore have offered to share the fees charged by these experts.

objectors and their counsel have "ulterior motives"; and second, that the objections should be brushed aside because the objecting class members have failed to justify their decision to object rather than opt out. See Plaintiffs' Reply to Objections Regarding Plaintiff's Motion for Final Approval of Class Action Settlement, Class Certification and Ethical Matters ("Plaintiffs' Reply") at 2, 4, 5-8; Plaintiffs' Memorandum in Support of Motion for Final Approval of Class Action Settlement, Class Certification and Ethical Matters and in Opposition to Objections, Motions to Intervene and Motions for Pro Hac Vice Admission ("Plaintiffs' Memorandum") at 37, 57-59 (referring to "professional objectors" with "their own economic agendas" who have lodged "canned objections").

The Court should give short shrift to these ad hominem attacks. First, the subjective motivation of any objector or his lawyer is irrelevant; an objection should rise or fall based on its merit. Moreover, it is certainly not the case that Public Citizen Litigation Group and local counsel, Baher Azmy, who represent objectors Kaiser and Sullivan, filed these objections in the hope of being "bought out" by class counsel or Cooper Tire. As explained in the accompanying Certification of Bonnie Robin-Vergeer in Support of the Supplemental Memorandum of Law in Support of the Objections of Matthew G. Kaiser and Francis X. Sullivan, attached hereto as Exhibit 1 ("Robin-Vergeer Certif."), at no time have the lawyers at Public Citizen Litigation Group, local counsel, or objectors Kaiser and Sullivan ever approached class counsel or Cooper Tire's counsel with a request for a fee in exchange either for not filing or for withdrawing the Kaiser and Sullivan objections. Robin-Vergeer Certif. ¶ 10. Not only have the undersigned counsel not even hinted at an interest in a fee in this case, but it is Public Citizen Litigation Group's policy to refuse to enter into side agreements for fees with either class counsel or defendant's counsel in class actions. Instead, in those cases in which we believe that our participation has substantially improved the value of a settlement to the class, we do not negotiate with the parties or their counsel, but instead file an application with the Court for fees and expenses. Id. Public Citizen Litigation Group undertook the representation of objecting class members in this case because it believed that this settlement is of no value to the class and that the $30 million attorney fee award sought is grossly disproportionate to the level of success achieved. Id. ¶ 11.

Second, plaintiffs' "love it or leave it" argument—that absent class members have no cause to complain because they could simply have opted out of the settlement—and their suggestion that the objectors who own tires worth $50 should not bothered to have retained counsel to appear at the fairness hearing, see Plaintiffs' Reply at 5, misses the entire point of New Jersey Rule 4:32-4. This rule, like the federal rule upon which it is modeled, Federal Rule of Civil Procedure 23(e), requires that any proposed settlement of a class action be approved by the Court. The very purpose of the requirement of court-approval is to protect class members from a settlement that is not in their best interests. Chattin v. Cape May Greene, Inc., 216 N.J. Super. 618, 627, 524 A.2d 841, 845 (N.J. Super. Ct. App. Div. 1987). If the existence of an opt-out right were sufficient to guarantee a settlement's fairness, then there would be no requirement of court-approval of settlements in which class members have a right to exclude themselves from the class.

That the New Jersey Rule, like the federal rule, affords class members in a (b)(3) class the right to *choose* whether to opt out of the class, file objections, or do nothing—in other words, that these rights are consecutive, not merely alternative—is confirmed by the logic of the U.S.

Supreme Court's decision in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). There the named plaintiffs argued that they should be excused from providing class members notice and opt-out rights under Rule 23(c)(2) because "no prospective class member has a large enough stake in the matter to justify separate litigation of his individual claim" and because "adequate representation, rather than notice, is the touchstone of due process in a class action." Id. at 176. "[T]his view has little to commend it," the Supreme Court held, because "Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided." Id.

So, too, here, the fact that class members had a right to opt out of this class action does not render illegitimate or implausible their decision to elect, instead, to object to the settlement. Nor does the relatively low value of their tires justify belittling their objections. Indeed, as plaintiffs well know, objecting is often the only way to protect the interests of class members who oppose a proposed settlement, regardless of whether class members are provided the opportunity to opt out of the class. For claimants whose damages are relatively small, it is simply not feasible to opt out and litigate individually, even if their recovery under a proposed settlement is small and the settlement unfair. Moreover, class members are precluded from pursuing a class claim if they opt out; generally, class members may opt out only on an individual basis. Where opting out is not feasible, objecting is the only way for class members to protect their interests. See Plaintiffs' Memorandum at 9 (citing Eisen, 417 U.S. at 161, and Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985), for the proposition that it is uneconomical to litigate small claims individually). A settlement or a verdict in this class action represents class members' only real opportunity to recover some relief from Cooper Tire's alleged consumer fraud; hence, their decision to object, rather than opt out, reflects a highly rational decision that it is better to oppose the current settlement and to propose improvements to be incorporated in a new one, than to exclude themselves in the unrealistic hope that they will be able to pursue an individual action against Cooper Tire.[2]

The notion that absent class members must actually establish that their decision to retain out-of-state lawyers to pursue their objections is a sensible "tactic," Plaintiffs' Reply at 4, places an insuperable burden on out-of-state class members who may find it difficult or undesirable to retain New Jersey counsel and is inconsistent with the minimum due process required by Shutts, 472 U.S. at 811-12. More importantly, however, it ignores the important and legitimate purpose served by objectors and their counsel in seeking to block or significantly improve class settlements. The participation of objectors benefits the settlement process because objectors reintroduce an element of adversariness into class settlements, where it is otherwise lacking. See, e.g., Girsh v. Jepson, 521 F.2d 153, 157 (1975) (because objector is in an adversarial relationship with plaintiff and defendant, the objector is entitled to test the strengths and weaknesses of the proposed settlement through adequate discovery). This adversarial dynamic may prove particularly helpful to the trial court, which must decide whether the settlement meets the required legal standard, a determination that is difficult to make outside of an adversarial context. See, e.g., In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768,

[2] By the same token, the fact that only 103 class members elected to exclude themselves from the class is hardly the ringing endorsement of this settlement that the settling parties have painted it. That low number is not only a function of a minimalist notice program not reasonably calculated to apprize class members of the pendency of this action, see Memorandum of Law in Support of Objections of Matthew G. Kaiser and Francis X. Sullivan ("Kaiser Memorandum") at 12-13, 24-29, but also reflects the practical impediments to class members pursuing their own individual claims against Cooper Tire. See In re General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1137 (7th Cir. 1979) ("Acquiescence to a bad deal is something quite different than affirmative support.").

803 (3d Cir. 1995) ("[W]here there is an absence of objectors, courts lack the independently-derived information about the merits to oppose proposed settlements."); Bell Atlantic Corp. v. Bolger, 2 F.3d 1304, 1310 (3d Cir. 1993) ("The parties can be expected to spotlight the proposal's strengths and slight its defects. In such circumstances, objectors play an important role by giving courts access to information on the settlement's merits.") (citation omitted). The value of class action objectors is hardly hypothetical. Some of the most important recent cases regarding class action settlements have been decided because class members objected in the trial court and then pursued their objections on appeal. See, e.g., Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); General Motors, 55 F.3d 768.

B. The Claim That This is a Consumer Fraud Case, Not a "Safety Case."

Also off the mark is the refrain from plaintiffs and Cooper Tire that this class action is not a "safety case," but rather, one that focuses on consumer fraud and diminished consumer expectations. Accordingly, the settling parties argue, this Court need not concern itself with class members Kaiser and Sullivan's objection that the settlement does little to address the latent defects that allegedly make some portion of Cooper tires more prone to tread and belt separations. See Plaintiffs' Memorandum at 67; Plaintiffs' Reply at 3, 10; Cooper Tire & Rubber Company's Memorandum in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement and in Opposition to Objections ("Cooper Tire Memorandum") at 26, 28; Fairness Hearing (Jan. 29, 2002).[3]

[3] Contrary to the settling parties' assertion, objectors Kaiser and Sullivan do *not* assume that every tire manufactured by Cooper is defective, but only that some percentage of them may be and that it will be difficult, if not impossible, for class members to tell whether or not their tires are defective. See Kaiser Memorandum at 9 ("[T]he enhanced warranty program is of almost no benefit to class members because it does little to ensure that Cooper tires are safe,

There is no disputing the fact that this class action does not involve claims for personal injury or property damage. As this Court recognized in denying Cooper Tire's motion to dismiss, however, consumers did not receive the benefit of their bargain with Cooper Tire and their expectations were accordingly diminished because Cooper Tire allegedly "consciously incorporated a known hazard into its tire manufacturing process in disregard of consumer safety." Opinion at 2 (Apr. 16, 2001). Such diminished expectations clearly constitute an "ascertainable loss" under the New Jersey Consumer Fraud Act. See Miller v. American Family Publishers, 284 N.J. Super. 67, 90-91, 663 A.2d 643, 655 (N.J. Super. Ct. Ch. Civ. 1995) (plaintiffs suffered ascertainable loss because, "[f]or their money, they received something less than, and different from, what they reasonably expected in view of defendant's presentations"). In Cox v. Sears Roebuck & Co., 138 N.J. 2, 20, 647 A.2d 454, 463 (1994), the New Jersey Supreme Court dismissed the supposed analytical distinction between consumer fraud and safety, confirming that misrepresentations regarding the safety of a product require damages under the Consumer Fraud Act. In Cox, Sears incorrectly completed repairs to plaintiff's kitchen which created "a dangerous condition." The Cox court held that, by failing to comply with applicable safety regulations, Sears violated the Consumer Fraud Act because the "purpose of the regulations is to protect the consumer from hazardous or shoddy work." Id. at 22, 647 A.2d at 464. Accordingly,

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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.") (emphasis added); id. at 10 ("*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 . . . .") (emphasis added). That the defects are latent and not readily observable complicates the analysis because if plaintiffs had succeeded in proving at trial that Cooper Tire's manufacturing practices produced an unacceptably high number of defective tires, there may have been no effective way to whittle down the number of class members who have suffered an ascertainable loss.

the Court held that the plaintiff suffered an ascertainable loss, measured by the cost of repairing his potentially dangerous kitchen. Id. at 24, 647 A.2d at 465.

Here, class members thought they had bought a safe tire; instead, it is alleged, they may have purchased a tire that is more prone to separate. As Professor Bloom's Certification explains, there is no doubt that a consumer will attach a much lower value to a product that is potentially dangerous than to one that merely deteriorates prematurely. Certification of Paul N. Bloom ("Bloom Certif.") ¶ 6 (attached hereto as Exhibit 2). As the First Amended Complaint itself acknowledges, the alleged fraud in this case occurred at the point of sale; a consumer need not wait to until an accident actually occurs to challenge misrepresentations regarding a latent safety defects in his or her tires. See First Amended Class Action Complaint ¶¶ 34-36, 54. The claim of consumer fraud simply cannot be divorced from the safety allegations that lie at the heart of it.

The question, then, is whether the proposed nonmonetary remedies for the class are fair, reasonable, and adequate. Certainly, there is no denying that the relief that is proposed here bears no resemblance to the claims for damages under the Consumer Fraud Act sought in the class complaint See Kaiser Memorandum at 4, 31-32 (citing cases holding that the relief sought in the complaint is a useful benchmark in evaluating the reasonableness of a class settlement). After all, if this is a "consumer fraud" case and not a "safety" case, then where are the damages that inevitably flow from a finding of fraud? This Court acknowledged that plaintiffs were entitled to "seek damages for the defective tires they purchased." Opinion at 10 (Apr. 16, 2001). For this reason, plaintiffs' contention that they could not have achieved at trial the proposed improvements to the enhanced warranty is a non sequitur. If this case had gone to trial and plaintiffs had prevailed, class members would have stood to recover $600 apiece—an amount that would have been triple the cost of replacing their Cooper tires—and a remedy that would dwarf what is contemplated here. See Cox, 138 N.J. at 24, 647 A.2d at 465 (an award of treble damages and attorneys' fees is mandatory under the Consumer Fraud Act if the plaintiff proves both an unlawful practice and an ascertainable loss).[4]

If this case is to settle, then this Court must closely scrutinize the efficacy and value of the equitable remedies proposed to ensure that they are tailored to addressing both the alleged consumer fraud and the safety defect that allegedly makes some portion of Cooper Tires more prone to tread and belt separations. The need for careful scrutiny is all the more acute here because, as courts have recognized, settlements that involve only non-cash relief are "a prime indicator of suspect settlements." General Motors, 55 F.3d at 803; Kaiser Memorandum at 34.[5] It is no answer to say that because this case does not involve claims for personal injury that the

[4] Plaintiffs argue that even if they had won at trial, that there would be no guarantee that class members would use the $600 to purchase new tires. Plaintiffs' Reply at 10. Of course not. But that flexibility is one reason why a cash remedy would be far superior to this settlement. Surely plaintiffs cannot seriously contend that the speculative benefit to the class afforded by this proposed settlement—which even the most ambitious and exaggerated of valuations pegs at $17.75 per tire, not $150 per tire—is comparable to an award of $600 per class member. If this case were tried to judgment, the tremendous publicity that would accompany the trial, coupled with appropriate orders from this Court regarding the dissemination of the awards and the notice to accompany that dissemination, would make it much more likely that class members would obtain new tires than the meager, restrictive, and poorly advertised remedy afforded under this settlement.

[5] As noted in the Kaiser Memorandum at 2-3, the U.S. Supreme Court and the lower federal courts also have demanded heightened scrutiny in approving settlement classes. Plaintiffs disagree, citing one case for the proposition that appellate courts will review the approval of a class settlement under the "abuse of discretion" standard. Plaintiffs' Memorandum at 4 n.2. Plaintiffs confuse the standard under which this Court should evaluate the proposed settlement with a standard of appellate review that is sometimes applicable.

toothless equitable remedies proposed here are sufficient. In any number of class actions that have involved consumer fraud and related claims arising out of alleged product defects, courts have not shied away from rejecting proposed settlements as inadequate on the grounds that they not only provided none of the relief sought in the complaints, but that the settlements failed to abate the alleged defects in the products. In these instances, too, the defendants' liability had yet to be established. See, e.g., General Motors, 55 F.3d at 810, 819; Ford Motor Co. Bronco II Prods. Liab. Litig., No. MDL-991, 1995 WL 222177, at *5 (E.D. La. Apr. 12, 1995); cf. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1027 (9th Cir. 1998) (approving class settlement that "obligates Chrysler to make the minivans safe"); see also Kaiser Memorandum at 4, 31-32. Moreover, the *release* contained in this settlement, while not precluding future claims for personal injury and property damage, would nonetheless bar a host of potential causes of action against Cooper Tire for selling an allegedly defective product. That the settling parties have labeled this a consumer fraud case rather than safety case does not diminish this Court's obligation to assess whether the equitable remedies that the settling parties propose to substitute for cash in this settlement are reasonable and of value to the class.

II. THE BENEFIT OF THIS PROPOSED SETTLEMENT TO THE CLASS

Plaintiffs urge "that there is no such thing as a perfect settlement." Plaintiffs' Memorandum at 57. Objectors Kaiser and Sullivan are not looking for perfection; if they were, they would have insisted that any settlement contemplated should include cash benefits for the class, which would have provided a much more certain measure of value. These objectors are more flexible and more pragmatic than that. Thus, in the Kaiser Memorandum and at the fairness hearing, counsel for objectors Kaiser and Sullivan proposed—not a recall and not a crushing multi-billion-dollar judgment against Cooper Tire—but several concrete improvements to ensure that the settlement provides greater value to the class and that its benefits would actually *be used* by the class. To clarify, we believe that each of the improvements we have proposed are necessary, reasonable, and practicable, but they are not minor "tweaks," as plaintiffs suggest.[6] See Plaintiffs' Memorandum at 12, 18; Plaintiffs' Reply at 3. If they were, we suspect that Cooper Tire would have agreed to them by now rather than litigate with objectors.

A. The Enhanced Warranty Component of the Settlement

1. Certification of Paul Bloom—Marketing Valuation of the Enhanced Warranty

As the Third Circuit recognized in General Motors, 55 F.3d at 806, "[t]he primary touchstone" of the inquiry whether a settlement providing nonmonetary relief to the class is fair, reasonable, and adequate "is the economic valuation of the proposed settlement." In support of their claim that the enhanced warranty is worth anywhere between $1 billion and $3 billion to the class, the settling parties submitted the Affidavit of Mark Browne (Exhibit Appendix in Support of Plaintiff's Motion for Final Approval, Vol. I, Exh. B) and the Affidavit of Claude Martin (Cooper Tire and Rubber Company's Appendix of Affidavits, Exh. B) shortly before the January

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[6] We have proposed the following changes: (1) Cooper Tire (through its dealers) will provide a free replacement tire, with mounting and balancing, for (a) all separations, not only "adjustable" separations; and (b) precursors to separation; (2) an expansion of ADR so that any class member who requests and is denied a replacement tire will be given the right to participate in ADR and will be so informed in writing by the dealer; (3) an expansion of the role of the special compliance master to supervise the implementation of the enhanced warranty and ADR; (4) Cooper Tire will ensure that a point of purchase notice is prominently displayed by all dealers who sell Cooper Tires for the full five-year enhanced warranty period; (5) adequate information will be provided on the Cooper Tire home page on its website regarding the settlement and class members rights under the Enhanced Warranty and ADR; and (6) reporting requirements for Cooper Tire and plaintiffs regarding the implementation of the settlement and the utilization of the enhanced warranty and ADR.

29, 2002 fairness hearing.[7] It is important to note here that all valuations of this settlement submitted by the settling parties are predicated on the assumption that there are 170 million tires covered by this class action. No evidence has ever been offered to justify that assumption.

Paul Bloom, Professor of Marketing at the Kenan-Flagler Business School of the University of North Carolina, analyzed these valuations on behalf of objectors Kaiser and Sullivan and has submitted his own Certification, attached hereto as Exhibit 2.[8] Professor Bloom concludes that "the settling parties have vastly overstated the value consumers would receive from the 'enhanced warranty' proposed in this settlement." Bloom Certif. ¶ 4. Rather than the multi-billion-dollar bonanza the parties argue will be conferred on class members, Professor

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[7] Plaintiffs contend that the objectors must submit evidence to challenge the fairness, reasonableness, and adequacy of the settlement. Plaintiffs' Reply at 12. That, of course, is not the law. The proponents of a settlement bear the burden of establishing its fairness, and not the objectors the burden of proving the reverse. See Kaiser Memorandum at 2-3. Nor is it the responsibility of the objectors to dream up every possible justification that might be offered in support of it and then rebut it in advance. See General Motors, 55 F.3d at 785; see also Letter Brief on Behalf of Objectors Kaiser and Sullivan (Jan. 29, 2002). The motion for preliminary approval of this class action settlement presented no evidence in support of the outlandish $1 billion valuation (apparently predicated on Professor Browne's opinion) that the settling parties assigned to this settlement. Not until the expert affidavits of Claude Martin and Mark Browne were filed less than a week before the fairness hearing was any evidence offered in support of the valuation of the settlement.

[8] Professor Bloom has taught courses in the legal aspects of marketing, marketing research, integrated marketing communications, marketing management, and other subjects. He has published numerous articles and books on a wide range of consumer protection and antitrust topics and has served as an expert witness on many occasions, offering opinions on various subjects, including the valuation of proposed class-action settlements. For example, Professor Bloom wrote affidavits that were used to help persuade courts to reject as inadequate the proposed settlements in two class action cases involving automobile companies. The courts rejected the settlements in both cases. See In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir. 1995); In re Ford Motor Co. Bronco II Prods. Liab. Litig., No. MDL-991, 1995 WL 222177 (E.D. La. Apr. 12, 1995). His curriculum vitae is attached as Exhibit A to his Certification.

Bloom believes that "many more Cooper tire owners ultimately will receive negative value from the 'enhanced warranty' than the number of Cooper tire owners who will receive a small amount of positive value from it." Id.

a. Critique of the Valuations of Mark Browne and Claude Martin

First, Professor Bloom critiques the settling parties' characterization, based on the Affidavit of Mark Browne, that the enhanced warranty is a type of insurance policy that would provide a benefit to every class member regardless of whether that individual was able to use the enhanced warranty to obtain a free replacement tire. See Plaintiffs' Memorandum at 24-25; Cooper Tire Memorandum at 22-23; Browne Affid. ¶¶ 3-10. As Professor Bloom explains, the so-called "enhanced warranty" is not, in function, either a warranty or an insurance policy. Bloom Certif. ¶ 5.

A "warranty" is something a consumer either purchases separately or buys as part of a "bundle" along with a product, typically a new product. The amount consumers are willing to pay for a warranty turns on a number of factors, such as (1) how likely they think it is that the product will not perform up to standards or expectations; (2) how harmful the financial, physical, or other consequences will be to them if this happens; (3) the compensation that they will receive under the warranty if this happens; and (4) their degree of risk-averseness. Bloom Certif. ¶ 6. In general, consumers will assess a warranty as having no value at all, and may not even consider it a warranty, if they believe that there is a high likelihood that the product will not perform up to standards or expectations, that it will harm them severely (financially or physically) if it performs badly, or that they will receive very little compensation under the purported warranty when the product fails. Id. It is beyond question, Professor Bloom maintains, that a consumer will attach a much lower value to a product that—as is claimed to be the case here—is potentially dangerous than to one that merely deteriorates prematurely. Indeed, the consumer probably would not even buy such a product, let alone a warranty to go with it. Id.

Given how consumers think about and value warranties, Professor Bloom reasons, Cooper tire owners who receive notification of this settlement likely will assume that there is a significant possibility that they own a defective tire, that they may be harmed severely by an accident caused by a defective tire, and that the compensation they will receive (in the event they qualify for a free replacement tire) is inadequate to compensate for the risk they have taken driving on the tires. Bloom Certif. ¶ 7. Rather than perceiving this offer as a type of "warranty," Professor Bloom explains, most consumers will see this offer as more of an "inadequate peace offering" from Cooper Tire. Id.

An "insurance policy," Professor Bloom continues, is something that consumers buy to give them something close to full compensation if a harmful event occurs. Bloom Certif. ¶ 7. Professor Bloom agrees with the plaintiffs' expert, Professor Browne, that an insurance policy can give consumers "peace of mind," allowing them to feel that they have limited the amount of overall harm that they may suffer. See Browne Affid. ¶ 7. The greater the chance of the harmful event and the greater the harm it can cause, the more a consumer would be willing to pay for an insurance policy that can substantially mitigate this harm. Bloom Certif. ¶ 8.

This enhanced warranty, however, Professor Bloom explains, only superficially resembles an insurance policy. Most consumers would not see the kind of offer embodied in the enhanced warranty as an insurance policy. Class members are unlikely to view the possibility of receiving the modest benefit of a replacement tire as mitigating the potentially catastrophic harm associated with an accident caused by a tread separation because it would not pay for any car repairs, medical expenses or inconvenience associated with the accident, or compensate for the possible loss of life. Id. Although Professor Bloom does not suggest that such an indemnification policy must be included as part of this settlement, he concludes that "it is misleading to suggest that the offer of a replacement tire and nothing more in the event of a separation can in any way be considered an 'insurance policy.' I cannot see how consumers would derive any 'peace of mind' from this offer." Id.

Nor does Professor Bloom see how this enhanced warranty would provide value to consumers by giving them a signal that their tires are of high quality, as Professor Browne suggests. Bloom Certif. ¶ 9 (citing Browne Affid. ¶ 2). Warranties can be a signal of low, rather than high, quality when consumers infer that the warranty is offered with a product to persuade them to take a chance on an inferior product. In light of the context in which this enhanced warranty is being offered, with notice informing class members that they are being given an "enhanced warranty" to protect them in case their tires are more defective than normal tires, Professor Bloom concludes that "[i]t is difficult to see how consumers could view this as anything other than a signal of possible poor quality." Id.

Plaintiffs' expert estimates that the enhanced warranty is worth $6 per tire, "based on the assumption that class members value the coverage provided by the settlement warranty similarly to the road hazard warranties" listed in Exhibit B to his affidavit. Browne Affid. ¶ 16. Professor Bloom explains that this assumption has no basis. A road hazard warranty

> has value to consumers because it covers them for a wide range of possible tire failures, regardless of fault, that consumers perceive as having a reasonably high likelihood of occurrence. The "enhanced warranty" here, by contrast, covers

> Cooper tire owners only if it turns out that their tires have a narrow category of defects, and many consumers will see the likelihood of experiencing a qualifying defect as significantly lower than the likelihood of encountering road hazards. Therefore, most consumers would assign a significantly higher value to a "road hazard warranty" than to the "enhanced warranty" proposed here.

Bloom Certif. ¶ 10. That the enhanced warranty would provide a free replacement tire, rather than a tire prorated for wear, did not alter his assessment regarding the comparative values of these two dissimilar warranties, "*given the extremely low probability that consumers would ever be able to use the 'enhanced warranty.*'" Id. (emphasis added). Professor Bloom concludes that it is not "possible to look at the price consumers pay for a 'road hazard warranty' . . . as indicating anything at all about what a class members, who may even feel some anger toward Cooper, would be willing to pay for this far less usable 'enhanced warranty.'"

Professor Bloom found the survey by Cooper Tire's expert, Professor Martin, see Martin Affid. ¶¶ 20-30, to be fundamentally flawed. As he points out, the survey by Professor Martin attempts to obtain information about how consumers would value the enhanced warranty when buying new tires, but that is not the situation presented here; thus, the survey is irrelevant to determining the value of the enhanced warranty. At a minimum, Professor Martin should have asked consumers how they would value the enhanced warranty if it came with a used, rather than a new, tire that they already owned that may or may not have a serious and potentially quite dangerous defect. Bloom Certif. ¶ 11.

Moreover, Professor Bloom explains why neither the methodology of Professor Martin's study nor his interpretation of his results has any validity in gauging the value of the enhanced warranty to class members. As Professor Bloom explains, asking consumers how much they would be willing to pay for two different "tire-warranty bundles" is an unreliable way to estimate the value of one of those bundles. "The fact that such a wide range of dollar figures was provided in answer to this question, wild guesses ranging from $2 to $100, evidences the flaws with this approach. Indeed, the fact that many consumers suggested amounts that were larger than what they probably paid for a tire demonstrates the total lack of validity of Professor Martin's study." Bloom Certif. ¶ 12. Professor Bloom explains how a properly conducted study should have been set up to determine the maximum price that consumers would be willing to pay for the enhanced warranty. See Bloom Certif. ¶ 13. He suspects that a properly conducted study would reveal "a very low willingness" by consumers "to pay more than a trivial premium for a bundle with an 'enhanced warranty'—certainly not the staggering $17.75 per tire that Professor Martin suggests." Id.

Even assuming that Professor Martin had conducted a valid study and had collected estimates of the premiums that consumers would be willing to pay for the enhanced warranty, Professor Bloom found it inappropriate to estimate a value for the enhanced warranty to class members simply by averaging all the scores of consumers who participated in the study. Bloom Certif. ¶ 14. The characteristics of study participants may not mirror those of the class members, so, at the very least, it would be necessary to calculate a weighted average premium that would give higher weights to the average scores of consumer segments in the study that make up a larger proportion of the class. More importantly, Professor Bloom explains, there are substantial portions of the class who will not use the "enhanced warranty," and the value of the warranty for these consumers will be zero or even less. Professor Martin's approach assumes that these people do not exist and that they will not lower the average value to the class. "In sum," Professor Bloom concludes, "not only was the structure and methodology of this study seriously flawed, but Professor Martin did not correctly interpret his data." Id.

____________ b. The Value of the Enhanced Warranty to Different Categories of Class Members

Whether the enhanced warranty is viewed by consumers as a real warranty, an insurance policy, an "inadequate peace offering," or as something else, Professor Bloom found that "there is no reason to believe that more than a small number of consumers would obtain any net benefit or value from possessing this offer." Bloom Certif. ¶ 16. As he explains, class members can be divided into several categories, each of which would assign a different value to the enhanced warranty.

First, a substantial number of class members will never be notified of the enhanced warranty or hear about problems with their tires. If these consumers do not happen to come into contact with a Cooper Tire dealer who advises them of their rights under the settlement, they will never get the chance to use the enhanced warranty and will receive no value from it. Bloom Certif. ¶ 16.

A second segment of consumers will assess the enhanced warranty as virtually worthless and will not take the time to get their tires inspected to see if they qualify for a free replacement tire under that warranty. Bloom Certif. ¶ 17. This segment consists of class members who receive notification about the settlement, but decide that it is not worth the travel expenses, lost time, and lost income opportunities to go to a Cooper Tire dealer to have their tires checked. This segment also would receive no value from the enhanced warranty. They may believe that there is a small chance that they will qualify for a replacement tire or that a free replacement tire is insufficient to compensate them for the risk they have taken driving around with potentially defective tires. Many of these consumers may choose to replace their tires with another brand. Theoretically, these consumers could choose the ADR option offered in the proposed settlement if they were among the few that would qualify for a new tire, but given the lack of clarity in the settlement agreement and the class notice about the ADR process, Professor Bloom believed that class members would find this alternative both risky and difficult to understand. Id.

A third segment of class members will actually obtain negative value from the enhanced warranty, Professor Bloom explains. One subsegment would consist of consumers who receive notification of the settlement, who bring in their tires for an inspection to determine if they have an "adjustable separation," and who are told that their tires are fine (whether or not the tires have a latent defect). Bloom Certif. ¶ 18. These class members will incur travel and time expenses in getting the inspection, and these costs will exceed the value of any "peace of mind" that they would receive from knowing that their tires are not defective. The other subsegment that would receive negative value would consist of class members who receive notification of the settlement, who have their tires inspected, and who find out that their tires are indeed defective, but do not have defects considered "adjustable" under the enhanced warranty. Id. This subsegment, too, may have incurred travel and time expenses. More importantly, this subset of class members also will either incur significant expenses for replacing a tire that has defects because they do not qualify for a free replacement tire (but would be entitled to adjustment only to the extent permitted by the standard warranty) or these class members would choose to take the risk (and a significant chance of incurring costs) by continuing to drive on defective tires. Id.

______Only the fourth segment will find value in the enhanced warranty, but this will be a small number of people who would receive a small amount of value. Bloom Certif. ¶ 19.[9] The value that they receive from obtaining a free replacement tire will be dwarfed by the negative value received by the much larger third segment of class members who have brought in their tires for an inspection and have found no adjustable separation. The net value of a replacement tire to a consumer in this last segment would be small once one takes into account various offsets. The amount the consumer originally spent on the tire, reduced by the depreciation of the tire, would have to be subtracted from the market value of the replacement tire (including the value of mounting and balancing). Likewise, the amount of prorated credit the consumer would have received for trading in the defective tire under the standard warranty would have to be deducted, as well as any travel and time expenses specially incurred. The remaining net value of the replacement tire would likely be small. Id.

For these reasons, Professor Bloom concludes "that no substantial segment of consumers will receive positive value from this 'enhanced warranty,' and whatever benefit a small segment might receive would be more than offset by a much larger segment of consumers receiving negative value from the offer. *I therefore conclude that the proposed 'enhanced warranty' is at best worthless and at worse very harmful to the class members.*" Bloom Certif. ¶ 21 (emphasis

[9] This fourth segment consists of three subsegments: First, there will be the small number of class members who regularly have their tires checked at a Cooper Tire dealer, thereby not incurring extra travel and time expenses to get inspections, who find out their tires are fine, and thereby receive "peace of mind," but little more. Second, there will be the small number of consumers who make a special trip to a Cooper Tire dealer to have their tires inspected and then learn that one or more tires has an "adjustable separation" qualifying under the enhanced warranty—though the value of the replacement tire they receive will be reduced by travel and time costs incurred. Third, there will be a small group of consumers who regularly have their tires checked at a Cooper Tire dealers, therefore not incurring additional travel and time costs, who will learn they have tires eligible for replacement under the enhanced warranty. Bloom Certif. ¶ 19.

added).

Professor Bloom does not opine, however, that no enhanced warranty could ever be of value to members of the class. He believes that it would be possible to craft a settlement that would encourage owners of defective Cooper tires to replace them while, at the same time, compensating class members for costs and risks incurred while owning and replacing their tires. Bloom Certif. ¶¶ 4, 21. Moreover, the enhanced warranty, to be of value, would have to provide free replacement tires for a broader category of tires that have potentially dangerous defects, not only the tires that have a narrowly defined "adjustable separation." Bloom Certif. ¶ 21.

In addition to an expanded enhanced warranty, a key feature of any improved settlement, in Professor Bloom's view, would be the provision of an incentive that would actively encourage class members to get their tires inspected by a Cooper Tire dealer. Bloom Certif. ¶ 22. As currently crafted, the settlement provides class members no inducement to get their tires inspected. Such an incentive could be designed in many different ways, such as one that would provide class members with a significant discount on new tires, services, or other merchandise if they have their tires inspected. Professor Bloom suggests, for example, that a voucher, for class members only, could be printed in advertisements in major magazines and newspapers and on Cooper Tire's website (supplementing, not replacing, any existing offers). Such an offer, Professor Bloom believes, could also prove beneficial to Cooper Tire and its dealers, generating more traffic for the dealers and creating goodwill with customers. He emphasizes, however, that he does "not propose such an incentive as a substitute for an expanded 'enhanced warranty,' but as a mechanism that would make the 'enhanced warranty' more effective and more valuable to a larger segment of the class." Id.

In sum, Professor Bloom's careful analysis demonstrates that the enhanced warranty, as currently crafted, is worthless, or even of negative value, to members of the class. Far from supporting the approval of this settlement and an award of a substantial attorney fee, the nonexistent value of this enhanced warranty to the class dictates that this Court reject this proposed settlement. See Kaiser Memorandum at 13-16 (citing decisions rejecting class settlements that were either worthless or of speculative value to the class or that provided a benefit only to a fraction of the class).

2. Certification of Rex Grogan

In light of the fact that objectors Kaiser and Sullivan submitted, prior to the fairness hearing, the Certification of Rex Grogan, a tire expert who concluded that the proposed class settlement is "virtually worthless to the owners of Cooper tires," Grogan Certif. ¶ 18, both sides trained their sights on that one Certification, twisting it until it bore little resemblance to the actual Certification submitted by Mr. Grogan. For example, Cooper Tire cited ¶ 24 of the Grogan Certification for the proposition that "Cooper's failure rate is 'dramatically' lower than one quarter of one percent." Cooper Tire Memorandum at 3; see also id. at 16 (Mr. Grogan certified "that he is 'confident from the numbers that [he has] seen that the failure rate [of Cooper Tires] is lower than 1/4 of 1 percent, and is probably dramatically lower than that'") (emphasis omitted). Class counsel repeated this selective quotation from the Grogan Certification during the fairness hearing, actually maintaining that Mr. Grogan could be an expert *for Cooper Tire* if the case went to trial—notwithstanding the fact that Mr. Grogan spent the first portion of his Certification describing the faulty manufacturing practices that had caused tread and belt separation in a number of Cooper tires he had examined, calamitous tire failures that led to serious injuries and deaths.

Mr. Grogan's Certification speaks for itself; nonetheless, counsel for objectors Kaiser and Sullivan corrected this mischaracterizaton of his Certification during the fairness hearing. Mr. Grogan did not provide either the overall failure rate or the separation rate for Cooper tires, because as he said, "I do not have data establishing the overall rate of separations among Cooper tires." Grogan Certif. ¶ 24. This is not counsel "impeaching" her witness, see Plaintiffs' Reply at 2, 11; this is a qualification made in the Certification itself. Mr. Grogan assumed, for the purposes of illustrating the low cost of the enhanced warranty to Cooper Tire, that the *separation rate*, one species of tire failure, *and not the overall failure rate,* of Cooper Tires was less than 1/4 percent. Grogan Certif. ¶ 24. Mr. Grogan's cost analysis has not been rebutted. Cooper Tire selectively quoted from the Grogan Certification, a selective quotation repeated by class counsel during the fairness hearing, in an attempt to show that Mr. Grogan affirmed that Cooper Tire's *overall* failure rate was less than 1/4 percent and, moreover, that this established that Cooper Tire's failure rates were well within industry standards. Mr. Grogan plainly said no such thing.[10] And, of course, as discussed below, there is no safe level of separations and no industry standard for separations.

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[10] The settling parties also belittle Mr. Grogan's conclusion that the "enhanced warranty" would not benefit the class on the ground that Mr. Grogan is not a marketing expert. See Plaintiffs' Memorandum at 3, 24; Cooper Tire Memorandum at 22. Mr. Grogan did not purport to engage in a marketing analysis. Rather, he opined, based on his fifty years' experience in the tire industry, that the enhanced warranty would neither address the alleged faults in Cooper Tire's manufacturing practices nor provide a meaningful and useable remedy to class members who possess tires with latent defects increasing the risk of tread and belt separations. Cooper Tire's own tire expert likewise offered an opinion regarding the value and utility of the enhanced warranty. See Affidavit of Herbert A. Heuchert ("Heuchert Affid.") ¶¶ 26, 28, 31-32, 43, 50 (Cooper Tire and Rubber Company's Appendix of Affidavits, Exh. B).

3. Certification of Dick Baumgardner

Because plaintiffs and Cooper Tire disagreed with several key points made in the Grogan Certification, however, and submitted affidavits from two tire experts, Herbert Heuchert and Alberto Solaroli, objectors Kaiser and Sullivan submit the Certification of H.R. (Dick) Baumgardner ("Baumgardner Certif."), attached hereto as Exhibit 3, to corroborate the Certification of Rex Grogan on these disputed issues. Mr. Baumgardner was trained in tire engineering in the Firestone College Training Class and worked for nearly thirty years in the Firestone Tire Engineering Department before starting his own tire consulting business. Baumgardner Certif. ¶¶ 4-5. His curriculum vitae is attached as Exhibit A to his Certification. Like Mr. Grogan, Mr. Baumgardner concludes, based on more than forty-five years' experience in the tire industry, that "the contemplated enhanced warranty would be of virtually no use or value to Cooper tire owners." Baumgardner Certif. ¶ 12.

a. Awling

Mr. Baumgardner agrees with the Grogan Certification that puncturing new tires with an awl in the factory to release trapped air is not a safe practice and disagrees with Herbert Heuchert's claim to the contrary in ¶ 30 of his Affidavit. Baumgardner Certif. ¶ 7. Like Mr. Grogan, he affirms that the hole that is made permits air, moisture, and contaminants to enter the tire, which in turn, can cause the steel belt to rust. This rust can cause the detachment of the steel wires from the rubber, increasing the risk of tire separation failures. Id.; accord Grogan Certif. ¶¶ 14-15. Plaintiffs' expert, Alberto Solaroli, likewise agrees with this assessment regarding the risks associated with puncturing tires with awls. Affidavit of Alberto Solaroli ("Solaroli Affid.") ¶ 12 (Exhibit Appendix in Support of Plaintiff's Motion for Final Approval, Vol. I, Exh. H). As

Dick Baumgardner recalls, Firestone eliminated this practice on radial passenger tires in the early 1970's because of this very concern.

b. The "Fatigue Effect" of Adhesion Problems in the Tires

Mr. Baumgardner also agrees with Mr. Grogan that problems with adhesion of the layers of a tire increase the risk of delamination over time; in other words, that it is a fatigue effect. See Baumgardner Certif. ¶ 8; Grogan Certif. ¶ 32. He strongly disagrees with the claim made by Herbert Heuchert in ¶ 46 of his Affidavit that "a tire with a separation problem caused by poor adhesion fails during its early life cycle, i.e. within the first year of the tire's life" and that, therefore, there should be no concern that the older Cooper tires on the road may experience a separation. Baumgardner Certif. ¶ 8. Mr. Baumgardner has examined many more than 500 tires involved in tread and belt peel accidents relating to poor adhesion and has found that most do not peel and cause accidents until the third year after production. Id.

Of course, if Mr. Heuchert is right, then that would be just one more reason that this enhanced warranty would provide no additional benefit to the class. Class members are already entitled to a free replacement tire under the standard warranty for separations that occur early in the life of the tire because there would be no, or virtually no, prorating for tread wear. Plaintiffs' expert admits as much, explaining that when adhesion related production process problems cause failure at very low tread wear, "*it is likely that there would be full credit given for such a tire condition under the pre-settlement warranty* assuming it was related to a production problem under Cooper's current adjustment program"). See Solaroli Affid. ¶ 27 (emphasis added).

c. The Rate of Separations

It is telling that Cooper Tire has not specified the actual separation rate for Cooper Tires, but is content to embrace Mr. Grogan's 1/4 percent assumption. See Cooper Tire Memorandum at 3, 16; Heuchert Affid. ¶ 44. Be that as it may, Mr. Baumgardner disagrees with Mr. Heuchert when he states that a tread separation rate of less than 1/4 percent "is an extremely low rate that is well within industry standards and a strong indication that Cooper manufactures first quality tires." Baumgardner Certif. ¶ 9 (quoting Heuchert Affid. ¶ 44). First, as Mr. Baumgardner observes, because the Heuchert Affidavit does not provide the actual rate of tread separations for Cooper tires, it is difficult to gauge how their rate of separation compares with that of other U.S. manufacturers. More importantly, however, Mr. Baumgardner emphasizes, as did Mr. Grogan, see Grogan Certif. ¶ 10, that there simply is no safe level or industry standard for this type of tire failure. Baumgardner Certif. ¶ 9. He explains:

> Firestone claimed an overall adjustment rate of 1/4th of 1 percent for the lines of tires that they finally had to recall. The National Highway Transportation Safety Administration has logged 271 deaths and over 800 injuries on those tires. *That is an extremely small percentage of Firestone's total production, but it is an engineering safety disaster. A tread and belt separation is a catastrophic failure of the product. There is no good or safe percent of these separations.*

Id. (emphasis added).

d. The Enhanced Warranty's Failure to Cover Precursors to Separation

Based on decades of experience working with adjustment data on Firestone product lines and analyzing the effect of adjustment policy changes on the consumer, Dick Baumgardner concludes that the proposed enhanced warranty "would be of virtually no use or value to Cooper tire owners." Baumgardner Certif. ¶ 12. He also notes that the difference between the free and the pro-rated cost of adjustment on the extremely small percentage of tires defined by the settlement would be almost negligible to Cooper Tire. Id.

Mr. Baumgardner cites the same major problems with the proposed enhanced warranty that Mr. Grogan identified. First, the enhanced warranty is too narrow to be of any use to the class. He agrees with ¶ 19 of Mr. Grogan's Certification that it is troubling that the enhanced warranty would force a Cooper Tire owner to wait until a separation actually occurs before he may obtain a free replacement tire under the settlement. Baumgardner Certif. ¶ 13. If, as this class action alleges, and as the Solaroli Affidavit (¶¶ 8, 11) and the Grogan Certification (¶¶ 8-17) support, Cooper Tire has engaged in manufacturing practices that have made some percentage of its tires more prone to separation, then Mr. Baumgardner concludes that it is not a responsible or safe remedy to wait until a tire actually fails from a separation before furnishing a class members a free replacement tire.[11]

Instead, to be of value to the class, Mr. Baumgardner states, the enhanced warranty must cover indicators of, or precursors to, separation that fall short of an "adjustable separation," as defined in the settlement. Baumgardner Certif. ¶ 14; accord Grogan Certif. ¶¶ 28-29. Mr. Baumgardner believes that at least two such indicators of impending separation should be

[11] Plaintiffs argue that objectors assume that class counsel learned nothing in discovery that contradicted the original allegations of the complaint. Plaintiffs' Reply at 3. If plaintiffs have such evidence, they should come forward and disclose it. Otherwise, there is no reason for objectors to assume—especially given the opinions of experts Grogan and Solaroli, the latter plaintiffs' own expert—that there are no adhesion problems with Cooper tires. And of course, if it is true that plaintiffs' case against Cooper Tire is weak and that Cooper Tire decided to settle only because of the nuisance value of this class action, then class counsel is hardly entitled to the extraordinary fee award they seek. See Polar Int'l Brokerage Corp. v. Reeve, 187 F.R.D. 108, 119 (S.D.N.Y. 1999); Clement v. American Honda Finance Corp., 176 F.R.D. 15, 25 (D. Conn. 1997); see also Kaiser Memorandum at 32-33.

covered by the enhanced warranty. First, Code 17, Tread Cracking in Grooves, which is listed in Cooper Tire's Adjustment Manual, see Grogan Certif., Exh. B, is not included in the enhanced warranty. Not only should Code 17 be included in the enhanced warranty, Mr. Baumgardner opines, but this category of failure should be expanded to include cracking of the tread surface in the shoulders (outside tread ribs). Separations allow a slight bulge as they are growing in the shoulders. The stretched rubber develops small cracks that are telltale evidence of the separation under the tread. Tires should be adjusted if these stretch cracks are present. Baumgardner Certif. ¶ 15; accord Grogan Certif. ¶ 29.

Second, Code 25, Shoulder Malwear (spot wear) is also listed in Cooper Tire's Adjustment Manual, see Grogan Certif., Exh. B, but is not included in the free adjustment program. Mr. Baumgardner explains why it should be: Treads wear faster over separations, causing easily detectable spots of fast wear. Shoulder spot wear is the most significant, and in some cases the only indication of a massive, dangerous separation that is ready to peel on the next highway trip. Baumgardner Certif. ¶ 16; accord Grogan Certif. ¶ 29.

Both of these conditions, as pointed out by both experts, see Grogan Certif. ¶ 29; Baumgardner Certif. ¶ 16, are readily observable by trained dealers and correlate to a significant degree with tread separations. Mr. Baumgardner disagrees with Mr. Heuchert when he states in paragraph 54 of his Affidavit that these conditions may just as readily indicate less serious problems. The risk of serious injury or death is simply too great to permit these precursors to separation to remain outside the enhanced warranty.

As for Code 14, Ride Disturbance, Mr. Baumgardner also agrees with Mr. Grogan that ride disturbance may be a sign of tread separation, see Grogan Certif. ¶ 29, though he acknowledges that it may also reflect other problems with the tire unconnected to separation. In his view, a class member who experiences a ride disturbance should bring—and be actively encouraged by Cooper Tire to bring—his tire to his dealer. If, upon inspection of the tire, the dealer finds evidence of a separation or a precursor to separation, that dealer should be required to provide a free replacement under this enhanced warranty. Baumgardner Certif. ¶ 17.

e. The Causes of Tread Belt Separations (Consumer Error Versus Manufacturing Defect) and the "Adjustable Separation" Limitation on the Enhanced Warranty

Mr. Baumgardner, like Mr. Grogan, see Grogan Certif. ¶¶ 20-21, faults the enhanced warranty for its failure to encompass *all* separations of Cooper tires, rather than simply "adjustable separations" determined in accordance with Cooper Tire's existing policies and adjustment manual.[12] Baumgardner Certif. ¶ 18. Astoundingly, for example, Code 105 of Cooper Tire's Adjustment Manual, "Separation with Puncture," is specifically excluded from the list of adjustable separations—despite the fact that the class action alleges that *Cooper Tire punctured tires* and that this practice has increased the risk of tread and belt separations. See Cooper Tire Draft Enhanced Warranty Booklet at 12 (Cooper Tire and Rubber Company's

[12] As the Kaiser Memorandum explains at 12-13, the notice provided to the class was insufficient for failing to provide the full list of adjustment codes, which are not to be found in either the full class notice, the short published notice, or in the settlement documents themselves. Plaintiffs claim that we are "simply wrong" to say that the notice does not disclose that only tires deemed "adjustable" according to Cooper Tire's criteria are eligible for replacement under the enhanced warranty. Plaintiffs' Memorandum at 80. What we actually said, however, was that the short "legal notice" that was actually published was misleading when it stated that the enhanced warranty would "provide[] a free replacement tire or an alternative dispute resolution system if you experience an 'Adjustable Separation.'" The short notice contains no caveats, no disclosure that there are separations that would not be covered, and no list of criteria or codes that would govern the eligibility determination. Nor does the full class notice contain such a list of criteria or codes. See Kaiser Memorandum at 12-13.

Appendix of Exhibits, Exh. 5) (excluding separation with puncture); Grogan Certif., Exh. B (excerpt from Cooper Tire adjustment manual); Heuchert Affid. ¶¶ 28, 32, 51 (the proposed enhanced warranty properly excludes road hazards); see also Kaiser Memorandum at 10-12.

This limitation is premised on the assumption that many of these separations are the consumer's, not the manufacturer's, fault and, accordingly, that Cooper Tire should not be required to cover them. Yet this premise, that tread belt separations "usually having nothing to do with how the tire is manufactured," but rather, are frequently attributable to the consumer, see Heuchert Affid. ¶ 44; see also id. ¶ 52, is nothing more than wishful thinking on Cooper Tire's part. Mr. Baumgardner completely disagrees with Cooper Tire's expert on this score. Baumgardner Certif. ¶ 11. Instead, Mr. Baumgardner agrees with Mr. Grogan that *"nearly all tread and belt separations are attributable to a manufacturing defect, not to the consumer*." See Baumgardner Certif. ¶ 11 (emphasis added); Grogan Certif. ¶ 22.

As Mr. Grogan has already explained, a well-made tire should not suffer a sudden separation even if it has been punctured with a nail. Grogan Certif. ¶ 21. Mr. Baumgardner elaborates, based on his extensive investigation into the causes of Firestone/Explorer tread belt separations:

> Punctured tires should go flat and notify the driver by a rumble or slight sway, they should not peel open without warning at high speeds. If overloaded or impacted, a tire should simply deflate due to failure of the thin and relatively weak single or double ply of cords in the sidewall. For example, Goodyear and Firestone put 2.9 million tires each on 1995-1997 Ford Explorers. Firestone failures caused 1182 accidents as of 2001. Goodyear caused 2. At Tire Consultants, we have investigated 129 Firestone/Explorer accidents; many of these involved tires that had been repaired and some tires had open punctures when the tread peeled. The 2.9 million Goodyear's would have had the same exposure to road hazards and other usage anomalies. To date, we have not seen the first tire from this batch of 2.9 million for any reason. *If tread separations*

> *have nothing to do with the way the tire is manufactured, then why do we see this amazing difference between two major manufactures with equal exposure?*

Baumgardner Certif. ¶ 11 (emphasis added).

This is not to suggest that the enhanced warranty should be expanded to cover all types of damage caused by road hazards that have no bearing on tire separations—the defect at issue in this class action—or even that it should cover flagrant instances of consumer abuse, such as the far-fetched scenario posited by plaintiffs in which a class member intentionally damages a tire and then brings it to a dealer for a new tire under the enhanced warranty. See Plaintiffs' Reply at 13. As Mr. Baumgardner explains, he would not quarrel with a refusal to cover a tire with a nail in it that the driver had simply run flat, but he finds the blanket refusal to include separations with punctures in this enhanced warranty unacceptable based on his Goodyear/Ford Explorer experience, as compared with Firestone, and particularly in light of the fact that this class action concerns Cooper Tire's practices of puncturing tires. Baumgardner Certif. ¶ 18; cf. Ford Bronco, 1995 WL 222177, at *4 (rejecting settlement, in part, because it provided none of the relief requested in the complaint). In his view, separations with puncture should be covered in the enhanced warranty unless the tire manifests clear signs of consumer abuse. Based on his familiarity with the adjustment practices of tire manufacturers in the United States, Mr. Baumgardner believes that this distinction would be a readily manageable and reasonable one for dealers and their employees. Id.

This is not litigation over the scope of Cooper Tire's standard warranty, and so the fact that it may be standard industry practice to exclude road hazards from the standard warranty, even if true, is irrelevant. Rather, the scope of the enhanced warranty is being evaluated here in the context of a consumer fraud class action, and it is insufficient to adopt Cooper Tire's preexisting adjustment policies wholesale without regard to the allegations of the class complaint. See Kaiser Memorandum at 10. Nor is this objection to the restrictiveness of the enhanced warranty "based on a general dislike of Defendant by the objectors," as plaintiffs suggest. See Plaintiffs' Memorandum at 68. Rather, our concerns regarding the extreme narrowness of the enhanced warranty are predicated on an objective analysis of the scope of the enhanced warranty itself—an analysis backed by two tire experts with a combined century of experience in the industry.

In sum, Mr. Baumgardner finds "the enhanced warranty to be of virtually no value to class members because it fails to provide any meaningful remedy for any latent safety defects that may exist in the tires." Baumgardner Certif. ¶ 19. Although the enhanced warranty might provide a small financial advantage to the extremely limited number of customers who get free tires rather than a normal pro-rated adjustment for that same condition, Mr. Baumgardner explains that for the vast majority of the class, the enhanced warranty would accomplish nothing. Id. He agrees with Mr. Heuchert that this proposed enhanced warranty is unlike any other in the industry, see Heuchert Affid. ¶ 26, but not because it is so generous, but because it covers such a narrow set of conditions.[13]

[13] Mr. Baumgardner also agrees with Mr. Grogan's reasoning that not only has the value of this enhanced warranty to class members been "wildly exaggerated," but that the cost of this enhanced warranty to Cooper Tire would be quite modest—certainly less than the $30 million in attorneys' fees that is sought. Baumgardner Certif. ¶ 20 (citing Grogan Certif. ¶¶ 23-25). Indeed, based on his experience with adjustments, Mr. Baumgardner believes that Mr. Grogan's cost calculation of $21,250,000 is probably twice the likely cost to Cooper Tire. Id.

4. Purported Checks and Balances on Cooper Tire's Discretion

It is no answer to promise checks and balances (several of which are not even embodied in the settlement and are therefore unenforceable) that allegedly will ensure that Cooper Tire will faithfully implement the settlement, if the settlement itself is flawed. First, Cooper Tire argues that dealers have an incentive to honor the enhanced warranty in order to please their customers, see Cooper Tire Memorandum at 25, but that is no reason to assume that dealers will provide free replacement tires to class members whose tires do not qualify for replacement under this settlement.

Moreover, if a larger number of class members qualify for a replacement tire than expected, the incentives could easily reverse.[14] If the cost of implementing the enhanced warranty grows large, Cooper Tire will have a financial incentive to be less liberal in reimbursing its dealers for replacing tires under the enhanced warranty, and the dealers, in turn, will have a financial incentive to be less generous in dealing with their customers. Class counsel stated at the January 29 fairness hearing that even under the standard warranty, Cooper Tire tends to back its dealers 60 percent of the time in instances where it disagrees with a dealer's adjustment decision. If we have understood class counsel's representation correctly, that means that *40 percent* of the time, Cooper Tire will not reimburse its dealers when they err on the side of consumers—even under the less expensive standard warranty, where the customer receives a new

[14] Plaintiffs contend that the number of class members who are likely to use the enhanced warranty is "multiples higher" than Mr. Grogan's estimates, see Plaintiffs' Memorandum at 24, but never provide an actual estimate as to the likely utilization of the enhanced warranty. Tellingly, the settling parties provide no information as to either (1) the number of class tires that are expected to manifest "adjustable separations," based on Cooper Tire's adjustment data, or (2) the percentage of these eligible class members that are expected to seek a free replacement tire under the enhanced warranty or ADR.

tire prorated for wear, rather than a free replacement.

Second, both settling parties promise that class members who seek free replacement tires under the enhanced warranty, but who are turned down by dealers, will have an option to appeal directly to Cooper Tire. Plaintiffs' Memorandum at 23; Cooper Tire Memorandum at 21 n.17. Objectors Kaiser and Sullivan take no comfort in this possibility; Cooper Tire has little incentive to reach an accommodation with such class members, who have no other recourse under the agreement. See Kaiser Memorandum at 19-20 (protesting the absence of a grievance procedure for aggrieved class members). Even assuming that the possibility of an appeal to Cooper would be reassuring, the settlement agreement makes no mention of any appeal rights or the procedure for dealers to follow when they turn down class members seeking to exercise their rights under the enhanced warranty. In short, the hen's right to appeal to the fox is illusory.

Third, the settling parties attempt to assuage objectors' concerns by arguing that a compliance monitor will supervise Cooper Tire's implementation of the enhanced warranty. Yet the parties have no answer for objectors Kaiser and Sullivan's response that the settlement agreement explicitly provides that the compliance special master 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 Kaiser Memorandum at 19-20. Even assuming that the compliance special master had jurisdiction over the enhanced warranty component of the settlement, he or she would be restricted to implementing the flawed enhanced warranty set forth in the agreement.

Even the modest proposal that the settlement require Cooper Tire to ensure that a point-of-purchase notice, informing class members of their rights under the settlement, be prominently displayed by all dealers who sell Cooper Tires and be made available in writing, see Kaiser Memorandum at 29, has been greeted by the limpid assertion that "[m]aterials explaining consumer rights and dealer responsibilities will be available at the point of purchase, including all necessary contact numbers." Plaintiffs' Memorandum at 23. Nowhere—and certainly not in the settlement agreement—is there any commitment by the parties to ensure that notice regarding the enhanced warranty will be displayed by the dealers where class members will see it.

The conclusion is inescapable that the settling parties have designed an enhanced warranty for class members that virtually no class member will be eligible to use and that virtually no class member will know anything about. This Court should not condone a settlement that is so hollow.

B. The Enhanced Finishing Inspection Component of the Settlement

Dick Baumgardner agrees with Rex Grogan that an enhanced finishing tire inspection process will do very little to rectify manufacturing practices that contribute to an increased risk of adhesion problems in tires and than an enhanced finishing tire inspection will do nothing to detect any latent defects that may exist in the tires as a result of inadequate bonding. Baumgardner Certif. ¶ 21; Grogan Certif. ¶ 32. As previously indicated, adhesion problems increase the risk of a tread and belt separation over time; such defects cannot be detected at the finishing stage, which follows vulcanization of the tire. Baumgardner Certif. ¶ 21. He therefore disagrees with the opinions of both Mr. Solaroli, Solaroli Affid. ¶ 15, and Mr. Heuchert, Heuchert Affid. ¶¶ 18-25, ¶¶ 55-59, that such changes at the finishing stage will reduce the risk that tires with adhesion problems will be sold to the consumer.

C. Consumer Education

The consumer education component of this settlement would not be objectionable as part of a broader settlement that provided value to the class, but this settlement does not. There also remains a disconnect between the provision of general information regarding tire safety and maintenance to class members and the specific tire failures at issue in this class action—tread and belt separations.

The settling parties point to the Declaration of Mary Jane Fingland from NHTSA ("Fingland Decl.") (Exhibit Appendix in Support of Plaintiff's Motion for Final Approval, Vol. II, Exh. KK), as an endorsement of the contemplated consumer education component. It is not. Ms. Fingland was not "informed of the specific content of the consumer education program for which Cooper tire has agreed to provide funding." Fingland Decl. ¶ 5. Ms. Fingland states that "a consumer education program that provides the public with information on important safety issues such as the need to maintain proper inflation pressure, observe load limits, ensure proper tire maintenance and follow other safe practices is of value." We would be surprised if the Director of the Office of Public and Consumer Affairs of NHTSA said anything different.

Ms. Fingland's declaration says nothing about the allegations in this class action, nothing about the safety issues presented by tires potentially more prone to tread belt separations, and nothing about what the key ingredients should be in a consumer education program that focuses on the dangers associated with tread belt separations. See Fingland Decl.

III. CLASS COUNSEL'S REQUEST FOR ATTORNEYS' FEES

A. Public Citizen Litigation Group's So-Called "Threat" to Class Counsel

Plaintiffs raise yet another distraction when they assert that the objection to their proposed attorney fee award pressed by objectors Kaiser and Sullivan and their counsel "appears to be along the lines of a threat to Class Counsel." Plaintiffs' Reply at 2. Plaintiffs seem to imply that Public Citizen Litigation Group is insincere in its view that the attorney fee award sought here is grossly disproportionate to the recovery that would be afforded the class, and is instead threatening class counsel with litigation over their attorneys' fees to compel changes to the proposed settlement along the lines that these objectors have proposed.

As explained in the Robin-Vergeer Certification, attached as Exhibit 1 hereto, nothing could be further from the truth. Plaintiffs point to the absence of discussion of their attorneys' fees in a January 11, 2002 letter (attached as Exhibit 4 to Plaintiffs' Reply) from Public Citizen Litigation Group to class counsel, a letter that identified several proposed improvements to the Settlement, as evidencing some sort of bad faith on the part of Public Citizen Litigation Group.[15] Robin-Vergeer Certif. ¶¶ 3-4. What Plaintiffs' Reply neglects to report was the context in which

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[15] Plaintiffs attempt to justify the highly unorthodox filing of a confidential document evidencing Public Citizen Litigation Group's negotiations with class counsel by attaching a second letter from Ms. Robin-Vergeer to class counsel, which supposedly indicates Public Citizen Litigation Group's intent to share this settlement with others. See Plaintiffs' Reply, Exh. 5 (Jan. 15, 2002 letter). The letter says no such thing. What this letter actually states is that Public Citizen Litigation Group lawyers felt free to share information with others outside the office regarding "[class counsel's] failure to be candid with us regarding Cooper Tire's position on the proposed stipulation" regarding the requested extension of the time for filing our clients' objections. The letter says nothing at all about disclosing the substance of Public Citizen Litigation Group's negotiations with class counsel or the text of the January 11, 2002 letter. Indeed, we did not share that confidential information or the January 11 letter with others. See Robin-Vergeer Certif. ¶¶ 4, 8.

the letter was sent. The day before, on January 10, representatives from Public Citizen met with class counsel and discussed class counsel's view that the proposed settlement was a good one and Public Citizen's concerns, on behalf of its clients, that the settlement was seriously flawed and provided no value to the class. During that discussion, representatives from Public Citizen repeatedly emphasized their concern over what they viewed as an extraordinary and unjustified attorneys' fee request. Id. ¶ 5.

Nonetheless, class counsel and representatives from Public Citizen engaged in a serious substantive discussion regarding the components of the settlement and how they might be improved. Id. ¶ 6. The meeting concluded with class counsel soliciting from Public Citizen a written list of several key improvements to the substance of the settlement, which class counsel committed to taking to Cooper Tire for further negotiation. Public Citizen Litigation Group incorporated several of its proposals in the January 11 letter. Because we understood from our discussions with class counsel that they would not budge on the size of their requested fee award, the January 11 letter did not discuss the issue of fees. Id. This letter did not purport to be an exhaustive cataloguing of all that had been said the day before and could not possibly effectuate a waiver of objectors Kaiser and Sullivan's right to object to the attorneys' fees sought by class counsel. More to the point, if these suggested improvements had been adopted, the class would have received considerably more value than is currently the case. With a far more valuable settlement in hand, the profound disconnect that now exists between the attorneys' fees sought and the success achieved would have been reduced, though not eliminated. To insinuate that Public Citizen did not express any objection to the proposed attorneys' fees award, except in a fit of vindictiveness after negotiations with class counsel had fallen through, is false. Id. ¶ 7.

B. The Applicability of the Lodestar Analysis

Turning to the merits of the attorneys' fee request, at the time objectors Kaiser and Sullivan argued in their initial legal memorandum that class counsel's $30 million dollar request for attorneys' fees and costs was grossly excessive, we noted that, because class members had not yet received a copy of the fee petition, they could only speculate about the basis for the fee portion of the settlement. See Kaiser Memorandum at 32. Having now reviewed Plaintiff's Memorandum in Support of Class Plaintiffs' Motion for an Award of Attorneys' Fees and Reimbursement of Costs and for Special Incentive Awards to Representative Plaintiffs ("Plaintiffs' Fee Memorandum") and the accompanying exhibits, we urge this Court to reject the fee request in its entirety. Leaving aside the question of the size of the award sought, the request itself is inadequate on its face. Class counsel must submit documentation sufficient to enable this Court to assess the reasonableness of both the hours expended and the hourly rates charged. Only after class counsel have provided this missing documentation, will this Court be in a position to calculate the lodestar amount, as required by the New Jersey Supreme Court in a statutory fee-shifting case such as this, and to consider whether to adjust the lodestar upward or downward.

We reserve judgment on the question whether class counsel are entitled to a multiplier that would reflect the risk, if any, in undertaking this representation because, to date, class counsel have furnished no objective information or evidence about the risk of nonrecovery in this type of case. In any case, as discussed in the Kaiser Memorandum at 35-36, the lodestar should be adjusted downward to reflect the low measure of success achieved in this settlement, if the settlement is approved.[16]

Although they maintain that the staggering fee requested is fair and reasonable under either a lodestar or a percentage-of-recovery approach, class counsel argues that this Court should defer to the parties' agreement and that it need not rigorously apply *either* the lodestar *or* the percentage of fund approach in assessing the fees in this case because the requested amount is presumptively reasonable for the simple reason that the settling parties agreed to it. Plaintiffs' Fee Memorandum at 2-3. This approach is simply wrong as a matter of law and fraught with dangers of collusion as a matter of policy. Whether or not the settling parties have agreed upon a fee, and whether or not they do so after the merits have been settled, the court has an independent duty to assure that attorney fees are both fair and reasonable.[17] See, e.g., In re: Prudential Ins. Co.

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[16] Plaintiffs cite the testimony of Brian Wolfman for the proposition that "in cases where the class receives *significant* injunctive or other non-monetary relief, class counsel are entitled to a full fee, enhanced for the risk of non-recovery." Plaintiffs' Reply at 15 (quoting Testimony of Brian Wolfman, Staff Lawyer, Public Citizen Litigation Group Before the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Jan. 22, 2002)) (attached as Plaintiffs' Reply, Exh. 3) (emphasis added). The operative word, of course, is "significant" non-monetary relief—of which there is none in this case. None of the quoted testimony discusses the issue addressed in the Kaiser Memorandum, which was the propriety of discounting the lodestar amount to reflect the low level of success achieved in this settlement. Kaiser Memorandum at 35-36. The Kaiser Memorandum did not discuss at all whether the lodestar should be enhanced, after the reduction for low success, to reflect the level of risk. We continue to take no position on that issue until further documentation is provided.

As an aside, it bears mention that plaintiffs' frequent citations to Public Citizen Litigation Group's public testimony on significant class action litigation issues only further validates our contention in our pro hac vice application that Public Citizen Litigation Group has special expertise on the subject of class actions. Also worth reading in the same testimony cited by plaintiffs is Mr. Wolfman's particularly apt repudiation of the "hide the ball" strategy frequently employed by the settling parties, who (as the settling parties did here) submit their evidentiary support for a settlement "just days before the fairness hearing." Wolfman Testimony (discussing Fed. R. Civ. P. 23(e)).

[17] The Third Circuit in Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977) actually holds that "[o]nly after court approval" of a settlement should discussion and negotiation

of America Sales Practices Litig., 148 F.2d 283, 333 (3d Cir. 1998) ("A thorough judicial review of fee applications is required in all class action settlements.") (quoting General Motors, 55 F.3d at 819); Zucker v. Occidental Petroleum Corp., 192 F.3d 1323, 1328-29 (9th Cir. 1999) ("In a class action, whether the attorneys' fees come from a common fund or are otherwise paid, the district court must exercise its inherent authority to assure that the amount and mode of payment of attorneys' fees are fair and proper. This duty of the court exists independently of any objection."), cert. denied, 529 U.S. 1066 (2000); Weinberger v. Great Northern Nekoosa Corp., 925 F.2d 518, 525 (1st Cir. 1991) (requiring that trial court, "as the guarantor of fairness," must scrutinize fee applications in class actions carefully, especially "where a clear sailing agreement strips away any true market-based check upon the scope and cost of counsel's efforts").[18]

Class counsel try in vain to transform cases that state a prohibition against settling fees before settling merits into cases promoting *deference* to fees that were negotiated after settlement of the merits. For example, class counsel cite Coleman v. Fiore Brothers, 113 N.J. 594, 552 A.2d 141 (1989), as authority for the presumptive reasonableness of negotiated fees. See Plaintiffs' Fee Memorandum at 19. But Coleman is irrelevant to this fee petition. In that case, the Supreme Court of New Jersey held that public interest counsel must settle the merits of consumer fraud

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of attorneys' fees begin. Id. at 1021; accord Court Awarded Attorney Fees, Report of the Third Circuit Task Force ("Third Circuit Task Force Report"), 108 F.R.D. 237, 266-67 (1985).

[18] The draft Committee Note to proposed Federal Rule of Civil Procedure 23(h), citing with approval several of the above-cited cases, emphasizes "the singular importance of judicial review of fee awards to the healthy operation of the class action process." "Indeed," the Committee Note observes, "improved judicial shouldering of this responsibility may be a key element in improving the class action process." Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy, Civil, and Criminal Procedure, and the Rules of Evidence, Committee on Rules of practice and Procedure of the Judicial Conference of the United States 85-86 (Aug. 2002).

claims prior to negotiating statutory claims for attorneys' fees. Id. at 610, 552 A.2d at 149. At issue was a dispute between plaintiffs and defendants as to whether or not their settlement had included a waiver of attorneys' fees. The court concluded that the fees were encompassed within the settlement and then announced for the future the rule that a settlement of the merits must precede fee negotiation. Id. Coleman states a necessary, not a sufficient, condition for the reasonableness of an attorney fee award. The decision nowhere suggests that the mere fact that attorney fees have been negotiated subsequent to settlement of the merits is sufficient for a court to defer to whatever fee is requested merely because the defendant does not object to it. Moreover, Coleman was not a class action case and thus did not implicate the necessity of the trial court's protection of absent class members' interests in the attorney fee context.

Class counsel also suggest that this Court need not concern itself with careful scrutiny of the fees because class "has little interest" in the fee, as any reduction of the fee will redound only to the benefit of Cooper Tire, not to class members. Plaintiffs' Fee Memorandum at 2 n.4, 3. As "the Court has no analogous role in protecting Cooper," id. at 2 n.4, plaintiffs maintain that the Court should simply defer to the arrangement made between class counsel and Cooper Tire. This argument ignores the economic reality, recognized by court after court, "that a settling defendant is concerned only with its total liability." Strong v. BellSouth Telecomm. Inc., 137 F.3d 844, 849 (5th Cir. 1998). As the Court of Appeals of Texas explained:

> Any settlement represents a total value figure that one party is willing to pay to end the controversy. Attorneys' fees, even though they may not be technically deducted from the amount paid to the litigants, represent an integral part of the overall amount that the settling party is willing to pay, and as such, they have a direct effect on the net amount that will ultimately be paid to the litigants.

Bloyed v. General Motors Corp., 881 S.W.2d 422, 435-36 (Tex. Ct. App. 1994), aff'd in relevant part and rev'd on other grounds, 916 S.W.2d 949 (Tex. 1996); see also Kaiser Memorandum at 34-35.

The Third Circuit has emphasized "that a thorough judicial review of fee applications is required in *all* class action settlements." General Motors, 55 F.3d at 819 (emphasis added). "Specifically, the danger inherent in the relationship among the class, class counsel, and defendants 'generates an especially acute need for close judicial scrutiny of fee arrangements' in class action settlements." In re Cendant Corp. Prides Litig., 243 F.3d 722, 730 (3d Cir.) (citation omitted), cert. denied, 122 S. Ct. 202 (2001); see also Piambino v. Bailey, 757 F.2d 1112, 1139 (11th Cir. 1985) ("Because of the potential for a collusive settlement, a sellout of a highly meritorious claim, or a settlement that ignores the interests of minority class members, the district judge has a heavy duty to ensure that any settlement is 'fair, reasonable, and adequate' and that the fee awarded plaintiffs' counsel is entirely appropriate."). And in the context of pre-certification class action settlements, this Court must be especially vigilant in scrutinizing attorneys' fees petitions, not only to guard against actual collusion between lead counsel and defendants, but to protect against the public perception of collusion. General Motors, 55 F.3d at 820; see also Third Circuit Task Force Report, 108 F.R.D. at 266 (describing the conflict of interest between class counsel and the class regarding negotiation of a fee).

Thus, this Court's obligation to conduct an exacting review of the attorneys' fee request here does not turn on whether the excess fees sought would be disbursed to the class or simply used to reduce Cooper Tire's exposure. (We believe that it ignores economic reality again, however, to suggest that Cooper Tire would not be more willing to increase the value of this settlement to the class if it realized that its obligation to pay plaintiffs' attorneys' fees would be reduced by the Court). In Cendant, for example, the lead counsel contended, as class counsel essentially argues here, that an objector had no standing to complain about attorneys' fees because any reduction in the award would not be distributed to the class, but would revert to the defendant. The Third Circuit rejected this argument, despite its "superficial attraction," because of the court's independent authority over the grant of fees, especially in class action cases. "[W]e indicated in In re GM Trucks the importance of the judicial role in finalizing class action settlements, and we suggested that this importance derived from general concerns about 'potential public misunderstandings' as much as from a desire to protect the plaintiffs in the particular class." 243 F.3d at 730; see also Zucker, 192 F.3d at 1328-29 (the court need not decide whether an objector would be sufficiently aggrieved by an attorneys' fee award to have standing to object to that award because the court must exercise its inherent authority to evaluate the fairness of the fees).

As a cross-check, class counsel maintain that their requested fee is reasonable under either the percentage-of-recovery approach or the lodestar approach. The percentage-of-recovery approach, however, is not an appropriate way to determine a reasonable fee in this case, but is instead "generally favored for cases involving a common fund." Prudential, 148 F.3d at 333. There is no common fund in this case. Not only is the lodestar approach favored where, as here, "the nature of the recovery does not allow the determination of the settlement's value necessary for application of the percentage of recovery method, id. (citing General Motors, 55 F.3d at 820), but it is the preferred method in statutory fee-shifting cases. See General Motors, 55 F.3d at 821. More to the point, the New Jersey Supreme Court has held that trial courts must use the lodestar method to determine the fee under state fee-shifting statutes such as the Consumer Fraud Act.

See Rendine v. Pantzer, 141 N.J. 292, 334-35, 661 A.2d 1202, 1226 (N.J. 1995). The court even cited the Consumer Fraud Act as an example of a state statute encompassed within its holding. Id. at 322, 661 A.2d at 1219.

Class counsel contend that because a rationale behind the lodestar method required in Rendine was to reward attorneys for prosecuting cases with small recoveries, there is no need to use the lodestar method here. Plaintiffs' Memorandum at 48. Rendine did not involve a class action, so it is not surprising that it did not discuss the reasons that a lodestar approach would be important in this context as well. Class counsel suggest that because Rendine's concern lay elsewhere, the New Jersey Supreme Court's holding in that case is consistent with the view that a lodestar analysis is unnecessary where, as here, the settling parties have agreed to the amount of fees. But, as already noted, even if there has been settlement, the court must still determine if the requested fee is fair and reasonable. *Some* method must be used to make this determination. A percentage of recovery approach makes little sense in a case such as this, where there is no common fund and the value of the settlement to the class is speculative and disputed. Class counsel never explain, however, why reasonable fees times reasonable hours, with appropriate adjustments for risk and level of success achieved, will not be sufficient.

C. The Absence of Appropriate Documentation of the Fee Request

Unless and until class counsel supplement their inadequate submission, this Court will not able to evaluate whether the requested fee is fair and reasonable. Class counsel claim to have "collectively expended more than 27,000 hours of professional time" which, "when multiplied by the current hourly rates of the attorneys and paralegals who worked on the litigation result in an aggregate lodestar of more than $7.2 million."[19] Plaintiffs' Fee Memorandum at 43-44. Even assuming that this undocumented 27,000 hour figure is accurate, with an attorney fee request amounting to approximately $27 million for fees up to the fairness hearing, this amounts to a whopping *$1,000 per hour from the highest paid partner to the lowest paid paralegal.* According to Allan Kanner's Affidavit ("Kanner Affid."), Mr. Kanner generated this total number of hours worked by reviewing contemporaneous time records and making internal adjustments. Kanner Affid. ¶ 43. The combined total, which includes estimates of time through the final approval hearing, is claimed to be based on the each firm's standard billing rates. Id. Class Counsel apparently believe that it is for *them* to determine whether the time spent was "fair, reasonable and necessary for successful administration and prosecution of this case," id., and what hourly rates are permissible, without any review by this Court or input from the class.

It is for this Court, however, not Mr. Kanner, to determine whether the requested fee is reasonable. Remarkably, the request for fees is bereft of documentation supporting the requested fee. Class counsel's submission is inadequate on its face because it does not supply the rates used, the hours worked by the various attorneys and paralegals, or describe the specific work that was done. See Rendine, 141 N.J. at 335, 661 A.2d at 1226 ("In our view, the trial court's determination of the lodestar amount is the most significant element in the award of a reasonable fee because that function requires the trial court *to evaluate carefully and critically the aggregate*

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[19] Class counsel also claimed that their obligations in this class action "effectively precluded any other meaningful employment during the past year." Plaintiffs' Fee Memorandum at 49. But see Ann David & Joseph T. Hallinan, Conseco's Class-Action Settlement Proposal is Criticized as Inadequate by Some Groups, Wall St. J., Feb. 1, 2002, at B8 (citing Allan Kanner as "one of the lead plaintiffs' attorneys" involved in another class action settlement as to which a fairness hearing was reportedly scheduled for yesterday, February 13, 2002).

hours and specific hourly rates advanced by counsel for the prevailing party to support the fee application. Trial courts should not accept passively the submissions of counsel to support the lodestar amount.") (emphasis added); accord 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.").

The fee application must present billable hours "in sufficient detail to permit the trial court to ascertain the manner in which the billable hours were divided among various counsel." Rendine, 141 N.J. at 337, 661 A.2d at 1227. This Court cannot determine the "reasonable hours" spent on the litigation without knowing which lawyers performed which tasks, and how long they took performing them, because "[h]ours are not reasonably expended if they are excessive, redundant, or otherwise unnecessary." Id. at 335, 661 A.2d at 1226 (citation omitted). In a case purportedly involving 48 law firms, 124 lawyers, and 91 paralegals, Kanner Affid. ¶ 42, it is especially important for this Court to examine billing records to determine whether there has been duplicative or unnecessary work. For example, multiple class complaints against Cooper Tire, all virtually identical, were filed across the country, as well as various pleadings relating to removal/remand litigation in these various actions. This Court would need to assure that excessive or redundant hours have not been billed for doing the same work over and over again. See Szczepanski v. Newcomb Medical Center, Inc., 141 N.J. 346, 366, 66 A.2d 1232, 1243 (N.J. 1995) ("[A] trial court should carefully and closely examine the lodestar-fee request to verify that the attorney's hours were reasonably expended. Fee-shifting cases are not an invitation to prolix or repetitious legal maneuvering.") (citation omitted).

In addition to documenting the number and reasonableness of the hours billed, class counsel must also supply evidence as to the prevailing market rates in order to justify the hourly rates for each of the attorneys and paralegals whose work is billed. Rendine, 141 N.J. at 335, 337, 661 A.2d at 1226, 1227; see also Blum v. Stenson, 465 U.S. 886, 895 & n.11 (1984) (reasonable fees are to be calculated according to the prevailing market rates in the relevant community, and "the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation"); see also Gunter v. Ridgwood Energy Corp., 223 F.3d 190, 200 (3d Cir. 2000) (describing the documentation required in an attorney fee application). In short, attorneys seeking fee awards "should submit evidence supporting the hours worked and rates claimed. Where the determination of hours is inadequate, the district court may reduce the award accordingly." Hensley, 461 U.S. at 433, quoted with approval in Rendine, 141 N.J. at 324, 661 A.2d at 1220.

Mr. Kanner's Affidavit suggests that the reason class counsel have not submitted adequate billing records for a lodestar determination by the Court, and the reason that the "affidavit has necessarily been vague," is that "many time entries will reflect the mental impressions of counsel and should not be disclosed given the possibility that litigation will resume if this Settlement is not approved." Kanner Affid. ¶ 43(c). This is not a credible or sufficient explanation for a submission that does not meet Rendine's requirements. If certain time entries contain work product, these work-product portions can be redacted from the publicly-filed version of the records. There is no justification for a refusal to file class counsel's full billing records and other evidence justifying the requested fee in open court, so that the basis for their request for this extraordinary $30 million dollar fee will be open to scrutiny by this Court, class members, and the public. Class counsel have cited no authority for the propriety of withholding these records, nor any explanation for why they can not redact their time entries, to the extent that is even necessary.

Obviously, in the absence of any documentation, it is impossible to assess what sort of multiplier is embodied in class counsel's $30 million fee request. Even assuming that Class counsel's calculation that their requested fee represents a multiplier of 3.6, Plaintiffs' Fee Memorandum at 43, such a multiplier is grossly excessive in light of the minimal success achieved. Class counsel recognize that the Third Circuit has recently suggested that a lodestar multiplier of 3 should serve as a ceiling. Cendant, 243 F.3d at 741. They argue, however, that this ceiling was intended to be confined to the facts of that case. Plaintiffs' Memorandum at 47. But whether or not Cendant imposes a ceiling of 3 on multipliers is irrelevant in a case such as this, where the lodestar not only should not be multiplied, but should be adjusted *downward* to reflect the low level of success achieved in the litigation, as compared to the relief sought. See Rendine, 141 N.J. at 336, 661 A.2d at 1227; Kaiser Memorandum at 35-36. As a comprehensive study by the Rand Institute of Civil Justice concluded regarding attorneys' fees:

> The private gains that accrue to plaintiff class counsel in damage class action litigation are the engine that drives the litigation. *The single most important action that judges can take to support the public goals of class action litigation is to reward class action attorneys only for lawsuits that actually accomplish something of value to class members and society.*

Deborah R. Hensler et al, Class Action Dilemmas: Pursuing Public Goals for Private Gains 490 (2000).

Class Counsel maintain that a reduction of fees under a Rendine analysis of success is somehow not appropriate in class actions cases involving fee-shifting statutes. Plaintiffs' Fee Memorandum at 47-48. However, in Incollingo v. Canuso, 297 N.J. Super. 57, 63, 687 A.2d 778, 781 (N.J. Super. Ct. App. Div. 1997), the court recognized that the lodestar method used in Rendine is appropriate in class actions involving fee-shifting statutes, and class counsel has cited no authority to the contrary. Class counsel contend that such a "broad" reading of Incollingo is unjustified because Incollingo did not involve a negotiated fee. They argue, moreover, that Incollingo cannot be reconciled with Coleman's supposed link between court approval and negotiated fee requests. Plaintiffs' Fee Memorandum at 47 n.44. But Coleman *pre-dates* Rendine, and, as noted above, does *not* stand for the proposition that courts should defer to negotiated agreements. As discussed above, it is this Court, and not the settling parties, that is ultimately responsible for determining whether a fee request is reasonable. The proper approach to making that determination in this case is the lodestar analysis.

D. The Need for Disclosure of Any Fee-Sharing Agreements Among Class Counsel

Finally, according to the Kanner Affidavit, the disbursement of the requested $30 million would be "in the discretion of Lead Counsel bases [sic] on actual work expenditures, and quality enhancements." Kanner Affid. ¶ 21. On the contrary, this Court should require that Mr. Kanner disclose his plans for disbursement of any fee award, including any side agreements into which he entered with his fellow class counsel. As the court explained in In re Agent Orange Product Liability Litig.: "Because class attorneys have special fiduciary obligations to the class, and because the court has a responsibility to protect the rights of the class, the class and the court have a right to know about any agreements among counsel for allocating fees payable from a class recovery." 611 F. Supp. 1452, 1462 (E.D.N.Y 1985), aff'd in relevant part and rev'd on other grounds, 818 F.2d 216, 226 (2d Cir. 1987) (agreeing that class counsel must inform the court of a fee sharing agreement at the time it is formulated).

That the requested fee is theoretically paid by Cooper and not by the class members is no reason not to require disclosure of side agreements. Fee-sharing agreements among class counsel, particularly those agreements predicated on incentives or enhancements not directly related to services rendered, present a significant potential for a conflict of interest between class counsel and those whom they have undertaken to represent. Some of the lawyers who stand to obtain a fee may be encouraged to settle early or to accept a low-ball settlement of little benefit to the class because of incentives that may be provided in undisclosed fee-sharing agreements. The risk of such abuse is significant in the class action context. See Agent Orange, 818 F.2d at 223-24. The district court in Agent Orange explained:

> In view of the lack of a personal relationship between most class members and the attorneys representing them it is essential that this information be available through the court. Class actions are public or quasi-public in nature. . . . The public and press must have full access to information about this kind of fee-sharing arrangement so that an opportunity is afforded for comment and objection.

611 F. Supp. at 1462.

The enormous number of lawyers involved in these class actions, coupled with the peculiar circumstances under which this fee request is made, are all the more reason for disclosure and scrutiny of any fee-sharing agreements in this case. The fact that dissent from one set of lawyers, Bruce Kaster and other counsel representing the Mosely objectors, led to a request from lead class counsel that these lawyers *be denied a fee altogether*, see Plaintiffs' Fee Memorandum at 52—even for their services that predate both the settlement and the ensuing fall-out over these lawyers' decision to represent objectors—gives rise to an inference that dissent among class counsel is not only not tolerated, but is punished by lead class counsel. The rift between counsel for the Mosley objectors and lead class counsel only increases the need for this Court to scrutinize the fee agreements reached among the various class lawyers to assure the class and itself that other class lawyers have not agreed to this settlement simply out of a fear that otherwise, they will be cut off from receiving a fee for their services. The threat or promise of attorneys' fees should not be wielded by lead class counsel as a hammer to stifle dissent. See Bowling v. Pfizer, Inc., 102 F.3d 777, 781 n.3 (6th Cir. 1996) (recognizing that fee-sharing "agreements should certainly raise questions at the settlement approval stage. The risk that counsel has in some way been 'bought off' and provided with a significant incentive to not represent the class's interest would clearly make these agreements relevant at that settlement stage of the proceedings.").

CONCLUSION

For the foregoing reasons, and those stated in their previous filings, objectors Matthew Kaiser and Francis Sullivan respectfully request that this Court reject the proposed class settlement.

Respectfully submitted,

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February 14, 2002

CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 14th day of February, 2002, he caused to be served by overnight Federal Express one copy each of the foregoing Supplemental Memorandum of Law in Support of the Objections of Matthew G. Kaiser and Francis X. Sullivan, with attached Certifications, upon counsel for the settling parties:

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