IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

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

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

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

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

Counsel for Objectors Anderson, *et al.*

March 26, 2007

TABLE OF CONTENTS

INTRODUCTION 1

FACTUAL BACKGROUND 2

IDENTITY OF OBJECTORS 3

ARGUMENT 5

I. Under The Settlement, Most Of The Class Will Receive No Benefit In Exchange For Releasing Their Claims. 5

A. The Settling Parties' Failure To Offer A Valuation Of The Settlement Reflects The Absence Of Value To The Class. 5

B. The Individual "Benefit" Is Illusory. 7

1. Carfax vouchers 8

2. Inspection coupon 10

3. Uniform treatment of class members 12

C. The Injunctive "Relief" Perpetuates The Misrepresentation On Which The Lawsuit Is Based. 13

III. The Failure To Provide Individual Notice To The Majority Of The Class Exacerbates The Poor Prospects For Coupon Redemption And Independently Requires That The Settlement Be Rejected. 18

A. The Settling Parties Offer No Explanation For Their Failure To Provide Individual Mailed Notice. 19

B. Email Notice Was Sent To Only A Fraction Of The Class And, In Any Event, Is No Substitute For Mailed Notice. 20

C. One-Time Publication In *USA Today* And *Investor's Business Daily* Does Not Provide Meaningful Notice. 23

D. The Settlement Website Is Useless As A Means of Notice (And Virtually Useless For Any Other Purpose). 24

CONCLUSION 26

AFFIDAVIT OF TODD B. HILSEE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases **Page**

Browning v. Yahoo! Inc.,
2006 WL 3826714 (N.D.Cal. 2006) 21

Buchet v. ITT Consumer Finance Corp.,
845 F. Supp. 684 (D. Minn.), *amended*, 858 F. Supp. 944 (D. Minn. 1994) 5, 6

Carnegie v. Household International, Inc.,
371 F. Supp. 2d 954 (N.D. Ill. 2005) 9, 11, 12, 19

Clement v. American Honda Finance Corp.,
176 F.R.D. 15 (D. Conn. 1997) 6

D.R.I., Inc. v. Dennis,
2004 WL 1237511 (S.D.N.Y. 2004) 21

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974) 20

Gottlieb v. City of South Euclid,
157 Ohio App. 3d 250, 810 N.E.2d 970 (Ohio App. 2004) 18

Greenfield v. Village Industries, Inc.,
483 F.2d 824 (3d Cir. 1973) 23

Gross v. Standard Oil Co.,
45 Ohio Misc. 45, 345 N.E.2d 89 (Ohio Ct. Com. Pl. 1975) 18

Henry v. Sears Roebuck & Co.,
1999 WL 33496080 (N.D. Ill. 1999) 6

In re Compact Disc Minimum Advertised Price Antitrust Litigation,
216 F.R.D. 197 (D. Me. 2003) 1, 5

In re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation,
55 F.3d 768 (3d Cir. 1995) 5, 9, 12

In re Kroger Co. Shareholders Litigation,
70 Ohio App. 3d 52, 590 N.E.2d 391 (Ohio App. 1990) 5

In re Mexico Money Transfer Litigation,
267 F.3d 743 (7th Cir. 2001) 5, 12

In re Motorsports Merchandise Antitrust Litigation,
112 F. Supp. 2d 1329 (N.D. Ga. 2000) 6

In re Orthopedic Bone Screw Products Liability Litigation,
246 F.3d 315 (3d Cir. 2001) 23

In re Prudential Insurance Co. America Sales Practice Litigation Agent Actions,
148 F.3d 283 (3d Cir. 1998) 8

In re Western Union Money Transfer Litigation,
2004 WL 3709932 (E.D.N.Y. 2004) 12

Jones v. Flowers,
547 U.S. 220, 126 S. Ct. 1708 (2006) 21, 24

Kearns v. Ford Motor Co.,
2005 WL 3967998 (C.D. Cal. 2005) 7

Mullane v. Central Hannover Bank & Trust Co.,
339 U.S. 306 (1950) 18

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 19

Romstadt v. Apple Computer,
948 F. Supp. 701 (N.D. Ohio 1997) 1, 5

Shaw v. Toshiba America Information System,
91 F. Supp. 2d 942 (E.D. Tex. 2000) 12

States of New York & Maryland v. Nintendo of America,
775 F. Supp. 676 (S.D.N.Y. 1991) 6

Strong v. Bellsouth Telecommunications, Inc.,
173 F.R.D. 167 (W.D. La. 1997), *aff'd*, 137 F.3d 844 (5th Cir. 1998) 7

Sutherland v. ITT Residential Capital Corp.,
122 Ohio App. 3d 526, 702 N.E.2d 436 (Ohio Ct. App. 1997) 1

Synfuel Technologies, Inc. v. DHL Express,
463 F.3d 646 (7th Cir. 2006) 7, 8, 13

Toledo Fair Housing Center v. Nationwide Mutual Insurance Co.,
94 Ohio Misc. 2d 127, 704 N.E.2d 648 (Ohio Com. Pl. 1996) 20

Thompson v. Midwest Found. Independent Physicians Ass'n,
124 F.R.D. 154 (S.D. Ohio 1988) 20

Turner v. Murphy Oil USA,
__ F. Supp. 2d __, 2007 WL 283431 (E.D. La. 2007) 7, 19

Varacallo v. Massachusetts Mutual Life Insurance Co.,
226 F.R.D. 207 (D.N.J. 2005) 7

Warner v. Waste Management, Inc.,
36 Ohio St. 3d 91, 521 N.E.2d 1091 (Ohio 1988) 18

Wilson v. Brush Wellman, Inc.,
103 Ohio St. 3d 538, 817 N.E.2d 59 (Ohio 2004) 18

Statutes and Rules

Class Action Fairness Act of 2005,
Pub. L. 109-2, § 2(a)(3) 8

Federal Rule of Civil Procedure 23 1

Ohio Civil Rule 23 . . . . 1, 18

Ohio Consumer Sales Practices Act,
Ohio Rev. Code § 1345.01 2

15 U.S.C. § 7701(a)(4) 22

Miscellaneous

Arora, *The CAN-SPAM Act: An Inadequate Attempt to Deal with a Growing Problem*,
39 Colum. J.L. & Soc. Probs. 299 (2006) 22

Braucher, *Rent-Seeking and Risk-Fixing in the New Statutory Law of Electronic Commerce: Difficulties in Moving Consumer Protection Online*,
2001 Wis. L. Rev. 527 (2001) 21

George Mason University Center for Regional Analysis,
Trends Alert #5, Commuting Trends and Patterns in the Trends Alert #5,
Commuting Trends and Patterns in the Washington Region (2003),
available at www.cra-gmu.org/alerts.htm 4

Hilsee, Wheatman, & Intrepido, *Do You Really Want Me to Know My Rights? The Ethics Behind Due Process in Class Action Notice is More than Just Plain Language: A Desire to Actually Inform*, 18 Geo. J. Legal Ethics 1359 (2005) 19

Kelman, *E-Nuisance: Unsolicited Bulk E-mail at the Boundaries of Common Law Property Rights*, 78 S. Cal. L. Rev. 363 (2004) 22

Miller & Singer, *Nonpecuniary Class Action Settlements,*
60 Law & Contemp. Probs. 97 (1997) 8, 9

Mossoff, *Spam—Oy, What a Nuisance!*,
19 Berkeley Tech. L.J. 625 (2004) 22

National Association of Consumer Advocates, *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, 176 F.R.D. 375 (1998) 6, 7

Rossman and Delbaum,
Consumer Class Actions (2006) 21, 23, 25

U.S. Census Bureau, *Domestic Migration Across Regions, Divisions, and States: 1995-2000* (2003), *available at* www.census.gov/prod/2003pubs/censr-7.pdf 4

Zeller, *Law Barring Junk E-Mail Allows a Flood Instead*, N.Y. Times, Feb. 1, 2005 22

INTRODUCTION

A class action settlement can be approved only if it is fair, adequate, and reasonable. Ohio Civ. R. 23(E). Before approving a class action settlement, "a court must 'independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished.'" *Romstadt v. Apple Computer*, 948 F. Supp. 701, 705 (N.D. Ohio 1997) (quoting 2 Newberg & Conte, *Newberg on Class Actions* § 11.41 at 88-89 (3d ed. 1992)). As discussed below, the proposed settlement in this case would leave a majority of the class with no meaningful relief. Indeed, because the means of providing notice is so inadequate, the majority of the class is unlikely even to know that a settlement has occurred. The proposed settlement thus fails to meet the Rule 23 standard and should be rejected.[1]

To begin with, the relief offered is worthless to any class member who is not interested in buying a used car in the next three years. Even for class members who do want to buy a used car within that time period, the predominant relief is only Carfax Vehicle History Reports ("Carfax reports")—the same reports that the complaint portrays as being of limited usefulness to consumers because of limitations in the Carfax database. The only parties that are sure to obtain a benefit from the settlement are Carfax, which will obtain releases from all Carfax customers of a range of potential claims; class counsel, who seek $556,000 in fees, and the named plaintiff, who will receive $1,000 under the proposed settlement. However, "a settlement is not fair where all the cash goes to expenses and lawyers, and the members receive only discounts of dubious value." *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 221 (D. Me. 2003). The proposed settlement should therefore be rejected.

Furthermore, the notice to the class is not calculated to reach the great majority of class members. The settling parties provided no mailed notice at all. And although the class definition

---

[1]Because of the similarities between Ohio Civil Rule 23 and Federal Rule of Civil Procedure 23, "federal authority is an appropriate aid to interpretation of the Ohio rule." *Sutherland v. ITT Resid. Capital Corp.*, 122 Ohio App. 3d 526, 536 n.1, 702 N.E.2d 436, 443 n.1 (Ohio Ct. App. 1997) (citation omitted). For the Court's convenience, copies of all federal cases cited here are available in a CD-Rom that is being filed together with this brief.

includes people who bought Carfax reports from 1993 through October 2006, *see* Notices at 1, and the complaint suggests that injured class members are those who bought Carfax reports in 1998 or later, Am. Compl. ¶ 17, the settling parties attempted to give individual notice, via email, only to people who bought Carfax reports during the year ending October 27, 2006—only one-year's worth of the almost nine years of injured class members. Even then, as discussed below, the emails were not effective in providing notice to recent Carfax purchasers.

A notice also appeared once in *USA Today* and once in *Investor's Business Daily*. Settl. Agmt. 6 (¶ I.T.). The chance that many class members saw either notice is slim; indeed, none of the Objectors did. And the website set up pursuant to paragraph III.B to provide "further information," located at www.westcarsettlement.com, is essentially useless for giving notice because, unless the class member knows that a settlement has occurred, he or she would not know about the website. According to the settlement agreement (at 7 ¶ III.B.), the website will provide "further information about the settlement." In fact, the website provides only a recitation of the dates stated in the notices, the two notices, a claim form, and the Court's two-page order giving preliminary approval to the settlement. Notably lacking are the settlement agreement, the complaint, and the parties' memoranda in support of the proposed settlement.

FACTUAL BACKGROUND

This lawsuit was brought as a class action under Ohio's Consumer Sales Practices Act ("CSPA"), Rev. Code § 1345.01, and common law to remedy the allegedly misleading practices of Carfax in suggesting to consumers that Carfax reports were based on accident data provided from all 50 states, when in fact Carfax's database does not include police accident data from 23 states. Am. Compl. ¶¶ 1, 44, 46, 47. The complaint seeks rescission of the purchase price of Carfax reports and/or actual damages and an injunction requiring the defendants to disclose the limitations of the Carfax database, including that it does not include complete accident data for 23 states. *Id*. at VI & VII (Causes of Action, Prayer for Relief).

The settlement agreement and class notice define the class to include anyone who bought a Carfax report prior to October 27, 2006. Under the proposed settlement, each class member would be eligible to receive one of four types of coupons—three for one or more Carfax reports and one for a discount off a car inspection by a company called SGS SA. Settl. Agmt. 6 (¶ V). The proposed settlement would also require Carfax to make certain changes to its website or to maintain certain existing features of its website for two years from the date of settlement approval. *Id*. at 3 (¶ O.3). The vouchers and injunctive relief are described in more detail in the Argument below.

IDENTITY OF OBJECTORS

These objections are filed on behalf of class members Gwynneth Anderson (Maryland), Bernard Brown (Kansas), Nikita Brown (Ohio), Jeff Crabtree (Hawaii), Pedenia Evans (Missouri), Joanne Faulkner (Connecticut), Craig Friedberg (Nevada), Norman Lau (Hawaii), Steven Moseley (Florida), Greg Paulson (Minnesota), Ira Rheingold (Maryland), Mark Steinbach (District of Columbia), Frank Thurman (Missouri), Robert Thuss (South Carolina), Edward Uechi (District of Columbia), David Wolfe (Missouri), Brian Wolfman (Maryland), and the Center for Auto Safety ("CAS"). *See* Affidavits of Objectors/Class Members Anderson, *et al.*, filed concurrently herewith. Each objector purchased one or more Carfax reports prior to October 27, 2006. The name and address of each objector is set forth in the accompanying affidavits. Only three of these objectors received an email notice; the other 15 did not. None saw a notice in *USA Today* or *Investor's Business Daily*. Objectors include individuals who bought just one Carfax report, individuals who bought several reports, and individuals who purchased a 30-day subscription for an unlimited number of reports. In addition, objector CAS is a not-for-profit organization devoted to auto safety. CAS objects on behalf of itself, a Carfax customer, and on behalf of its members, all of whom are interested in auto safety and some of whom have purchased Carfax reports.

Several objectors learned first-hand about the deficiency of Carfax reports. For example, objectors Moseley and Thurman learned that the cars for which they had purchased Carfax reports had been involved in major accidents that were not shown on the report. *See* Moseley Aff. ¶¶ 3-10;

Thurman Aff. ¶ 2. Others did not know about the incompleteness of Carfax's "nationwide database" until they learned about it as a result of this settlement. *E.g.*, Anderson Aff. ¶ 3; Thurman Aff. ¶ 2; Wolfman Aff. ¶ 3. None are interested in purchasing Carfax reports in the next three years.

Some objectors live in states for which Carfax apparently gets police accident data, and some live in states for which Carfax does not get that data. *See* Am. Compl. ¶ 23. The limitations of the Carfax database affect all eighteen objectors because cars move from state to state so frequently, for a variety of reasons. For example, car owners move from one state to another. *See*, *e.g.*, U.S. Census Bureau, *Domestic Migration Across Regions, Divisions, and States: 1995-2000*, at 1 (2003), *available at* www.census.gov/prod/2003pubs/censr-7.pdf (over 22 million people changed state of residence between 1995 and 2000). Thus, a used car purchased in Missouri (included in the database) may well have had an accident while a prior owner was traveling in neighboring Illinois (not included in the database) or living in California (not included in the database). Furthermore, used cars are very often moved from one state to another by dealerships, and thus the state of purchase is not a reliable indication that the vehicle has been in the state throughout its lifetime. And many vehicle owners live and register their vehicles in one state but drive to another state on a regular basis. For example, although major accidents in Maryland—the home of objectors Anderson, Rheingold and Wolfman—are apparently included in the Carfax database, Virginia accidents are not. Yet more than 150,000 people commute for work from Maryland to Virginia, or vice versa, and the majority commute by car. *See* George Mason University Center for Regional Analysis, Trends Alert #5, Commuting Trends and Patterns in the Trends Alert #5, Commuting Trends and Patterns in the Washington Region 4, 8 (2003), *available at* www.cra-gmu.org/alerts.htm (data as of 2000). Countless other situations routinely arise in which a vehicle owner from one state might visit another state for an extended period of time: Northeasterners who drive to Florida to spend the winter, college students who commute between school and home, and people who drive frequently to visit family members in other states could all have had accidents in a state not included in the database, even if their car is later sold in a state that is included.

ARGUMENT

When considering a class action settlement, the court "acts as a fiduciary who must serve as guardian of the rights of absent class members." *Romstadt*, 748 F. Supp. at 705 (citations omitted). The burden is on the settling parties to show that the settlement is fair, adequate, and reasonable. *Id.* (citing *In re GM Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig*., 55 F.3d 768, 785 (3d Cir. 1995)). Here, however, the settling parties have made little effort to meet that burden, as shown by their bare bones memoranda in support of preliminary approval. Given the weakness of the benefits offered and the notice provided, Objectors urge the Court to reject the proposed settlement.

I. Under The Settlement, Most Of The Class Will Receive No Benefit In Exchange For Releasing Their Claims.

A settlement that confers no benefit on a portion or all absent class members should not be approved. *See In re Kroger Co. Shareholders Litig*., 70 Ohio App. 3d 52, 68, 590 N.E.2d 391, 402 (Ohio App. 1990). The proposed settlement in this case will confer no benefit on most class members. Moreover, it does nothing to rectify the problem on which the complaint is based.

A. The Settling Parties' Failure To Offer A Valuation Of The Settlement Reflects The Absence Of Value To The Class.

Neither the settlement agreement nor the papers seeking preliminary approval make any attempt to quantify the value of the settlement. Courts reviewing proposed class settlements, however, routinely consider the aggregate monetary value of a settlement. *See*, *e.g.*, *In re Mexico Money Transfer Litig.*, 267 F.3d 743, 748 (7th Cir. 2001) (considering experts' estimate that redeemed coupons would total $40 million to $60 million); *In re Compact Disc*, 216 F.R.D. at 220 (rejecting settlement where, among other things, value to class had not been quantified); *Buchet v. ITT Consumer Finance Corp*., 845 F. Supp. 684, 693-96 (D. Minn.), *amended*, 858 F. Supp. 944 (D. Minn. 1994) (discussing at length likely rate of coupon redemption to ascertain settlement's value to the class). Here, the settling parties are unable to place a value on the settlement because, even assuming that the coupons have value, the number of class members who will use them is unknown, and counsel have offered no evidence that would enable the Court to make an informed estimate.

To protect against a coupon settlement that in reality provides no value to most class members, "a settlement involving certificates should require a minimum level of redemption by the class members within a reasonable period of time. In the event actual redemption does not meet this minimum level, the defendant should provide alternative relief in the form of a common fund." National Association of Consumer Advocates, *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, 176 F.R.D. 375, 384 (1998) ("NACA Guidelines"). Thus, some class action settlements have provided that if a minimum number of coupons are not used, the value of unused coupons up to that minimum will be distributed to the class in another form or will be awarded as cy pres. *See*, *e.g.*, *In re Motorsports Merchandise Antitrust Litig*., 112 F. Supp. 2d 1329 (N.D. Ga. 2000) ("Defendants participating in the coupon program have agreed to continue issuing coupons until the face value of each of the settlements is reached in redemptions. . . . Only if several years elapse and the redeemed value has not reached the limit of the Defendants' obligations may Defendants discharge their liability at that time by making donations to charitable organizations. They are, therefore, not completely freed from liability by lapse of time."); *States of N.Y. & Md. v. Nintendo of Am.*, 775 F. Supp. 676, 679 (S.D.N.Y. 1991) ("If fewer than a million purchasers redeem the coupons, Nintendo will pay the difference up to $5 million to the Attorney Generals."); *see also Henry v. Sears Roebuck & Co.*, 1999 WL 33496080, *2 (N.D. Ill. 1999) ("There is no requirement that Class members submit a proof of claim form or take any other action in order to obtain the benefits of the Settlement, thereby ensuring 100% distribution of the Settlement consideration."). In this case, there is no minimum and no cy pres. At least one court has noted that the lack of a minimum pay-out by the defendant suggests that the defendant is assuming that the coupon redemption rate will be low—in other words, that the settlement will provide little value to the class. *See Buchet*, 845 F. Supp. at 696; *see also Clement v. Am. Honda Fin. Corp*., 176 F.R.D. 15, 28 (D. Conn. 1997) (disapproving settlement) ("The value of these coupons is too speculative. Absent a transfer option or other guaranty of some minimal cash payment, there is a strong danger that the settlement will have absolutely no value to the class.").

Here, as discussed below in part B, it is entirely possible (and even likely, in the view of Objectors) that few coupons will be used and that many class members will get no value from the settlement—although the lawyers will still get their full fees, and Carfax will still get its broad release.

B. The Individual "Benefit" Is Illusory.

Under the proposed settlement, a class member who submits an "approved claim" can receive one of four vouchers. Three of the four are coupons for one or more Carfax reports—either two free Carfax reports within one year of final approval of this settlement, one free report within two years, or an unlimited number of reports for half-price during a 30-day period within three years of final approval. The fourth voucher is a coupon for $20 off one car inspection by a company called SGS SA, within six months of final approval.

So-called "coupon settlements" have been widely criticized by courts and commentators —and for good reason. First, coupons are worth less than cash of the same value because many class members will not use the coupons. *Synfuel Tech., Inc. v. DHL Express*, 463 F.3d 646, 654 (7th Cir. 2006) (vacating approval of class action settlement); *Strong v. Bellsouth Telecomm., Inc.*, 173 F.R.D. 167, 172 (W.D. La. 1997) ("Neither the true economic value of an offered credit to its recipient, nor the true economic cost to its issuer, is equivalent to its face value. If it were, a newspaper containing $10 worth of coupons would be as valuable as a $10 bill. Many customers never cash in coupons. Those who do cash a coupon often receive the benefit months or years later, so the true value of the coupon is slightly less.") (internal citation omitted), *aff'd*, 137 F.3d 844 (5th Cir. 1998); NACA Guidelines, 176 F.R.D. at 383 ("For most of the class, redemption may not be an option, because they are unwilling or unable to make a future purchase."). For this reason, coupons and discounts may provide only "illusory benefits." *Turner v. Murphy Oil USA*, __ F. Supp. 2d __, 2007 WL 283431, *30 (E.D. La. 2007); *Kearns v. Ford Motor Co.*, 2005 WL 3967998, *1 n.1 (C.D. Cal. 2005) (coupon settlements "produce hardly any tangible benefits for the members of the plaintiff class but generate huge fees for the class attorneys"); *Varacallo v. Mass. Mut. Life Ins. Co.*, 226

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

Second, coupons force class members to do more business with the defendant, "something that at least some class members likely would prefer not to do." *Synfuel Tech.,* 463 F.3d at 654.

Third, coupon settlements "fail to disgorge ill-gotten gains from the defendant." *Id*. (citing Leslie, *The Need to Study Coupon Settlements in Class Action Litigation*, 18 Geo. J. Legal Ethics 1395, 1396-97 (2005)).

The vouchers in this case typify all of these problems with coupon settlements.

1. Carfax vouchers: The Carfax vouchers provide **no** value to any class member who—like many of the objectors, including Anderson, Crabtree, Lau, Paulson, Rheingold, Steinbach, and Uechi, for example—is uninterested in buying or unable to afford a used car within the next two years (the vouchers for one or two free Carfax reports) or three years (the discount voucher). And because many used car buyers are unlikely to buy a new used car every two or three years, any class member who has bought a car in the past few years is unlikely to use these vouchers. The fact that cars only infrequently require replacement weighs against approval of the settlement, both because the coupons may expire before class members have need of them and because they may misplace or

forget about the coupons before they would have use for them. *See* Miller & Singer, 60 Law & Contemp. Probs. at 126; *see*, *e.g.*, *In re GM Corp. Pick-Up Truck*, 55 F.3d at 808 (settlement was not adequate, among other reasons, because the high cost of a new truck and the infrequency of consumers' purchase of a new truck, relative to redemption period, would make using the coupons difficult).

Furthermore, the coupon offering 50% off of an unlimited number of reports for a 30-day period requires class members to pay $12.50 to Carfax to save $12.50 on Carfax reports. Coupons that require class members to spend money on more of a defendant's product or services, such as the 50%-off coupon, are particularly ill-regarded by the courts. *See*, *e.g.*, *Carnegie v. Household Int'l, Inc.*, 371 F. Supp. 2d 954, 957 (N.D. Ill. 2005). If Carfax was unjustly enriched by the conduct alleged in the complaint, it is difficult to comprehend how encouraging class members to pay Carfax another $12.50 provides a remedy.

Even as to those class members who might want to buy a used car within the next three years, a free Carfax report is of little value, for precisely the reasons set forth in the complaint. *See*, *e.g.*, Thuss Aff. ¶ 3. That is, as the complaint alleges, "accident searches are non-existent with respect to certain states' accident data . . . and therefore are incomplete, inaccurate and/or unreliable." Am. Compl ¶ 9. The notion that providing one or more additional Carfax reports is an appropriate remedy for people who bought a Carfax report based on Carfax's misrepresentations about the scope and value of the report is difficult to comprehend. If the purchased reports did not provide the information that class members wanted, and Carfax still cannot provide that information, supplying another incomplete or unreliable report is not a fair, adequate, or reasonable remedy. It is no remedy at all.

The Carfax vouchers also give Carfax an unwarranted advantage over its competitors. Vehicle history information is available from other companies that offer similar services for the same price. For example, absent the settlement, many class members interested in purchasing vehicle history reports in the next two to three years may prefer to purchase them from AutoCheck, *see*

www.autocheck.com, which offers vehicle reports at the same prices as Carfax, has access to the same public sources of information as Carfax, and, within the period when the class relief would be available, might even prove to be superior to Carfax. Other competitors, too, such as DMV.ORG (a project of eDriver, Inc.), sell vehicle history reports for the same prices as Carfax reports. If approved, therefore, the proposed settlement might shift potential customers that might otherwise choose these or other companies rather than Carfax for the next two to three years. In this way, the settlement threatens to give Carfax a leg up on its competitors, reduce competition, and stifle innovation that could lead to lower prices for consumers and better vehicle reports.

2. Inspection coupon: Similarly, the voucher for $20 off an inspection by one particular company, SGS SA, within six months of final approval of the settlement will be of no value to class members who do not want to buy a used car this year. Although the majority of class members are likely to own cars now and could have their current car inspected, the point of doing so is illusive. Some class members, such as objectors Anderson, Friedberg, Moseley, and Wolfe, will have already had inspections. Anderson Aff. ¶ 6; Friedberg Aff. ¶ 10; Moseley Aff. ¶¶ 5, 10; Wolfe Aff. ¶ 2. And if the class member bought their used car from Carmax (a company unaffiliated with Carfax), a comprehensive inspection was already included in the price of the car. *See* www.carmax.com/dyn/usedcar/cqi/ cqi.aspx (over 2 million used cars sold). For others, who bought a used car without an inspection, the value of having an inspection now is minimal because, even if the inspection finds signs of a major accident that the Carfax report failed to indicate, the class member already owns the car and so the information would be of little use to him or her now. Still others will no longer own the car for which they got the Carfax report, and therefore have no need of the inspection.

Even if a class member wanted an inspection of the car that they already own, SGS generally charges $99.50 for an inspection. *See* http://sgs-ebay.sgsauto.com/Order_Inspection.htm. Auto body shops convenient to many class members, however, may perform a comparable inspection for far less. Wolfman Aff. ¶ 5. Accordingly, at least some class members who wanted an inspection not

only would have to spend money to claim the inspection "benefit," they would lose money if they were to use the inspection coupon, as opposed to having an inspection done by a local mechanic. In addition, some class members, such as objectors Lau, Thurman, Thuss, and Wolfman, would prefer to use mechanics already known to them, as opposed to the SGS chain with which they are unfamiliar. Lau Decl. ¶ 4; Thurman Aff. ¶ 4; Thuss Aff. ¶ 5; Wolfman Aff. ¶ 5.

Moreover, the SGS webpages entitled "What does SGS inspect?" and "Order an Inspection" and the SGS sample inspection page state that an SGS inspection "is not a substitute for an examination by a qualified mechanic at a properly equipped repair facility." *See* http://sgs-ebay.sgsauto.com/vehicle_inspection.htm; http://sgs-ebay.sgsauto.com/order_inspection.htm; http://sgs-ebay.sgsauto.com/pdf/VINci_Online_CR_2003.pdf. This disclaimer further calls into question that value of an SGS inspection, and thus of the $20 coupon. In addition, objector Moseley's experience with an SGS inspection (ordered through Carfax) indicates not only that an SGS inspection is "not a substitute for an examination by a qualified mechanic," but that it is an entirely worthless inspection, failing to identify even the most obvious problems with a vehicle. *See* Moseley Aff. ¶ 5-10 (Carfax/SGS inspection failed to identify numerous cosmetic and mechanical problems, including that car was missing its back seats).

The real beneficiary of the $20 coupon is not the class, but SGS, which gets free advertising and possibly new customers. *See Carnegie*, 371 F. Supp. 2d at 957 ("The coupons here appear to be the classic free advertising, which [defendant] is free to provide but which cannot be given value in considering the reasonableness of a settlement."). Furthermore, the settling parties have described SGS as a "third party," *see* Sett. Agmt. 6 (¶ I.V.1); Notice (emailed) at 1, but they have apparently failed to mention that Carfax and SGS have a pre-existing relationship. Carfax's website allows customers to order a "Carfax inspection," but objector Moseley was told by Carfax that the Carfax inspection performed for him was actually done by SGS. Moseley Aff. ¶ 12 & Exh. C (email message from SGS describing itself as "in Partnership w/ Carfax"). Moreover, the inspection pages on the Carfax website, which repeat largely verbatim the information on SGS's website and display

identical photos, suggests that the two companies have relationship that pre-exists this settlement. *Compare* https://secure.carfax.com/car_inspection/prePurchaseInspection150Point2.cfm, *with* http://sgs-ebay.sgsauto.com/vehicle_inspection.htm. If Carfax's existing contract with SGS (or one entered into in connection with this settlement) provides for Carfax to receive from SGS a portion from each inspection fee paid by customers referred by Carfax, then Carfax may be making money off of the settlement each time a class member uses the $20 coupon. The Court should require disclosure of the relationship between Carfax and SGS and the amount of any money that Carfax will be paid for SGS inspections performed for class members. That the defendant would earn money from a settlement that will provide such speculative value to class members would be further reason to find that the settlement is not fair, adequate, or reasonable.

3. Uniform treatment of class members. The settlement is also not fair, adequate, and reasonable because, even if the coupons had some value to some class members, the settlement will provide no more relief to class members who purchased many Carfax vehicle reports than to members who purchased only one. The failure to distinguish among different categories of class members is further reason to disapprove the proposed settlement. *Cf. In re Mexico Money Transfer Litig.*, 267 F.3d at 746 (class members entitled to receive a coupon for each transaction with defendant); *In re Western Union Money Transfer Litig.*, 2004 WL 3709932, *4 (E.D.N.Y. 2004) ("Members of Subclass One are to receive a $4.00 coupon for every two qualifying transactions they made. Members of Subclass Two are to receive a coupon with a face value of approximately $3.25 in the appropriate local currency for every one qualifying transaction they made. Coupons will be made available on a claims-made basis"); *Shaw v. Toshiba Am. Info. Sys.*, 91 F. Supp. 2d 942, 983 (E.D. Tex. 2000) (settlement beneficial to class where, in addition to other benefits, purchasers of more than one Toshiba computer received more than one settlement coupon); *but see Carnegie*, 371 F. Supp. 2d at 957 & n.4 (disapproving settlement that, among other things, provided that class members would receive one coupon for each purchase, up to three coupons, that coupons would be attached to mailed notice, and that unclaimed coupons would be redistributed).

C. The Injunctive "Relief" Perpetuates The Misrepresentation On Which The Lawsuit Is Based.

The complaint is based on Carfax's misrepresentation about the scope of the information in its database. The complaint alleges that Carfax "purports to conduct accident report searches for used vehicles on a nationwide basis," but that it "does not and cannot perform accident vehicle report searches in almost half of the states." Am. Compl. ¶ 8. It further alleges that "Carfax goes to great lengths to avoid specifically" identifying the states for which it does not have the accident data. *Id.* ¶ 10. Carfax's failure to make clear (and the suggestion to the contrary) that it does not have data from all states and the failure to identify the states from which it does not have accident data form the crux of the complaint. *See id.* ¶¶ 8-10, 18-22, 24-25, 29.

The settlement's injunction would require Carfax to make certain changes to or to maintain certain aspects of its website for two years from approval of the settlement. The injunctive aspects of the proposed settlement do not cure either of the related problems identified in the complaint. *Compare In re GM Pick-up Truck*, 55 F.3d at 811 (rejecting settlement because, among others reasons, the relief would "not address the safety defect that formed the central basis of the amended complaint filed barely four months before the settlement"). Indeed, the changes perpetuate the primary misrepresentations alleged in the complaint. In addition, at least two of aspects of the injunction would not require Carfax to do anything that it does not already do. Sett. Agmt. 4 (¶ O.3.d. & g.). And several aspects of the injunction would benefit Carfax, to the detriment of the class.

1. As a preliminary matter, the two-year injunction offers no benefit to class members, who by definition are people who have already bought Carfax reports, not people who plan to buy them in the next two years. Thus, even if the changes were helpful to customers, "[i]t is future customers who are not plaintiffs in this suit who will reap most of the benefit from these changes." *Synfuel Tech.*, 463 F.3d at 654. "The fairness of the settlement must be evaluated primarily based on how it compensates class members for [their] past injuries," *id.*, not on benefits provided to future

customers. Because the injunctive relief does not benefit the class, it should not be a factor in the Court's evaluation of the fairness of the proposed settlement.

2. The settlement's injunction would require Carfax to say on its homepage: "Carfax Vehicle History Reports are based on information supplied to CARFAX. CARFAX may not have the complete history of every vehicle." Sett. Agmt. at 3 (¶ O.3.a). Then, above the order button for vehicle history reports, Carfax would state "By processing my order, I agree to the terms of the Customer Agreement and understand that Carfax may not have the complete history of every vehicle." *Id*. at 4 (¶ O.3.d.). These two statements are the only aspects of the injunctive relief that even come close to addressing the issue that forms the basis of the class complaint. Yet although they relate to the issue, they do not ameliorate the problem. In fact, far from remedying the misrepresentations, the statements themselves are misleading. By saying that Carfax "may" not have the complete history for every vehicle, the statements suggest that Carfax *will* have the complete history of many vehicles. In fact, Carfax knows for certain that it does not have the complete history of a large number, perhaps even most, of the vehicles for which Carfax provides vehicle history reports.

Further, the statements are no more specific or useful to individuals visiting the website than the statements of which the named plaintiff complains because they give purchasers no idea in what way a Carfax report "may" not be "complete." They certainly do not put any purchaser on notice that Carfax knows that it has incomplete accident data from nearly half of the states. The most likely reading of the statements is that Carfax is simply covering itself by making the general point that a Carfax report may not be perfect, whether because some accidents are never reported to any authority or because of human or technical errors somewhere along the line. However the statements are construed by purchasers, it is far-fetched to suggest that they correct the misleading statements about the scope of the Carfax database on which the lawsuit is based.

In addition, the complaint repeatedly complains of Carfax's failure to disclose the states for which it does not have accident data and identifies as "false, deceptive, and materially misleading"

the statement that Carfax “cannot specify whether an accident in your state would be covered.” Am. Compl. ¶ 25. Although the complaint itself is able specifically to identify 23 jurisdictions (22 states and the District of Columbia), *id*. ¶ 23, the proposed settlement does not require Carfax to make this disclosure to potential customers. Accordingly, the problem at the core of the lawsuit is not remedied by the settlement. To the contrary, the settlement seems to sanction it.

3. The settlement would also require Carfax to make several changes to encourage purchasers to look at the Carfax Customer Agreement. (In this regard, one provision would require Carfax to do something that its website already does. *See* Sett. Agmt. 4 (¶ O.3.d.)) The Customer Agreement itself says very little, but it does refer customers to the “terms and conditions.”[2] The only aspect of the terms and conditions that arguably relates to the subject matter of the lawsuit is the “Disclaimer of Warranty; Limitation of Liability,” which appears on page three of the six-page document. Among a host of broad disclaimers and legal boilerplate, this section states that Carfax makes no warranty as to the “accuracy or reliability of any information provided” through its website. This warranty disclaimer is hardly a remedy for the misrepresentations alleged in the

---

[2]The terms and conditions as stated on the page for purchasing a single vehicle history report appear at http://carfax.com/cfm/legal_disclaimer.cfm.

The full Customer Agreement as it appeared on March 19, 2007, on the 30-day unlimited Vehicle History Reports order page stated:

I agree to pay a one-time charge of $24.99 (USD), plus applicable sales tax, according to my card issuer agreement. This 30 day Unlimited CARFAX Reports Plan is valid for 30 days from the date the first report is run, and is intended for my personal use only. Commercial use, resale and redistribution of CARFAX Reports is strictly prohibited and may lead to deactivation of my account and the imposition of additional charges for CARFAX Reports. I agree that my CARFAX Report purchase shall be governed by all the Terms and Conditions of use of the CARFAX Web Site.

If you purchased the Unlimited Account and are not 100% satisfied you qualify for a refund if:

> You have not, nor has any member of your household, received a refund from CARFAX within the last 12 months.

> You have run two or less CARFAX Reports on the Account.

> Your refund is requested within 30 days of purchase.

> A refund will not be provided if you have used the CARFAX Report or service for commercial purposes or otherwise violated the terms of use.

https://secure.carfax.com/cfm/CCard_Options.cfm?page_type=&request_type=multiple&product=UCP&Vehicle=&VIN=&Partner=SGM_R_NCR_01&email=&zipcode=&ClickID=&SiteID=&Suggest=N&FID=27298&affiliateId=&subId=&bannerName=.

complaint. As quoted in the complaint, Carfax says near the top of its homepage that "CARFAX searches its nationwide database and provides a detailed vehicle history report in seconds." Am. Compl. ¶ 18; www.carfax.com (Mar. 7, 2007). This homepage statement, which, as the complaint points out, "suggests that Carfax could search for police accident records on a nationwide basis," Am. Compl. ¶ 18, is more noticeable, more concrete, and more meaningful to purchasers than the general warranty disclaimer. The disclaimer is simply not an effective remedy for Carfax's implicit and explicit representations, as alleged in the complaint, *id.* ¶¶ 8, 18, 22, that Carfax has information from every state. Accordingly, an injunction ordering website changes to try to encourage customers to read the Customer Agreement and the terms and conditions referenced therein provides no remedy to the class for the problems identified in the complaint.

Instead, what this aspect of the injunction would do is benefit Carfax. Based on our review of the case file, it appears that the Carfax terms and conditions are at issue in the case only with respect to Carfax's argument that it can only be sued in Virginia. *See* Defs' Mtn to Dismiss or Stay the Action, Oct. 13, 2004; Judgment Entry, Mar. 11, 2005. In denying that motion, the Court found that the forum selection clause contained in the terms and conditions was not binding on Carfax customers because it was not "reasonably conspicuous." Judgment Entry at 5. Therefore, to the extent that the settlement makes the terms and conditions—and thus the forum selection clause—more conspicuous, it benefits only Carfax. Surely, it is no benefit to class members Crabtree and Lau, who live in Hawaii, or class member Paulson, who lives in Minnesota, or thousands of Carfax customers nationwide for the settlement to help buttress Carfax's argument that it can only be sued in Virginia. For many class members, enforcement of such a provision would likely preclude a suit altogether. Moreover, Virginia apparently would not permit class actions against Carfax. *Id.* at 4. In this way as well, the injunction would limit class members' ability to sue Carfax in the future. To be sure, the forum selection clause might nonetheless be unenforceable as an adhesion contract and an unconscionable restriction on the right to sue, and the fact that the terms and conditions are not now "reasonably conspicuous" is bad for customers. Nonetheless, given that

the provisions of the settlement that require more obvious disclosure do not relate to the subject matter of the lawsuit, they seem plainly intended to aid Carfax in future suits, not to aid customers, much less the members of this class. Accordingly, this aspect of the injunction does not support the fairness, adequacy, or reasonableness of the proposed settlement.

4. The settlement would also require that, for two years after settlement approval, Carfax would provide a refund of the price of a Carfax report if requested within 90 days of purchase of the report. Settl Agmt. 4 (¶ O.3.b). The prerequisites for obtaining a refund are not set forth. Carfax currently offers a 30-day guarantee, subject to certain conditions. *See* www.carfax.com/cfm/mbg_terms.cfm. If the settlement requires Carfax to extend the 30 days to 90, then it would be providing a benefit to *future* Carfax customers—although, again, not to class members, all of whom purchased Carfax reports more than 90 days ago. *See* Notices at 1 (class defined to include individuals who purchased Carfax reports prior to October 27, 2006.

Finally, the settlement would also require that Carfax "continue" to indicate near the order button the existence of "any 'no risk money back guarantee.'" Sett. Agmt. 4 (¶ O.3.h.). Notably, this provision of the settlement would not require Carfax to provide a money back guarantee, but only to indicate near the order button that it did so, *if* it did so. In addition, this provision would only require Carfax to "continue" to do something that it already does. And if Carfax chose to offer "any guarantee," Carfax would either provide a "button on the www.carfax.com website to print" the terms of the guarantee on its website or would include the terms and conditions in a confirming email sent to the customer after he or she registered for the guarantee. This provision does not provide anything of value to anyone. Although there is no special button to do so, the terms and conditions of Carfax's current guarantee, once on the screen, are easily printable. Moreover, once again, this provision of the agreement offers no value to class members, all of whom purchased their Carfax reports at least five months ago and perhaps many years ago.

III. The Failure To Provide Individual Notice To The Majority Of The Class Exacerbates The Poor Prospects For Coupon Redemption and Independently Requires That the Settlement Be Rejected.

Making matters worse, the settling parties have failed to provide notice of the proposed settlement to the vast majority of the class. This failure compounds the proposed settlement's inadequacy because it means that most of the class members will have their claims released in exchange for nothing: They have been deprived any meaningful opportunity to object, opt out, or redeem even the purported "benefits" available under the settlement.

Rule 23's requirement is clear: Notice of a proposed settlement "*shall* be given to *all* members of the class." Ohio R. Civ. P. 23(E) (emphasis added). And where, as here, a court has conditionally certified a settlement class in a consumer fraud case seeking primarily monetary relief and has given class members a right to opt out, the notice must be "the best notice practicable under the circumstances, including *individual notice to all members who can be identified through reasonable effort*." Ohio R. Civ. P. 23(C)(2) (emphasis added).[3]

In addition to Rule 23's stringent requirements, notice must also satisfy constitutional standards. The touchstone for procedural due process analysis remains the United States Supreme Court's decision in *Mullane v. Central Hannover Bank & Trust Co.*, which held that "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be

---

[3] This requirement applies to all class actions maintained under Rule 23(B)(3). Although the settling parties have not identified the subsection of Rule 23 under which they sought conditional certification, the complaint itself identified this case as a Rule 23(B)(3) class action. Am. Compl. ¶ 38 (discussing Rule 23(B)), *id.* at VII (seeking recision and/or money damages). And, in any event, a consumer fraud class action with a right to opt out is the paradigmatic example of a case that falls under Rule 23(B)(3). *See* Ohio R. Civ. P. 23, Staff Notes (listing, as an example of a Rule 23(B) case, "a case where a fraud has been perpetrated on a large number of persons"). The other subsections of Rule 23 are inapplicable. *See Warner v. Waste Management, Inc.*, 36 Ohio St. 3d 91, 95, 521 N.E.2d 1091 (Ohio 1988) (Rule 23(B)(1)(a) is not appropriate for a case primarily seeking to recover monetary relief); *Gottlieb v. City of South Euclid*, 157 Ohio App. 3d 250, 258, 810 N.E.2d 970, 977 (Ohio App. 2004) (Rule 23(B)(1)(b) "applies where only a limited amount of money is available and there is a risk that separate actions would deplete the fund before all deserving parties could make a claim."); *Wilson v. Brush Wellman, Inc.*, 103 Ohio St. 3d 538, 541, 817 N.E.2d 59, 63 (Ohio 2004) (To qualify for Rule 23(B)(2), "[t]he action must seek primarily injunctive relief."). In short, "the complaint in this case is framed as a Rule 23(B)(3) action" and therefore invokes "its heavy notice requirements which [the parties] have intimated they cannot meet." *Gross v. Standard Oil Co.*, 45 Ohio Misc. 45, 50, 345 N.E.2d 89, 93 (Ohio Ct. Com. Pl. 1975).

such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." 339 U.S. 306, 315 (1950); *see Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable."). As explained below—and as detailed in the attached affidavit of leading class action notice expert Todd Hilsee— the notice program in this case failed to satisfy these standards.[4]

A. The Settling Parties Offer No Explanation For Their Failure To Provide Individual Mailed Notice.

The most common form of individual notice is notice by mail. Remarkably, the settling parties have not attempted any mailed notice to the class. If the defendants have records containing their customers' names and mailing addresses, it is difficult to understand why mailed notice, supplemented by efforts to update older address data, would not have been the best practicable notice. Ironically, as Mr. Hilsee observes, one of the defendants in this case, R.L. Polk, is actually in the business of selling lists of names and addresses, culled from motor vehicle records, for the purpose of creating and updating class notice mailing lists in other cases. Hilsee Aff. ¶ 19.a. Thus, "Carfax could have cross-tabulated the names of those people in its customer records" with the data from R.L Polk to obtain the best available address information. *Id.* ¶ 19.d. "[T]he result could have been individual notice provided to a large percentage of the class." *Id.*

---

[4]"Mr. Hilsee is a highly regarded expert in class action notice who has extensive experience designing and executing notice programs that have been approved by courts across the country." *Turner*, 2007 WL 283431, at *6 n.10. He has designed notice programs in hundreds of class actions, including some of the largest cases in the history of class action litigation. He has pioneered the methodology that many courts have used to calculate the adequacy of notice–that is, to calculate the percentage of class members that will be reached through audience coverage analysis. "Mr. Hilsee has worked with the Federal Judicial Center to improve the quality of class notice. His work has been praised by numerous federal and state judges." *Carnegie*, 445 F. Supp. 2d at 1034 n.2. He has also been appointed by the United States government, the Canadian government, and international organizations to design and implement notice programs, including notice for the largest claims process in history. He has spoken, written, and testified widely on notice issues, and he and his associates have written numerous articles on notice and due process in the class action context. *See, e.g.*, Hilsee, Wheatman, & Intrepido, *Do You Really Want Me to Know My Rights? The Ethics Behind Due Process in Class Action Notice is More Than Just Plain Language: A Desire to Actually Inform*, 18 Geo. J. Legal Ethics 1359 (2005).

Neither the size of the class nor the size of the claims in this case justifies the failure to provide mailed notice. The United States Supreme Court has held that mailed notice is required even where the number of class members is staggering and the individual interests at stake are small. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) ("Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort," even where most of the 2.25 million class members had small claims). The Court's conclusion in *Eisen* was based on language in Federal Rule 23 that is identical to Ohio's Rule 23 and was reinforced by the fact that the rule also incorporates the *Mullane* due process standard. *Id*. at 173-75. The same conclusion applies to class actions seeking monetary relief in the Ohio courts. *See Toledo Fair Hous. Ctr v. Nationwide Mutual Ins. Co.*, 94 Ohio Misc. 2d 127, 130, 704 N.E.2d 648, 650 (Ohio Com. Pl. 1996) (under *Eisen* and Ohio's Rule 23, "individual notice is required for those class members whose names and addresses can be determined by reasonable effort"); *see also Thompson v. Midwest Found. Indep. Physicians Ass'n*, 124 F.R.D. 154, 157 (S.D. Ohio 1988) (where "the names and last known address of all class members were available from [the defendant's] business records," mailed notice was "the best notice practicable under the circumstances"). In short, "some effort is required to develop a mailing list of class members to receive individual notice." *Toledo Fair Hous. Ctr*, 94 Ohio Misc. 2d at 131, 704 N.E.2d at 651. Here, the settling parties made no such effort.

B. Email Notice Was Sent To Only A Fraction Of The Class And, In Any Event, Is No Substitute For Mailed Notice.

The settling parties sent notice by email to some class members. That aspect of the notice program was deficient for several reasons. *See* Hilsee Aff. ¶¶ 24-25 (detailing defects with email notice). Perhaps the most glaring and inexplicable defect is that the emails were directed only to those class members for whom Carfax has email addresses and "who purchased a Carfax Vehicle History Report directly from Carfax *within the last year*." Sett. Agmt. 7 (¶ III.C.) (emphasis added). Because the proposed settlement would release the claims of consumers nationwide who have done

business with Carfax over a period of at least nine years—from 1998 through October 27, 2006—there is no excuse for sending email notice only to those customers who have done business with Carfax in a single year. Even if every email reached every intended recipient—which, as explained below, is highly unlikely—this provision guaranteed that at most only a fraction of the class would have received notice.[5]

Absent unusual circumstances, such as the impossibility of obtaining postal address information, email is generally not an appropriate substitute for mailed notice. To be sure, email offers a cheap and easy means of supplementing mailed notice. *See* Rossman and Delbaum, *Consumer Class Actions* §10.3 at 164 (2006) (suggesting that written notice may be "supplemented by e-mail notice to at least some class members as part of a 'belts and suspenders' approach"). Notice "by email alone, however, has been authorized only in rare circumstances." *D.R.I., Inc. v. Dennis*, 2004 WL 1237511, at *1 (S.D.N.Y. 2004) (discussing adequacy of service of process under *Mullane* standard). Particularly when the goal is to send mass notice to consumers, email is "less reliable than mail":

> Some consumers have email accounts they do not check regularly. Consumers change email addresses frequently, in some instances more frequently than they move. Often there is no system of forwarding for email. A consumer may terminate an account and not open another one. In contrast, regular mail is typically delivered six days a week and is forwarded. Only the homeless have no address at all.

Braucher, *Rent-Seeking and Risk-Fixing in the New Statutory Law of Electronic Commerce: Difficulties in Moving Consumer Protection Online*, 2001 Wis. L. Rev. 527, 539 (2001).

---

[5]The settlement also failed to require any follow-up action with respect to emails that were returned as undeliverable. *See* Hilsee Aff. ¶ 24.d. The Supreme Court has held that due process requires such efforts. *See Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708 (2006). Accordingly, where email notice is utilized, mailed notice should at least be sent to all class members to whom email is undeliverable. *See Browning v. Yahoo! Inc.*, Slip Copy, 2006 WL 3826714, at *8 (N.D.Cal. 2006) ("[I]n the event that an Email Notice sent to a Settlement Class Member is bounced back as undeliverable, the [a]greement provides for notice by standard mail. The notice program also has comprehensive and adequate procedures for identifying the names, email addresses, and postal addresses for Class Members, so that individual notice will be directed to all Class Members who can be identified through reasonable effort.").

The biggest hindrance to using email for class notice is the ever-increasing volume of unwanted commercial email, commonly known as "spam." *See* Mossoff, *Spam—Oy, What a Nuisance!*, 19 Berkeley Tech. L.J. 625, 631-32 (2004). Congress has concluded that consumers' "receipt of a large number of unwanted messages . . . creates a risk that wanted electronic mail messages, both commercial and noncommercial, will be lost, overlooked, or discarded amidst the larger volume of unwanted messages, thus reducing the reliability and usefulness of electronic mail to the recipient." 15 U.S.C. § 7701(a)(4) (congressional findings accompanying CAN-SPAM Act of 2003). Despite legislative efforts, the problem has increased exponentially in recent years. *See* Arora, *The CAN-SPAM Act: An Inadequate Attempt to Deal with a Growing Problem*, 39 Colum. J.L. & Soc. Probs. 299 (2006); Zeller, *Law Barring Junk E-Mail Allows a Flood Instead*, N.Y. Times, Feb. 1, 2005, at A1 (lamenting that within one year of the passage of federal anti-spam law, spam accounted for 80% or more of all email sent). Consumers' responses to spam—such as changing email addresses more frequently and making use of filters—only makes email an even less effective tool for class action notices. *See* Kelman, *E-Nuisance: Unsolicited Bulk E-mail at the Boundaries of Common Law Property Rights*, 78 S. Cal. L. Rev. 363, 394 (2004) ("[E]ven after a volume of spam is automatically identified and sorted, the filters are overinclusive, throwing out desirable mail with the spam.").

In this case, the email notices were especially likely to fall prey to these obstacles because they were "not even sent by 'Carfax,' a sender that class members may have recognized." Hilsee Aff. ¶ 24.f. "Instead, the email Notice was sent by 'settlement@tgcgi.com.' Because that sender was unknown to the Class members, or otherwise provided no sense of being legitimate or important, the email would very likely have been deleted and unread by many recipients as they sorted through their email inboxes looking to filter out spam (if indeed the email was not caught and deleted even before reaching the Class members' inbox by automated server-level spam filters, or user-level spam filters)." *Id*. In short, "[b]ecause of the tremendous volume of junk or spam email messages sent today, it is too much to suppose that un-requested non-personal email messages, sent by entities

unknown to class members, are actually received, opened, or read." *Id.* ¶ 24.c & n.8 (citing statistics showing that spam constituted 88.7% of all emails sent in October 2006 and 93% of all emails sent in February 2007).

The ineffectiveness of the email notice is reflected by the fact that several Objectors who bought Carfax reports in the year preceding the date of final approval received no notice of the proposed settlement. *See* B. Brown Aff. ¶¶ 2, 3; Crabtree Aff. ¶¶ 2, 9; Faulkner Aff. ¶¶ 3, 6; Lau Aff. ¶ 2, 6. Objector Bernard Brown, for example, has purchased Carfax reports on "literally hundreds of occasions prior to October 27, 2006, with over 15 of those purchases occurring in 2006." B. Brown Aff. ¶ 2. Nevertheless, Mr. Brown "never received an email notice about the settlement of this case," although his email address has remained the same. *Id.* ¶ 3.

C. One-Time Publication In *USA Today* And *Investor's Business Daily* Does Not Provide Meaningful Notice.

The settlement notice appeared once in *USA Today* and once in *Investor's Business Daily*. Settl. Agmt. 6, 7 (¶¶ I.T, III.A). There can be no serious argument that mere publication —particularly the perfunctory and ineffective publication that occurred here, *see* Hilsee Aff. ¶¶ 28-30—can make up for the failure to provide adequate individual notice. The United States Supreme Court could have been speaking about the publication notice in this very case when it warned that "when notice is a person's due, process which is a mere gesture is not due process." *Mullane*, 339 U.S. at 315; *see Greenfield v. Village Indus., Inc.*, 483 F.2d 824, 830 (3d Cir. 1973) (two-time publication in *Wall Street Journal* and *Philadelphia Evening Bulletin* "was insufficient notice under any standard of fairness, justice, or due process"); Rossman & Delbaum, *Consumer Class Actions* § 10.1.4 at 137 ("If class members cannot be located by resorting to the Internet, credit records, postal records, motor vehicle records, and similar sources, they probably cannot be found, and notice by publication is a meaningless and expensive gesture."); *cf. In re Orthopedic Bone Screw Prods. Liab. Litig.*, 246 F.3d 315, 327 & n.11 (3d Cir. 2001) (excusing class member's late filing because he could not be blamed for his "failure to note a small advertisement run once on page 50

of a newspaper he does not receive").

Just last year, in *Jones v. Flowers*, the United States Supreme Court reiterated that publication notice alone is acceptable when other measures are unavailable—for example, when there is no way to obtain someone's address. The Court explained that "'[c]hance alone' brings a person's attention to 'an advertisement in small type inserted in the back pages of a newspaper,' and that notice by publication is adequate only where 'it is not reasonably possible or practicable to give more adequate warning.'" 126 S. Ct. at 1720 (internal citations omitted) (quoting *Mullane*, 339 U.S. at 315, 317). Here, the "chance" that the publication advertisements in this case would have come to a class member's attention is not a matter of pure speculation. Audited circulation and audience readership data, combined with demographic and media usage data for adults who purchased used cars, indicates that one-time publication notice in *USA Today* and *Investor's Business Daily* would reach at best only 2.41% and 0.18% of used car purchasers, respectively. Hilsee Aff. ¶ 26. It should come as no surprise, then, that none of the 18 Objectors saw the publication notices. Indeed, the publications selected were not only certain to reach no more than a minuscule percentage of class members, but were also particularly poor selections to reach the demographic audience of used car buyers. *Id*. ¶ 28 (*USA Today* "generates much of its readership among business travelers" and that *Investors' Business Daily* serves "one of the more upscale audiences" compared to other publications). As in *Jones*, such ineffective "publication was not constitutionally adequate under the circumstances presented here because . . . it was possible and practicable to give" more adequate notice. 126 S. Ct. at 1720.

D. The Settlement Website Is Useless As A Means of Notice (And Virtually Useless For Any Other Purpose).

The settlement provides that the settlement administrator will establish a website containing "further information" about the proposed settlement. Settl. Agmt. 7 (¶ III.B). That website, located at www.westcarsettlement.com, is all but useless in providing notice of the settlement to class members. To begin with, unless a class member already knows about the settlement—that is, unless

the class members has already received notice—that class member would have no way of knowing about or reaching the website. It would have been more far more useful to provide notice of the settlement on Carfax's homepage, www.carfax.com, which is at least likely to be visited by those class members who are repeat customers of Carfax. *See* Rossman & Delbaum, *Consumer Class Actions* § 10.4 at 164 ("Posting the notice on the defendant's website is also inexpensive and is likely to attract notice, at least from certain class members, and perhaps from the media. In one action involving America Online (AOL), notice of the settlement popped up on the screen whenever any of its subscribers logged onto AOL.").

In any event, the only information provided on the website consists of the email and publication notices, the two-page preliminary approval order, and a claim form. The settlement agreement itself is not provided. *See* Hilsee Aff. ¶ 24.e (opining that failure to provide a copy of the settlement agreement itself "borders on the unconscionable in this day and age"). The absence of the settlement agreement made it impossible for even the relatively few class members who did receive notice to make a meaningful choice about whether to object, opt out, or participate in the settlement. With respect to the injunctive relief, for example, the most that can be discerned from the website is that Carfax will be ordered "to make certain changes in its disclosures and contracting process with customers." Notice (email version) at 1. Class members who want to know what those "certain changes" are before deciding how to exercise their rights are left completely in the dark.

* * *

In summary, the notice in this case was "woefully inadequate, and did not satisfy due process obligations, let alone statutory notice requirements." Hilsee Aff. ¶ 34; *see id.* ¶ 36 ("I have studied numerous communication efforts [in class actions]. . . . Of all these experiences, the communication of Class members' rights and options in the *West* settlement is among the least effective."). Objectors do not mean to suggest that a revised notice regime could render this settlement—given all of its substantive defects—fair, adequate or reasonable. But the failures in notice compound the inadequacy of the settlement because they ensure that most of the class members release their claims in exchange for nothing at all—not even the knowledge they have released potential claims.

CONCLUSION

The proposed settlement should be rejected.

Dated: March 26, 2007

Respectfully submitted,

____

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

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

Counsel for Objectors Anderson, *et al.*

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March, 2007, I served the foregoing OBJECTIONS OF CLASS MEMBERS ANDERSON, *ET AL.*, TO PROPOSED CLASS ACTION SETTLEMENT and the accompanying affidavit of Todd Hilsee on all parties required to be served by causing a true and correct copy thereof to be sent by overnight mail to counsel at each of the following addresses:

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

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

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

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

____
Ronald Frederick