#REPRESENT
A Project of the Consumer Education Foundation

October 8, 2018

Ms. Malgorzata Posnow-Wurm
DG JUST E2 Consumer Marketing and Law Unit
Directorate-General Justice and Consumers
European Commission

Dear Ms. Posnow-Wurm:

It was a pleasure to meet you and your colleagues in Brussels last month.

Please find enclosed our suggestions concerning the draft *Proposal for a Directive of the European Parliament and of the Council on Representative Actions for the Protection of the Collective Interests of Consumers, and Repealing Directive 2009/22/EC*. We have presented our suggestions as redlines to the text of the actual proposed Directive, followed by explanatory comments justifying the redlines.[1] The exhibits to our proposed revisions are also enclosed.

The proposed Directive is an important step towards providing consumers in the EU with long-overdue protections against unjust and unfair conduct in the EU marketplace. However, we believe that changes to the draft are necessary to ensure that the new "collective redress" procedures operate efficiently and that consumers are able to take meaningful advantage of them.

The major revisions that we propose include:

- Empowering consumers and qualified entities to hire attorneys on a contingency basis;
- Permitting individuals, in addition to qualified entities, to bring representative actions;
- Removing unnecessary and possibly arbitrary limitations that would prevent otherwise qualified nonprofit organizations from being classified as qualified entities;
- Creating a system for consolidating multiple similar representative actions filed against one defendant;
- Enabling consumers and qualified entities to obtain the evidence they need in order to support a determination that the defendant engaged in wrongful practices;

[1] These comments are submitted on behalf of #REPRESENT, a project of the Consumer Education Foundation. The Consumer Education Foundation is a California nonprofit consumer advocacy organization organized under United States Internal Revenue Code, 26 U.S.C. § 501(c)(4).

- Eliminating the "two-phase" process that would require individual consumers to pursue their own legal actions after a court or administrative authority has definitively found that a defendant has violated the law;
- Making final declaratory decisions, redress orders, and settlements binding against all parties so that consumers are automatically included in any decision affecting their rights, unless they choose not to participate;
- Setting forth specific factors that courts and administrative authorities can use to assess the fairness of a proposed settlement of a collective redress action;
- Requiring information about a final decision, redress order, or settlement to be sent individually to each affected consumer in an understandable, noticeable manner;
- Authorizing courts and administrative authorities to order a defendant to pay exemplary damages for intentional violations of the law, with the funds directed to supporting judicial systems;
- Prohibiting the unnecessary use of "claim forms" that require consumers to submit paperwork in order to recover redress or settlement benefits;
- Setting an objective standard for when redress funds should be directed to a public purpose rather than to affected consumers; and
- Allowing consumers affected by a settlement to voice their concerns about a settlement to the court or administrative authority.

The changes that we suggest will enhance the ability of EU consumers and consumer organizations to protect their rights, ensure that wrongdoers are held accountable for violations of the law, and strengthen the integrity of the courts and administrative authorities.

We are aware that the U.S. Chamber of Commerce and its Institute for Legal Reform has been misrepresenting the U.S. class action system in communications with the EU Commission and Parliament, and in Member States, in order to undermine support for the Directive and weaken its provisions. This is troubling, but not in any way surprising, since the U.S. Chamber of Commerce has long engaged in a well-funded attack *in the United States* on consumer protection laws generally, and on the class action system in particular, on behalf of its clients – the multinational corporations that are often accused of violating consumer rights. The "safeguards" the U.S. Chamber of Commerce has proposed are directly detrimental to the goals of the Directive and would disable EU consumers' ability to protect their interests through collective redress. We address the Chamber's arguments in our comments and explain why their suggestions would preclude harmed consumers from having its day and court and preventing, or obtaining redress for, wrongdoing.

This is not to say that the judicial redress process in the United States has no flaws – like most aspects of democracy, it can be abused. In our suggestions and comments, we have made proposals that would strongly protect against such abuses and enhance the collective redress process. Our goal – and of course the Commission's – is to strengthen the integrity of the consumer protection system. More is at stake here than a set of procedures. The rule of law is a fundamental component of civil society. We know from experience that when

citizens lose confidence in the ability of their governmental institutions to protect them from wrongdoing, democracy itself is at risk. Indeed, later this year, #REPRESENT will release a report that will examine current consumer protection laws in the United States and propose reforms needed to protect the rights of U.S. consumers in the globalized, digital marketplace of the 21st Century.

Thank you for the opportunity to submit our comments. Please do not hesitate to contact us should you wish to discuss our suggestions or require any further information.

Sincerely,

Harvey Rosenfield

Laura Antonini

Comments by #REPRESENT
A Project of the Consumer Education Foundation
October 8, 2018

Chapter 1

Subject matter, scope and definitions

Article 1

Subject matter

1. This Directive sets out rules enabling representative parties and qualified entities to seek representative actions aimed at the protection of the collective interests of consumers, while ensuring appropriate safeguards to avoid abusive or frivolous litigation.

Comment: *In addition to qualified entities, private parties (referred to as "representative parties" throughout this document), should be authorized to bring lawsuits aimed at the protection of the collective interest of consumers. The utility of representative actions is severely limited if qualified entities are the only parties authorized to bring representative actions. There are a number of reasons why meritorious and legitimate cases may not make their way to the pipeline of a qualified entity. For example, the qualified entity may not have the monetary or staffing resources to bring a case, or harmed consumers may not be aware of the existence of, or how to connect with, the right qualified entity to bring a case. Thus, empowering private parties to bring representative actions is a fundamental element that ensures every consumer who has been harmed has a voice and a right to seek relief in the courts.*

2. This Directive shall not prevent Member States from adopting or maintaining in force provisions designed to grant qualified entities or any other persons concerned other procedural means to bring actions aimed at the protection of the collective interests of consumers at national level as long as such provisions are at least as protective of consumers' interests as this Directive.

Comment: *If Member States are permitted to maintain or adopt laws that are weaker than the provisions of this Directive, wrongdoers would have an incentive to ensure that any litigation against them be brought in those Member States. Without the addition of this language, Member States would be vulnerable to pressure from business lobbyists to adopt laws that undermine and defeat the purposes of this Directive.*

Article 2

Scope

1. This Directive shall apply to representative actions brought against infringements by traders of provisions of the Union law listed in Annex I that harm or may harm the

collective interests of consumers. Each time a new Union law relevant to the protection of the collective interests of consumers is adopted, that new Union law shall be automatically placed within the scope of this Directive, unless the text of such new Union law expressly exempts it from being enforced through a representative action. This Directive~~It~~ shall apply to domestic and cross-border infringements, including where those infringements have ceased before the representative action has started or before the representative action has been concluded.

Comment: *With some exceptions that vary from state to state, and with respect to U.S. federal law, American consumers are able to challenge improper practices without the requirement that the statute directly authorize such actions. For example, under California's Unfair Competition Law ("UCL"), "any unlawful, unfair or fraudulent business act or practice"[1] can be the basis for collective redress. With respect to the "unlawful" prong of the UCL, the UCL "borrows" violations of other laws and treats them as unlawful practices independently actionable under the UCL.[2] "Virtually any state, federal, or local law can serve as the predicate for an action under" the UCL.[3]*

We suggest that new Union laws be automatically placed within the scope of this Directive unless expressly exempted by the new Union law. Considering "whether to amend" the Annex each time a new Union law is enacted will result in significant delays before its benefits can be invoked through this Directive. Technology and the ways in which traders use technology are evolving rapidly, as are corresponding laws designed to protect consumers. Consumers will be best protected if the procedural tools of collective redress are made available without such delays.

2. This Directive shall not affect rules establishing contractual and non-contractual remedies available to consumers for such infringements under Union or national law.

3. This Directive is cumulative and without prejudice to the Union rules on private international law, in particular rules related to court jurisdiction and applicable law.

Article 3

Definitions

For the purposes of this Directive, the following definitions shall apply:

(1) 'consumer' means any natural person who is acting for purposes which are outside their trade, business, craft or profession;

[1] Cal. Bus. & Prof. Code § 17200 *et seq*.

[2] *Farmers Ins. Exchange v. Superior Court,* 2 Cal. 4th 377, 383 (1982).

[3] *Podolsky v. First Healthcare Corp.,* 50 Cal. App. 4th 632, 647 (1996).

(2) 'trader' means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in their name or on their behalf, for purposes relating to their trade, business, craft or profession;

(3) 'coupon' means a discount, funds, or credit to be applied toward a particular product, service, or thing or redeemed at a particular trader's business.

Comment: *See comment to Article 6(7).*

(4) 'collective interests of consumers' means the interests of a ~~number~~ group of consumers;

(5) 'gift card' means is a document, card, code, or device that is issued on a pre-paid basis and entitles the holder to a discount, funds or credit that may be used at all retailers or at one particular retailer.

Comment: *See comment to Article 6(7).*

~~(4)~~(6) 'exemplary damages' means redress awarded when a trader's acts are found to be willful, malicious, violent, oppressive, fraudulent, wanton, or grossly reckless.

Comment: *See comment to Article 6(5).*

~~(5)~~(7) 'measures eliminating the continuing effects of an infringement' means actions a defendant must take to provide any form of relief including, but not limited to, redress and injunctive relief;

Comment: *"Measures eliminating the continuing effects of an infringement" is a term used throughout this Directive and we propose it be defined here for clarity purposes.*

~~(6)~~(8) 'redress' means any form of compensation or action that may provide compensation, including, but not limited to, compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate;

Comment: *"Redress" is a term used throughout this Directive and we propose it be defined here for clarity purposes.*

~~(7)~~(9) 'representative action' means an action for the protection of the collective interests of consumers ~~to which the consumers concerned are not parties~~;

Comment: *The changes proposed here would empower any consumer, whether or not he or she has been affected by a trader's illegal practice, to bring a representative action as a representative party. This would be a powerful improvement over state laws in the U.S., which generally require a consumer to have been injured or harmed by a defendant in order to bring a case. (In relatively rare circumstances in the U.S., an association may have standing to represent its members.) The "standing" requirement of injury and harm*

limits the rights of consumers to enforce consumer protection laws. In many cases, consumers who have been injured or harmed do not have the resources or time to initiate legal action, do not know how to do so, or, in situations such as environmental pollution, may not even know that they have been injured or harmed. Additionally, wrongdoers in the U.S. often urge courts to apply standing requirements to find that a consumer has not been injured or harmed in order to dismiss an otherwise meritorious and legitimate case. As a result, defendant corporations are not held accountable for their violations of law. Therefore, it is essential that private parties, whether or not they have personally suffered injuries or harm from a trader's infringement, be empowered to bring representative actions. Other protections we suggest in these comments would ensure that only meritorious and legitimate cases are pursued.

~~(8)~~(10) 'representative party' means any consumer who brings a representative action;

(11) 'practice' means any act or omission by a trader;

~~(9)~~(12) 'third party litigation funder' means an investor who provides financing for representative actions in return for an ownership stake in a legal claim.

Comment: *See comments to Article 7.*

~~(10)~~(13) 'final decision' means a decision by a Member State's court that cannot or can no longer be appealed or a decision by an administrative authority that can no longer be subject to judicial review.

Chapter 2

Representative actions

Article 4

Representative parties and q~~Q~~ualified entities

~~1. Member States shall ensure that representative actions can be brought by qualified entities designated, at their request, by the Member States in advance for this purpose and placed in a publicly available list.~~

Comment: *Requiring Member States to maintain a list of organizations designated as qualified entities creates what we consider unnecessary and potentially crippling hurdles for organizations to bring meritorious and legitimate cases. Requiring governmental approval of an organization's access to the courts could lead to politically-motivated exclusions and deprive the most effective (and thus perhaps controversial) organizations of the right to bring a representative action. Moreover, widely-varying requirements*

among Members States could lead to inconsistent rules, as well as potential "forum shopping."

Based on U.S. experience, if an organization is properly formed under the Member State's laws, has a demonstrable interest in ensuring that Union laws are complied with, and is a non-profit, that should be sufficient to bring a representative action. (See Article 4(2).)

Additionally, providing the presiding court or administrative authority, rather than the Member State, with the authority to decide whether an organization is fit to represent the interests of consumers in a representative action will protect against political considerations. The edits in Article 4(4) reflect this change as well.

1. Member States shall ensure that representative actions can be brought before national courts or administrative authorities by representative parties.

Comment: *See comment to Article 3(9).*

2. Member States shall ensure that representative actions can be brought by qualified entities before national courts or administrative authorities. Member States shall designate the following criteria that qualifies an entity as a qualified entity ~~if it complies with the following criteria~~:

(a) it is properly constituted according to the law of a Member State;

(b) it has a legitimate and demonstrable interest in ensuring that provisions of Union law covered by this Directive are complied with;

(c) it has a non-profit making character.

Member States shall not limit or prohibit otherwise qualified organizations from being classified as qualified entities, such as a requirement that an organization have a minimum number of members in order to be classified as a qualified organization. Member States shall assess on a regular basis whether a qualified entity continues to comply with these criteria. Member States shall ensure that the qualified entity loses its status under this Directive if it no longer complies with one or more of the criteria listed in the first subparagraph.

Comment: *There are two concerns with Article 4(2). First, the term "legitimate" in Article 4(2)(b) is vague and too open to interpretation. A court or administrative authority could apply this "legitimate interest" standard to disqualify an otherwise qualified organization from bringing a case. We added the term "and demonstrable" because it is clearer – an organization can demonstrate that it has an interest in ensuring Union laws are complied with by discussion of its main objectives as an organization and providing details about its work. (An alternative approach would be to focus on whether the organization will prosecute the representative action on behalf of the public interest. The*

"public interest" standard ensures that organizations are truly advocating on behalf of consumers.)

Second, we propose language to ensure that Member States do not impose unrealistic requirements that bar otherwise qualified organizations from being characterized as qualified entities, such as an arbitrary requirement that the organization have a specific number of members in order to bring a case. The addition of the sentence after Article 4(2)(c) achieves this.

~~2. Member States may designate a qualified entity on an ad hoc basis for a particular representative action, at its request, if it complies with the criteria referred to in paragraph 1.~~

Comment: *Because we propose elimination of the requirement of maintaining a list of designated qualified entities, we deleted this paragraph.*

3. Member States shall ensure that in particular consumer organisations and independent public bodies are eligible for the status of qualified entity. Member States ~~may~~ shall ensure that ~~designate as qualified entities~~ consumer organisations that represent members from more than one Member State are qualified entities.

~~4. Member States may set out rules specifying which qualified entities may seek all of the measures referred to in Articles 5 and 6, and which qualified entities may seek only one or more of these measures.~~

Comment: *We deleted this paragraph because it would arbitrarily limit qualified entities from protecting consumers, whether it be through an injunction, final declaratory decision, or redress. For example, in the course of prosecuting a representative action seeking an injunction, a qualified entity may discover that a trader's violation of the law has caused a group of consumers to lose money. If that qualified entity is not empowered to seek redress measures, the consumers would not be paid back. Restricting and discriminating between the types of remedies that qualified entities defeats the purpose of collective actions.*

4~~5~~. ~~The compliance by a qualified entity with the criteria referred to in paragraph 1 is without prejudice to the right of t~~The court or administrative authority shall have the authority to examine whether ~~the purpose of~~ the ~~qualified~~ entity is qualified to bring a representative action under this Directive ~~justifies its taking action in a specific case in accordance with Article 5(1)~~.

Comment: *See comments to Article 4 and Article 5.*

Article 5

Representative actions for the protection of the collective interests of consumers

~~1. Member States shall ensure that representative actions can be brought before national courts or administrative authorities by qualified entities provided that there is a direct relationship between the main objectives of the entity and the rights granted under Union law that are claimed to have been violated in respect of which the action is brought.~~

Comment: *This paragraph is duplicative in light of the factors set forth in Article 4(2). If an organization has a "legitimate and demonstrable interest in ensuring that in ensuring that provisions of Union law covered by this Directive are complied with," then the organization should not have to prove that "there is a direct relationship between the objectives of the entity and the rights under" the Union law that is claimed to have been violated. Such a requirement adds an unecessary step in the process.*

Also, the requirement of a "direct relationship" between an organization's main objectives and the substantive law underlying a case is both too narrow and vague. It could be applied to prevent otherwise qualified organizations from bringing a case. For example, an organization primarily focused on environmental issues may learn of a violation of data privacy laws and may also be qualified to bring a representative action for the violation of data privacy laws. The requirement of a "direct relationship" could be interpreted to prohibit that organization from enforcing the data privacy laws.

The U.S. Chamber Institute for Legal Reform ("the U.S. Chamber") advocates for "strict standing requirements" for qualified entities, including this "direct relationship" requirement. [4] *The U.S. Chamber's argument that strict standing requirements be imposed on qualified entities is an attempt to limit the number of lawsuits filed against wrongdoers. Because the "direct relationship" requirement is duplicative, unnecessary, and creates a hurdle to otherwise qualified organizations bringing a representative action, deletion of this paragraph is appropriate.*

1~~2~~. Member States shall ensure that representative parties and qualified entities are entitled to bring representative actions seeking the following measures:

(a) an injunction order as an interim measure for stopping the practice or, if the practice has not yet been carried out but is imminent, prohibiting the practice;

(b) an injunction order establishing that the practice constitutes an infringement of law, and if necessary, stopping the practice or, if the practice has not yet been carried out but is imminent, prohibiting the practice.

In order to seek injunction orders, representative parties and qualified entities shall not have to obtain the mandate of the individual consumers concerned or provide proof of

[4] U.S. Chamber, *Suggested Safeguards,* https://www.fairdealforconsumers.eu/suggested-safeguards/ (last visited Oct. 5, 2018).

actual loss or damage on the part of the consumers concerned or of intention or negligence on the part of the trader.

23. Member States shall ensure that representative parties and qualified entities are entitled to bring representative actions seeking measures eliminating the continuing effects of the infringement. These measures shall be sought on the basis of any final decision establishing that a practice constitutes an infringement of Union law listed in Annex I harming collective interests of consumers, including a final injunction order referred to in paragraph (2)(b).

34. Without prejudice to Article 4(4), Member States shall ensure that qualified entities are able to seek the measures eliminating the continuing effects of the infringement together with measures referred to in paragraph 2 within a single representative action.

Comment: *See comments to Article 4.*

4. Member States shall set out rules for the consolidation of multiple representative actions that share common questions of fact and law and that are filed and pending against the same defendant in different courts within the Member State. Consolidation is appropriate if it will promote the ends of justice, taking into account the following factors:

(a) the convenience of the parties, witnesses, and attorneys;

(b) the relative development of the actions and the work performed in the actions;

(c) the efficient use of judicial or administrative resources;

(d) the calendar of the courts;

(e) the disadvantage of duplicative and inconsistent rulings, orders, or judgments;

(f) the likelihood of settlement without further litigation if coordination is denied.

Comment: *The language we add here proposes that Member States set up a system to consolidate multiple similar representative actions filed against the same defendant in a single Member State into one proceeding so the actions can be efficiently prosecuted. When multiple similar actions are filed, it is usually an indication that a trader has engaged in widespread infringements. Allowing multiple actions to be consolidated into one comprehensive proceeding will result in more efficient use of judicial resources, prevent duplicative and unnecessary work, and ensure that all parties may participate and that the trader will be held accountable.*

If the rules allowed only one representative action over an infringement to proceed in a Member State, many problems would arise. For example, such a rule would incentivize representative parties or qualified entities to rush to be the first party to file a case in

order to prevent others from filing the case. This "rush to the courthouse" results in hastily prepared documents and incomplete preliminary investigations.

In the U.S., when multiple similar cases are filed in federal courts across the country, they usually become a "Multi-District Litigation" or "MDL." MDLs may be created when "civil actions involving one or more common questions of fact are pending in different districts."[5] *Cases concerning the same infringement are sent to one court and grouped together or consolidated into one proceeding in one court. States in the U.S. also have their own procedural rules, similar to MDL rules, for grouping cases together in one court or consolidating multiple similar actions against one defendant.*

For example, following the 2015 Volkswagen dieselgate scandal in the U.S., consumers filed approximately 600 class action lawsuits in federal courts against Volkswagen. Through an MDL proceeding, these class actions were all grouped together in one federal court in Northern California. While some issues in the case are ongoing, a settlement was reached that provides up to $10 billion in compensation to affected consumers, including vehicle buybacks at the market value prior to the dieselgate scandal and cash payments.[6] *The MDL system allowed this important case to be concentrated in one court and facilitated the redress to consumers.*

5. Member States shall set out rules for the management of attorney resources in multiple representative actions that have been consolidated into one proceeding. The rules shall empower a court to appoint one or more attorneys as lead counsel in the consolidated representative action to manage the action, including by establishing a litigation plan and making strategic decisions, implementing a process for communicating key events, deadlines, and other important information to all attorneys in the case, drafting and filing major documents in the action, if necessary for the prosecution of the action, delegating tasks to other attorneys, communicating and negotiating with counsel for the infringing trader, and communicating with the court.

Comment: *These rules ensure that when multiple representative actions against the same defendant are consolidated into one proceeding, attorney resources are used efficiently. Creating a system for one or more attorneys to lead the case will allow the case to proceed in an orderly fashion and prevent attorneys from performing duplicative work.*

Article 6

Redress measures and Deterrence

1. For the purposes of this Article ~~5(3)~~, Member States shall ensure that representative parties and qualified entities are entitled to bring representative actions seeking a redress

[5] 28 U.S.C. § 1407.

[6] *In re: Volkswagen "Clean Diesel" MDL*, Case No. 15-MD-2672-CRB (N.D. Cal.), https://www.cand.uscourts.gov/crb/vwmdl (last visited Oct. 5, 2018).

order, which obligates the trader to provide for, inter alia, compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate. ~~A Member State may require the mandate of the individual consumers concerned before a declaratory decision is made or a redress order is issued.~~

Comment: *Allowing Member States to require the mandate of individual consumers prior to a declaratory decision or redress order would be detrimental to consumers. Requiring consumers to take a particular action prior to a decision in their favor or a redress order creates an unnecessary burden for a legitimate case. Based on experience in U.S. class actions, when the burden is on consumers to take steps in order to participate or recover, less than 20% usually do. There are many reasons for this. For example, consumers are often inadequately notified or not notified at all about the steps they need to take to participate, the steps they need to take to participate are time consuming, cumbersome or require paperwork to be submitted, or deadlines to participate are too short or not communicated to the consumer. If the allegations against a trader in the representative action are determined to constitute an infringement if proven, that determination should be considered sufficient to justify redress sent to consumer without any action on the consumers' part.*

Affected consumers must be automatically covered by a declaratory decision or a redress order but should be given an opportunity to "opt out." The opt-out system is a cornerstone of class actions in the U.S.: consumers who are not comfortable with the decision and wish to pursue their own actions are free to do so. They have the right to hire their own lawyer and proceed against the trader individually. The opt-out system protects the independent legal rights of consumers while also maximizing the number of affected consumers who may benefit from the outcome of a case.

As discussed throughout our comments, placing the burden on consumers to take some action in order to recover or participate in a lawsuit will always create "friction" and have the effect of discouraging or limiting redress to consumers. If wrongdoers are not required to provide redress to all of the consumers they harmed, the result would be a windfall.

The U.S. Chamber proposes to require consumers to "opt-in" rather than opt out, claiming that "involving consumers in claims of which they may have no knowledge, and with which they may actively disagree, harms their legal autonomy and could be seen as a violation of privacy if their data is used without consent."[7] Cloaked in ostensible concern about a consumer's privacy, the U.S. Chamber's argument is simply an attempt to discourage consumer participation in lawsuits. Its reasoning is easily countered. First, under the edits proposed here, consumers would be properly notified of any action affecting their legal rights. Second, an opt-out system preserves consumers' legal autonomy and their right to not participate in a lawsuit should they so choose. Finally, it is highly unlikely that any consumer would object to their contact information being used

[7] U.S. Chamber, note 4.

to distribute money to them (see comment to Article 13). As discussed above, an opt-in system will result in less consumers participating in a lawsuit, and, therefore, less money being paid out by a trader.

*Attached as **Exhibit 1** is an article titled "Let a Hundred Cases Wither" by practitioners David Arkush and Brian Wolfman critiquing a proposal for opt-in class actions, arguing that requiring opt-in class actions would weaken consumer rights and permit companies to violate the law.*

It is thus in the best interests of consumers to include them in a declaratory decision or a redress order unless they opt out. The edits to Article 6(3) also reflect this change. (This Directive already creates an opt-out system for settlements (see Article 8(6)), and the same reasoning discussed above applies to settlements.)

The representative party or qualified entity shall state facts supporting the ~~provide sufficient information~~alleged violations of law ~~as required under national law to support the action~~, including a description of the consumers concerned by the action and the questions of fact and law to be resolved.

Comment: *There are three major concerns with this provision as it was written. First, it is unclear at what stage the party would need to provide the required information supporting the action. Does this information need to be alleged in the operative complaint or presented at some later stage in the proceeding? Second, the term "sufficient information" is vague: it could be interpreted by courts or administrative authorities a number of different ways. In order to prevent varying interpretations, we have slightly revised the language. Finally, the phrase "as required under national law" would also result in varying interpretations. By setting one objective standard here, all Member States would be required to apply the standard.*

2. ~~By derogation to paragraph 1,~~ Member States may empower a court or administrative authority to issue~~,~~ ~~instead of a redress order,~~ a declaratory decision regarding the liability of the trader towards the consumers harmed by an infringement of Union law listed in Annex I.~~,~~ If a court or administrative authority issues a declaratory decision regarding the liability of the trader, the court or administrative authority shall then issue a redress order. ~~in duly justified cases where, due to the characteristics of the individual harm to the consumers concerned the quantification of individual redress is complex.~~

Comment: *The "escape clause" in Article 6(2) would nullify "collective redress." It would allow wrongdoers to evade collective accountability and require harmed consumers to proceed on their own – a difficult if not impossible prospect, with enormous expenses and inefficiencies – the very consequences that collective redress is intended to address.*

As originally written, even if the trader is found to have violated the law, the burden would be on consumers to hire attorneys to pursue their individual cases after the finding of

liability. It is highly unlikely that individual consumers will pursue redress. Virtually no consumer has the resources to hire an attorney, other than through a contingency fee. Even then, the likely redress available to an individual consumer would be dwarfed by the cost and expense of bringing and proving the case – no attorney could afford to do so, especially in a case in which the redress for any single consumer is relatively small. Even consumers who do have the resources to hire an attorney may not want to resort to a cumbersome court proceeding in order to recover.

To repeat: The requirement that individual consumers must pursue their own case after a trader has been found to have violated the law defeats the entire purpose of a representative action. Advocates of this approach like the U.S. Chamber support a "two-phase" proceeding precisely because it will result in traders paying less out to harmed consumers.

Permitting a "two-phase" proceeding would also result in unnecessary additional expenses for the court or administrative system. In the U.S. system, liability and redress are adjudicated in the same proceeding by a single judicial authority, who is familiar with the entire circumstances of the case. This conserves judicial and attorney resources.

Additionally, the standard for traders to invoke the two-phase system – that "individual redress is complex" – is ambiguous and would easily permit traders to evade collective redress. Knowing that consumers will likely not pursue individual cases against them, traders will argue that their allegedly wrongful conduct is too "complex" for collective redress. For example, traders may rely on this argument if consumers suffered different dollar amounts of damage, which is not a sufficient reason to deny collective redress. Moreover, by definition, many infringements involve "complex" matters – the VW deiselgate emissions scandal is an example. Complex cases are especially suited for collective redress.

3. Member States shall empower a court or administrative authority to issue a redress order in all cases ~~Paragraph 2 shall not apply in the cases~~ where consumers concerned by the infringement are identifiable and suffered comparable harm caused by the same practice in relation to a specified period of time or a purchase. Representative parties and qualified entities may request relevant information from the defendant, such as the identity of the consumers concerned and the duration of the practice.

In such cases the ~~requirement of the~~ mandate of the individual consumers concerned shall not ~~constitute a condition to initiate the action~~be required. The redress shall be directed to the consumers concerned. Individual consumers shall be given an opportunity to accept redress and be bound by the redress order or to reject redress and not be bound by the redress order. In order to obtain redress, individual consumers who "opt out" are not bound by the redress order and must file and litigate a separate individual action if they wish to recover;

Comment: *The standards set forth in this Article for redress - "where consumers concerned by the infringement are identifiable and suffered comparable harm caused by the same practice in relation to a specified period of time or a purchase" – are an improvement over the U.S. system, which requires plaintiffs to meet more onerous evidentiary burdens to show that a similar group of consumers has suffered comparable harm during a procedure known as "class certification." This is the result of U.S. business interests securing victories in class certification cases before the U.S. Supreme Court.[8] The U.S. Chamber is charting a similar course in its proposal that the EU impose "[s]tringent certification standards to determine who should be included in a claim, and whether the claim should proceed as a collective action[.]"[9] The standards as written are sufficient, and making them any stricter would hamper consumers' ability to obtain redress.*

Also, we have added in a clarifying sentence providing for representative parties and qualified entities to request information from a defendant relevant to these factors. Although not stated in the text of this draft Directive, paragraph 20 of the recitals preceding the text of the Directive states:

> In particular, the court or administrative authority could ask the infringing trader to provide relevant information, such as the identity of the consumers concerned and the duration of the practice.

Permitting representative parties and qualified entities, rather than the court or administrative authority, to request information from defendants relevant to establishing the factors required for a redress order is more efficient – because it conserves judicial resources – and effective – because the party bringing the case will have greater knowledge of what information to request.

Also, for the reasons set forth in the comment to Article 6(1), requiring the mandate of the individual consumers - as a condition to initiating the action and at any time – discourages consumer participation and defeats the purpose of collective actions.

4. Where the cost of identifying, locating, and paying redress to each consumer~~s~~ concerned by the infringement exceeds the redress to which the individual consumer is entitled, redress may be directed to a public purpose serving the collective interests of consumers. When redress is being directed to a public purpose, it cannot be directed to the qualified entity bringing the representative action. ~~have suffered a small amount of loss and it would be disproportionate to distribute the redress to them. In such cases, Member States shall ensure that the mandate of the individual consumers concerned is not required. The redress shall be directed to a public purpose serving the collective interests of consumers.~~

[8] *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

[9] U.S. Chamber, note 4.

Comment: *We believe that basic principles of justice – and public confidence in the collective redress rules – require that every effort be made to return quantifiable losses to the consumer. Hence we do not believe a special exception should be created for "small losses" per se, but rather only those which mathematically exceed the cost of returning the losses to consumers.*

The phrases"small amount of loss" and "disproportionate to distribute redress" are vague. It is unclear when an amount would be too small to justify directing it to a public purpose rather than the affected consumer. This lack of clarity may result in redress being directed to a public purpose when redress to consumers was appropriate and feasible.

Sending redress directly to consumers is always favored. Redress is appropriately re-directed to a public purpose in the limited circumstance where it would cost more to send the redress to consumers than the redress itself. For example, if a redress order provided 5 Euros to each affected consumer, but the cost of identifying, locating and paying redress to each affected consumer was 8 Euros per consumer, then it would be appropriate to direct the redress intended for the consumer to a public purpose. However, if the cost of identifying, locating and paying redress to each affected consumer was 1 Euro, then it is appropriate to send the 5 Euros to the consumer. Setting an objective standard will ensure that consumers will receive redress when appropriate. Because collective redress is a method of ensuring that consumers obtain justice, and because obtaining justice protects public confidence in private and public institutions, consumers should receive redress whenever possible.

The last sentence that we added to Article 6(4) is a protection against conflicts of interest. To permit entities who bring representative actions to receive redress funds (as opposed to attorneys fees) directly through the litigation could undermine public confidence.

In the U.S., funds directed to a public purpose are called "cy pres" distributions. Cy pres provides a way to distribute unclaimed funds "to the 'next best' class of beneficiaries."[10] *Under the cy pres approach, "class members receive an indirect benefit (usually through defendant donations to a third party) rather than a direct monetary payment."*[11] *Recipient of cy pres funds are "selected in light of 'the objectives of the underlying statute(s)' and 'the interests of the silent class members.'"*[12]

Cy pres distributions are an important form of relief in the U.S. They are often components of class action settlements. The cy pres component of a class action settlement in the U.S. was recently approved by the Ninth Circuit Court of Appeal.[13]

[10] *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011).

[11] *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012).

[12] *Easysaver Rewards Litig. v. Perryman*, Case No. 16-56307, 2018 U.S. App. LEXIS 28000 (9th Cir. Oct. 3, 2018), citing *Nachshin v. AOL, LLC* 663 F.3d 1034, 1039 (9th Cir.).

[13] *Easysaver Rewards Litig. v. Perryman*, note 12.

Consumers sued an online business that sells flowers, chocolates, fruit baskets, and other similar items for enrolling them in, and charging them for, a membership program without their consent. The parties in the case reached a settlement where class members could submit claims for refunds. Unclaimed refunds were to be distributed to universities and law schools to fund educational programs on internet privacy and data security. Class members were concerned about the settlement because the remaining funds were not distributed to consumers. The court applied a similar analysis as we have proposed for this Directive – reasoning that amount each consumer would receive "compared to the administrative costs of distribution" would be minimal – to find that the cy pres distribution was appropriate.

A case is currently before the U.S. Supreme Court over a class action settlement that included cy pres relief.[14] *In the case, consumers sued Internet giant Google, claiming its search engine violated various federal privacy laws. Google agreed to settle the case by paying $8.5 million, $5.3 million of which was to be distributed as cy pres relief to universities and organizations selected by the parties. Class members were concerned because consumers affected by the privacy violations would get nothing in the settlement, and because the cy pres recipients are universities that plaintiff's counsel attended and organizations to which Google provides donations. The U.S. Supreme Court will decide whether the settlement is fair in light of the $5.3 million cy pres distribution. If an objective standard for distributing cy pres versus like the one we have proposed here were part of the law in the U.S., the issue in the Google case would not have arisen.*

54. A court or administrative authority may require a defendant who has acted in a willful, malicious, violent, oppressive, fraudulent, wanton, or grossly reckless manner to pay exemplary damages in a redress order. To the extent that exemplary damages exceed the actual monetary harm to consumers, funds may be directed to the public purpose of funding courts and administrative authorities in overseeing representative actions within the Member State.

Comment: *Exemplary (sometimes known as punitive) damages are a powerful form of redress. Exemplary damages are considered crucial to deter intentional misconduct, for which the payment of redress alone would effectively enable a wrongdoer to profit from its conduct through tax deductions and arbitrage.*

In the U.S., exemplary damages are assessed based on "the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident."[15]

[14] *Goas v. Holyoak (In re Google Referrer Header Privacy Litig.),* 869.F3d 737 (9th Cir. 2017), *cert. granted,* 86 U.S.L.W. 3556 (U.S. Apr. 30, 2018) (No. 17-961).
[15] *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 419 (2003).

Exemplary damages in civil cases are rarely awarded. A 2005 study by the U.S. Bureau of Justice Statistics found that exemplary damages were awarded in 5% of civil trials where the plaintiff prevailed.[16] *(This figure includes all civil actions; we are not aware of a single recent consumer class action in which punitive damages was awarded.) Attached as* ***Exhibit 2*** *is a fact sheet from the Center for Justice and Democracy with statistics on punitive damages awards in the U.S.*

Opponents of exemplary damages argue that permitting a consumer to retain punitive damages represents a windfall. However, the point of such awards is to deter and punish the wrongdoer. Their argument is self-serving of course. A wrongdoer has no legitimate interest in determining how the penalty it must pay is distributed. Nevertheless, the last sentence that we added to the text would allow such funds to be directed to support the courts and administrative authorities charged with overseeing representative actions. (Alternatively, they could be directed to support for qualified entities.)

The U.S. Chamber supports banning punitive damages because "[c]ollective actions serve to provide compensation to injured claimants and are not designed to serve as a means of punishing defendants who have allegedly violated the law. [17] *However, as the statistics show (see Exhibit 2), punitive damages are rarely awarded, and, when they are, they are in reasonable and limited amounts. Thus, punitive damages serve as a deterrent to traders to prevent them from violating the law in the first place. If a trader does not intentionally violate the law, then there is no threat of punitive damages.*

6. A redress order shall not require consumers to submit a claim form to obtain redress unless the identity and location of consumers entitled to redress is unknown or the amount of redress to which each consumer is entitled cannot be determined without a claims process. The court or administrative authority shall determine whether defendant or a third party has the means or information in its possession sufficient to determine the identity and location of consumers entitled to redress or the amounts of redress available to each consumer.

Comment: *This factor ensures that traders send redress directly to consumers when they have the requisite information to do so. Traders are usually able to send payments directly to consumers without requiring them to submit paperwork (also known as "claim forms") to receive redress: In most cases, traders know who affected consumers are and their address. Although claims processes in the U.S. are not prohibited by law, courts are skeptical when they appear to be unnecessary. The Federal Judicial Center in the U.S. warns federal judges to "consider whether a claims process is necessary at all. The*

[16] Bureau of Justice Statistics, *Punitive Damages in Civil Trials,* https://www.bjs.gov/index.cfm?ty=tp&tid=45111 (last visited Oct. 5, 2018).

[17] U.S. Chamber, note 4.

defendant may already have the data it needs to automatically pay the claims of at least a portion of class members who do not opt out."[18]

Requiring consumers to fill out unnecessary or burdensome forms in order to obtain redress will result in less redress going to consumers. In the U.S., such claims rates usually range between zero and about 20%.[19] *A settlement administrator in the U.S. that has handled over 3,000 class action settlements testified that the median response rate was 5% to 8%.*[20] *As noted in the comment to Article 8(4)(c), the problem of low consumer participation is prevalent in settlements that utilize claim forms as well. The problem is the same whether it is in the context of a redress order or a settlement. There are many reasons consumers do not submit claim forms: the forms may require too much paperwork or detail to be submitted; the forms may have too many steps to follow; the forms may never reach the consumer; the consumer was unaware of the claim form deadline; the consumer may fear making an error on the claim, especially if it is submitted under penalty of perjury. Low claims rates mean that consumers are not receiving the redress to which they are entitled.*

A claim form is likely necessary when a trader does not know the identity and/or the address of consumers entitled to redress under the settlement. For example, in mass false advertising cases it is typically impossible to determine who was exposed to the false advertising. Another scenario where claim forms might be necessary would be if a trader does not know the amount of redress to which an individual consumer is entitled.

It is in consumers' best interests to prohibit claims-made systems – whether in the context of redress orders or settlement – to the extent they can avoided.

7. A redress order may not provide coupon, gift card, or any other non-cash relief that would require redemption through the trader. A redress order may provide for credit to be applied toward the defendant's business if the affected consumers have a recurring relationship with defendant, the amount of credit is 10 Euros or less, and the defendant will provide the credit directly to the consumer without requiring the consumer to submit a claim.

Comment: *We suggest that coupons (defined in Article 3(3)), gift cards (defined in Article 3(5)), or other similar non-cash options that consumers must redeem by buying*

[18] Federal Judicial Center, *Managing Class Action Litigation: A Pocket Guide for Judges* (3rd Ed. 2010), https://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf.

[19] *See* National Consumer Law Center, *Consumer Class Actions* (9th Ed. 2016), § 14.7.2.2, *citing Sylvester v. Cigna Corp*., 369 F. Supp. 2d 34, 41–42, 44 (D. Me. 2005); Hillebrand & Torrence, *Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits*, 28 Santa Clara L. Rev. 747, 752 (1988) (between 3% and 20% rate typical).

[20] *Gascho v. Glob. Fitness Holdings, L.L.C*., 822 F.3d 269, 289–290 (6th Cir. 2016).

products or services from the defendant trader are not proper forms of redress in most circumstances.

Coupons are typically a win-win situation for companies: Consumers are unlikely to redeem coupons; evidence shows that redemption rates in class actions that provide coupon relief are 3% or less,[21] *meaning that 3% or less of consumers use any non-cash relief provided by a defendant. Moreover, it is unfair and inappropriate to force consumers to continue to do business with the company that has wronged them. In such situations, coupons become a valuable marketing gimmick for the trader.*[22]

For example, in a settlement between consumers and General Motors ("GM") over faulty fuel tanks, class members were entitled to a $1,000 coupon (that expired in 15 months) toward the purchase of a new GM car.[23] *Consumer advocacy groups objected to the settlement, arguing in part that the value of the settlement, because of the nature of the coupon relief, was much less than what the settling parties told the court. The court also likened the coupons to "little more than a sales promotion for GM" because consumers would have to buy a car from GM in order to realize their value.*[24] *The court rejected the settlement.*

The only situation in which it would be preferable to provide any sort of non-cash relief to consumers is where consumers have a relationship with a defendant where they are paying a bill or purchasing something from defendant in an ongoing manner, if the amount of money at stake is small (less than 10 Euros is an appropriate benchmark in our opinion), and if the defendant can provide the credit directly to the consumer without any action on the consumer's part. In this narrow scenario, non-cash relief would be convenient, practical, and efficient for the consumer.

As noted throughout this document, in every other situation, money sent directly to consumers is preferable over any type of relief.

8. Redress orders shall require defendants to pay interest at a rate to be determined by Member States on all funds ordered to be paid to consumers.

Comment: *Because representative actions may take years to resolve, it is important that consumers be compensated through interest for the time period during which they lost*

[21] Christopher R. Leslie, *The Need to Study Coupon Settlements in Class Action Litigation*, 18 Geo J. Legal Ethics 1395, 1396-97 (2005).

[22] *See In re HP Inkjet Printer Litig*., 716 F.3d 1173, 1181-82 (9th Cir. 2013); Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 Notre Dame L. Rev. 859 (2016) ("Not only do coupons cost less to the defendant, they may help the defendant to generate business.")

[23] *See In re General Motors Corp. Pickup Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995).

[24] *Id*., 808.

money. Otherwise, the wrongdoer who retains the consumers' money for a period of time receives a substantial windfall that could even exceed the value of the redress.

9. The redress obtained through a final decision in accordance with paragraphs 1, 2 and 3 shall be cumulative and without prejudice to any additional rights to redress that the consumers concerned may have under Union or national law.

Comment: *It is important to indicate that redress and other remedies provided by this Directive do not replace other redress options.*

Article 7

Contingency Fees and Funding

1. Member states shall enable representative parties and qualified entities to hire attorneys to represent them in representative actions on a contingency basis whereby attorneys' fees and costs are recoverable from the defendant if the representative party or qualified entity obtains a final decision providing for measures as set forth in Articles 5 and 6, or through an approved settlement as set forth in Article 8.

Comment: *The "contingency fee system" is an indispensable element of collective redress. Without a contingency fee system, representative parties and qualified entities will not have the ability to hire skilled and knowledgeable attorneys to represent them in representative actions. It will be virtually impossible for representative parties and qualified entities to amass the resources to prosecute representative actions to be brought in court or before an administrative authority. Hiring such attorneys, who are capable of matching the expertise and resources of wrongdoers, requires extensive resources that most representative parties and qualified entities do not have available. Permitting contingency fee arrangements will ensure that all victims, no matter what their financial status is, will be represented by attorneys.*

Under contingency fee arrangements, the client does not have to pay a retainer or hourly fee to the attorney; nor does the client pay expenses or other costs (except if misconduct is shown, courts may fine attorneys in the form of sanctions). The attorney only recovers his or her fees and costs if the action is successful (either results in a final decision or a settlement). If the case is unsuccessful, the client is not charged at all. The contingency fee system makes it possible for consumers to attract attorneys with enough expertise to make it a fair fight against high-paid corporate attorneys. The contingency arrangement also enable victims to bring in expert witnesses and have important tests conducted when they are needed to make a case.

The contingency fee system, when carefully monitored by the court or administrative agency, discourages frivolous or abusive litigation. Attorneys will not take cases on a contingency fee unless the cases are meritorious and legitimate because there is a high cost to the attorney if the case is unsuccessful. (Contrast this with attorneys for

wrongdoers, who are paid on an hourly basis and thus have an incentive to litigate even if their client engaged in wrongdoing.) Thus, contingency fee arrangements ensure consumers' interests are protected and righteous cases are brought in court or before an administrative authority. Attached as ***Exhibit 3*** *is a fact sheet on Contingency Fees and Their Importance for Everyday Americans by the Center for Justice and Democracy in the U.S.*

We recognize that in the EU and some Member States, government support for litigation is provided to qualified entities. This is highly advantageous for consumers. But with limited governmental resources, it is likely that the interests of justice will not always be funded. Also, political considerations could influence decisions to deny funding. The contingency fee system addresses these concerns.

The U.S. Chamber suggests barring contingency fees for lawyers "because of the negative effect this has on litigation incentives."[25] *As discussed above, the only incentive that contingency fees create is the incentive for attorneys to take on meritorious cases to protect consumers – which the EU presumably does not consider a negative. The Chamber's clients can use their shareholders' money to pay the hourly rates of their attorneys. The Chamber is an opponent of the contingency fee system precisely because it is the only way for average consumers to challenge illegal actions.*

~~1. The qualified entity seeking a redress order as referred in Article 6(1) shall declare at an early stage of the action the source of the funds used for its activity in general and the funds that it uses to support the action. It shall demonstrate that it has sufficient financial resources to represent the best interests of the consumers concerned and to meet any adverse costs should the action fail.~~

Comment: *In the U.S., a combination of First Amendment associational rights concerning the ability to protect a non-profit's donors from public threats and harassment, and generic privacy protections, allow non-profits to maintain the confidentiality of their donors (except that their donors' identities are disclosed to governmental authorities that monitor non-profits).*

Under the edits proposed herein, representative actions will presumably be funded by an attorney taking the case on contingency. In the case of a qualified entity, it is intrusive of the entity's internal governance, risky to its donors, and unecessary to require the qualified entity to disclose the source of any general funds used to support a representative action. Moreover, members of the public may stop donating to a qualified entity if there is a risk of their identity being dislcosed.

The same conerns apply to third party litigation funders. As defined in Article 3(12), a third party litigation funder is an investor who provides financing for representative actions in return for an ownership stake in a legal claim. Also, disclosure of third party

[25] U.S. Chamber, note 4.

litigation funders would severely prejudice representative parties and qualified entities. As noted in response to a similar proposal in the U.S., "forced disclosure of litigation financing arrangements would harm the disclosing party — typically the claimant — by revealing its ability to pay legal fees and costs, which would give defendants enormous leverage to force unjust settlements on plaintiffs, with no connection to the merits of the claims or defenses."[26] Defendants are not required to disclose their source of funding or their ability to pay any redress they may be ordered to pay. Requiring representative parties and qualified entities to do so would put them at an unfair disadvantage.

2. Member States shall ensure that in cases where a representative action for redress is funded by a third party litigation funder, it is prohibited for the third party:

   (a) to influence decisions of the representative party or qualified entity in the context of a representative action, including on settlements;

   (b) to provide financing for a ~~collective~~ representative action against a defendant who is a competitor of the fund provider or against a defendant on whom the fund provider is dependant;

3. Member States shall ensure that courts and administrative authorities are empowered to assess the circumstances referred to in paragraph 2 and in the event of a violation, accordingly require the representative party or qualified entity to refuse the relevant funding and, if necessary, reject the standing of the representative party or qualified entity in a specific case.

Article 8

Settlements

1. Member States ~~may~~ shall provide that a representative party or qualified entity and a trader who have reached a settlement regarding redress for consumers affected by an allegedly illegal practice of that trader can jointly request a court or administrative authority to approve it. ~~Such a request should be admitted by the court or administrative authority only if there is no other ongoing representative action in front of the court or administrative authority of the same Member State regarding the same trader and regarding the same practice.~~

   Comment: *As discussed in Article 5(4) and the comment thereto, similar representative actions against the same defendant must be permitted and proceed together in a consolidated manner. When a settlement is reached in a consolidated case, it is to the benefit of consumers to permit all parties to comment on the settlement.*

[26] Matthew Harrison & John Harabedian, *Claimants Shouldn't Be Forced to Disclose Litigation Funding,* Law360 (Jun 11, 2018), https://www.law360.com/articles/1052279/claimants-shouldn-t-be-forced-to-disclose-litigation-funding.

2. Member States shall ensure that at any moment within the representative actions, the court or administrative authority may invite the qualified entity and the defendant, after having consulted them, to reach a settlement regarding redress within a reasonable set time-limit.

Comment: *We assume that there is no implication that the parties are required to settle. Such an intervention would be inconsistent with the court or administrative authority's independent judicial role.*

3. Member States shall ensure that the court or administrative authority that issued the final declaratory decision referred to in Article 6(2) is empowered to request the parties to the representative action to reach within a reasonable set time limit a settlement regarding the redress to be provided to consumers on the basis of this final decision.

Comment: *See comment to Article 8(2).*

4. The settlements referred to in paragraphs 1, 2 and 3 shall be subject to the scrutiny and approval of the court or administrative authority. The court or administrative authority shall assess the ~~legality and~~ fairness of the settlement, taking into consideration the rights and interests of all parties, including the consumers concerned. When assessing the fairness of the settlement, the court or administrative authority shall consider the following factors:

Comment: *We propose standards similar to those utilized in the U.S. to ensure that courts and administrative authorities have a guide in assessing whether a settlement is fair.*

(a) The total value of the redress being provided to consumers concerned by the infringement, the average amount each individual consumer is entitled to, and whether such amounts are adequate;

Comment: *This first factor ensures that the court or administrative authority considers the amount of redress going to consumers when reviewing a settlement.*

(b) Whether the settlement terms are a reasonable compromise in light of the following the strength of plaintiff's case, the nature and amount of recovery that each consumer concerned by the infringement could have obtained if they had prevailed as set forth in Article 6(2), and the risk, expense and length of further litigation;

Comment: *This factor ensures that the representative party or qualified entity is settling the case for what it is worth.*

(c) Any steps consumers must take to obtain the benefits of the settlement. A settlement shall not require consumers to submit a claim form to obtain settlement benefits unless the identity and location of consumers entitled to benefits is unknown or the amount of benefits to which each consumer is entitled cannot be determined without

a claims process. The court or administrative authority shall determine whether defendant or a third party has the means or information in its possession sufficient to determine the identity and location of consumers entitled to benefits or the amounts of benefits available to each consumer;

Comment: *Defendants in the U.S. often negotiate settlements that include unnecessary or burdensome claims processes as an effort to limit the payout to consumers. For the same reasons set forth in the comment to Article 6(6), claims processes should always be avoided when possible.*

(d) A settlement may not provide coupon, gift card, or any other non-cash relief that would require redemption through the trader. A settlement may provide for credit to be applied toward the defendant's business if the affected consumers have a recurring relationship with the defendant, the amount of credit is $10 or less, and the defendant will provide the credit directly to the consumer without requiring the consumer to submit a claim.

Comment: *See comment to Article 6(7).*

(e) How unpaid or undistributed funds will be treated. Unpaid or undistributed funds shall not be retained by the defendant;

Comment: *Settlements that allow defendants to retain redress funds have no value to consumers. Redress intended for consumers in settlements may be unclaimed: checks are not cashed or consumers cannot be located. This undistributed redress should not be retained by the wrongdoer, as this would be a windfall. In the U.S., courts are wary to approve settlements that contain terms that permit defendants to retain or recoup unclaimed redress funds. One court called a settlement that permitted the defendant to retain funds, coupled with a claims process, a "bonanza" for the defendant company because the settlement would allow the defendant to retain most of the money intended to go to class members.*[27]

(f) Any evidence that supports the allegations of wrongdoing against the defendant;

Comment: *Any evidence collected pursuant to the laws adopted under Article 13 is relevant to whether a settlement is a fair deal for consumers.*

(g) Whether negotiations were pursued solely in the interest of the consumers concerned by the infringement;

Comment: *This factor ensures that the parties who negotiated the settlement did not act in self-interest when negotiating. It permits the court or administrative authority to assess*

[27] Order Denying Preliminary Approval of Proposed Class Settlement, *Kakani v. Oracle Corp.,* Case No. 06-06493 (N.D. Cal. Jun. 19, 2007).

whether there are any signs of collusion between the representative party or qualified entity, the defendant, or any attorney in the case.

5. If the settlement referred to in paragraph 2 is not reached within the set time-limits or the settlement reached is not approved, the court or administrative authority shall continue the representative action.

6. Individual consumers concerned shall be given the possibility to accept or to refuse to be bound by settlements referred to in paragraphs 1, 2 and 3. Individual consumers who reject a settlement and are not bound by the settlement must file and litigate a separate individual action in order to obtain redress.

Comment: *As with final decisions and redress orders discussed in the comment to Article 6(1), consumers should be included in any settlement unless they opt out.*

Business interests may support making settlements binding on all consumers without the chance to accept or reject it after the settlement has been reached. This would violate the legal autonomy of consumers.

7. Member States shall ensure rules are in place to provide a procedure by which consumers covered by a settlement may voice their concerns about the settlement prior to approval by a court or administrative authority. These consumers may be represented by an attorney.

Comment: *In the U.S., consumers covered by a settlement have a right to "object" to a settlement. They are called "objectors" in the U.S. system. This means that a consumer can tell the court – on paper or in person – why he or she thinks the court should accept or reject a settlement. Since settling parties are no longer in an adversarial position when they are asking for approval of a settlement, objectors can play an important role in making sure that terms are fair to consumers. The role is so important that attorneys who represent objectors may be entitled to attorneys' fees.*

An issue of growing concern in the U.S. system is the late intervention of an attorney who represents class members and presents meritless objections to settlements in order to extract attorneys' fees from the parties with the threat of frivolous appeals that would delay redress to the class.

We propose a similar system here, but with safeguards to prevent frivolous objectors. As discussed in Article 15(5) and the comment thereto, consumers who voice their concerns may be entitled to attorneys' fees in limited circumstances and would have to show the court that their objections were meritorious.

With the exception of a few professional objectors that exist in the U.S., most objectors bring value to settlements. The consumer advocacy organization Public Citizen in the U.S. has brought numerous objections to class action cases that have resulted in improvements

to settlements.[28] *For example, consumers settled with automobile manufacturer Honda in a class action brought against the company for falsely advertising the fuel efficiency of one of its vehicles, the Civic Hybrid.*[29] *The settlement provided that affected consumers would receive a DVD with tips on how to improve their gas mileage, an opportunity to receive a rebate on the future purchase of another Honda vehicle, and, for less than 2% of the class, an opportunity to make a claim for $100. Public Citizen submitted an objection on behalf of class members on the ground that most class members would receive no benefit from the settlement. In response to the objection, the court rejected the settlement*[30] *and the parties then negotiated a better deal for class members. Public Citizen's objection is attached as* ***Exhibit 4***.

Consumers who do not opt out of settlements should have a right to tell the court or administrative authority their opinion of a settlement and propose improvements. By not opting out, they are releasing their right to bring a separate lawsuit against the defendant and, in turn, they should have a voice.

8. The redress obtained through an approved settlement in accordance with paragraph 4 shall be cumulative and without prejudice to any additional rights to redress that the consumers concerned may have under Union or national law.

Article 9

Information on representative actions

1. Member States shall ensure that the court or administrative authority shall require the infringing trader to inform affected consumers at its expense about the final decisions providing for measures referred to in Articles 5 and 6, and the approved settlements referred to in Article 8, by means ~~appropriate to the circumstance of the case~~set forth in Article 9(3) and within specified time limits, including~~, where appropriate,~~ through notifying all consumers concerned individually.

Comment: *Consumers who are affected by the final decisions providing for measures set forth in Articles 5 and 6, and the approved settlements set forth in Article 8, must be individually notified about the final decision or settlement in all cases. This means that the information about the final decision or settlement must be sent directly to each affected consumer. Notification of these decisions are the means by which consumers understand the rights they are releasing through a final decision or settlement, the*

[28] *See* Public Citizen, *Class Actions – Objections to Proposed Settlements,* https://www.citizen.org/our-work/litigation/case-list/class-actions-%e2%80%94-objections-to-proposed-settlements (last visited Oct. 5, 2018).

[29] *See* Public Citizen, *True v. American Honda Motor Co., Inc*. https://www.citizen.org/our-work/litigation/cases/true-v-american-honda-motor-co-inc (last visited Oct. 5, 2018).

[30] Oder Denying (Without Prejudice) (1) Plaintiffs' Motion for Final Approval of Settlement and (2) Plaintiffs' Motion for Attorneys' Fees and Incentive Awards, *True et al. v, American Honda Motor Company,* Case No. 07-0287 (N.D. Cal. Feb. 26, 2010).

benefits to which they are entitled, and how to opt out of the final decision or settlement if they wish. Failure to properly inform affected consumers will result in consumers releasing rights without their knowledge or not obtaining benefits to which they are entitled.

2. The information referred to in paragraph 1 shall:

(a) ~~include~~ be written in intelligible, clear, concise, and easily understood language language;

(b) be in text that is noticeable and designed to come to the attention of the recipient. Text is noticeable if the following conditions are met:

(1) The text is appropriately divided and captioned by its various sections using bold headings;

(2) The text is in readable size and no less than 12-point font;

(3) The overall text uses layout and spacing that separate the paragraphs and sections of the text from each other and from the borders of the paper or medium upon which it is displayed;

(4) The text is displayed in ink or pixels that contrast with the paper or medium upon which it is displayed;

(c) include an explanation of the subject-matter of the representative action, its legal consequences and, if relevant, the subsequent steps to be taken by the consumers concerned.

Comment: *We begin by proposing that individual notice is always best, when it is possible to do so. Consumer and public awareness of the collective redress process builds confidence in judicial institutions and in the new tools made available through this Directive.*

In order to ensure individual notice is effective, information about a final decision or a settlement sent to consumers must be in understandable language and in a format that is noticeable. Problems arise if the informational documents are written poorly or use overly complex legal jargon. Consumers may be overwhelmed by confusing language and stop reading. Some consumers may be afraid to participate in the final decision or settlement because they do not understand what it is. Others may not understand what steps they need to take.

Additionally, if not formatted in a noticeable way, the informational document may not look like an important document. For example, documents may resemble commercial advertising or "junk" mail and thus be overlooked; they may be printed on postcards

with tiny, illegible font; they may be sent via email with a vague or misleading subject line; they may not list important deadlines in an eye-catching font.

Clear cut rules on language and format are necessary to ensure that consumers understand and notice informational documents about a final decision or settlement. Attached as ***Exhibit 5*** *is the Judge's Class Action Notice and Claims Process Checklist and Plain Language Guide produced by the Federal Judicial Center in the U.S. to provide a guide for federal judges when reviewing informational materials that are proposed to send to consumers in class actions.*

3. Affected consumers shall be individually informed about the final decisions providing for measures referred to in Articles 5 and 6, and the approved settlements referred to in Article 8, using the most effective means available, including through either email or paper letters. Additionally, notice may be provided on the trader's website, social media, online market places, or in popular newspapers, including those distributed exclusively by electronic means of communication.

Comment*: In addition to rules on language and format, rules on the manner of distribution of informational documents is crucial to consumers receiving the information. Simply placing the information on the trader's website and using tools like social media or newspaper are not optimum means of distributing the information because not all affected consumers are likely to be exposed to the information. Paper letters and email remain the most effective way to distribute information to affected consumers at this time*.

Article 10

Effects of final decisions

1. Member States shall ensure that an infringement harming collective interests of consumers established in a final decision of an administrative authority or a court, including a final injunction order referred to in Article 5(1~~2~~)(b), is deemed as irrefutably establishing the existence of that infringement for the purposes of any other actions seeking redress before their national courts against the same trader for the same infringement.

2. Member States shall ensure that a final decision referred to in paragraph 1, taken in another Member State is considered by their national courts or administrative authorities as a rebuttable presumption that an infringement has occurred.

3. Member States shall ensure that a final declaratory decision referred to in Article 6(2) is deemed as irrefutably establishing the liability of the trader towards the harmed consumers by an infringement for the purposes of any actions seeking redress before their national courts against the same trader for that infringement unless an individual consumer has opted out and therefore is no longer bound by such an order pursuant to

Article 6(3). ~~Member States shall ensure that such actions for redress brought individually by consumers are available through expedient and simplified procedures.~~

Comment: *For the reasons discussed in the comment to Article 6(2), individual cases brought by consumers challenging widespread practices are inefficient. The more effective collective redress is, the less likely consumers will seek to proceed with litigation on their own for most infringements.*

Article 11

Suspension of limitation period

Member States shall ensure that the submission of a representative action as referred to in Articles 5 and 6 shall have the effect of suspending or interrupting limitation periods applicable to any redress actions for the consumers concerned, if the relevant rights are subject to a limitation period under Union or national law.

Article 12

Procedural expediency

1. Member States shall take the necessary measures to ensure representative actions referred to in Articles 5 and 6 are treated with due expediency.

2. Member States shall take the necessary measures to ensure r~~R~~epresentative actions for an injunction order in the form of an interim measure referred to in Article 5(12~~2~~)(a) shall be treated by way of an accelerated procedure.

Article 13

Evidence

Member States shall ensure that, at the request of a representative party or qualified entity that has presented reasonably available facts and evidence sufficient to support the representative action, and has ~~indicated~~ sufficiently described ~~further~~ the evidence that would be relevant to support the alleged violations of law ~~which~~ and reasonably expected to lie~~s~~ in the control of the defendant, the court or administrative authority ~~may~~shall order, in accordance with national procedural rules, that such evidence be presented by the defendant, subject to the applicable Union and national rules on confidentiality.

Comment: *First, as noted in the comment to Article 6(1), it is unclear what it means for representative parties or qualified entities to "present[] reasonably available facts and evidence sufficient to support the representative action." Any clarifications regarding that phrase as used in Article 6(1) should be mirrored in this provision.*

Second, to ensure access to evidence needed to establish and support the allegations of wrongdoing, we have clarified and expanded the standard for requesting evidence. Manifestly consumers should not be required to "prove" their case before they have been granted access to the evidence in the wrongdoers' possession.

As written, the rule has the potential to result in Member States enacting widely different standards for the collection of evidence. Widely different standards between Member States may result in parties forum shopping to find the most favorable Member State in which to bring the action. The proposed language provides a tighter standard that would result in more uniform rules between Member States.

Finally, American courts have become accustomed to balancing the privacy interests of consumers (as asserted by traders accused of wrongdoing!) with their right to be contacted and notified of legal action that would redress wrongs committed against them. For example, in one California case where consumers sued an electronics company claiming that DVD players they had purchased were defective, the plaintiff in the case sought the contact information of class members who complained about the DVD players in order to develop evidence in the case.[31] *The California Supreme Court balanced the privacy interests of the consumers at issue with the need for the plaintiff to use the contact information for its case, and concluded that dislclosure of the contact information, after notifying the affected consumers of the disclosure, was appropriate. The California Supreme Court reasoned, "[f]rom the standpoint of fairness to the litigants in prosecuting or defending the forthcoming class action, [the defendant company] would possess a significant advantage if it could retain for its own exclusive use and benefit the contact information of those customers who complained regarding its product."*[32] *The California Supreme Court's opinion is attached as* ***Exhibit 6***.

The success of this Directive requires that traders are not prohibited by privacy laws from using or disclosing the contact information of consumers, subject to careful scrrutiny by the court or administrative authority, in order to notify them of final decisions and settlements and send redress to them.

Article 14

Penalties

1. Member States shall ~~lay down the~~issue rules on penalties applicable to non-compliance with the final decisions issued within the representative action and shall take all necessary measures to ensure that they are implemented. The penalties provided for must be effective, proportionate and deter defendants from refusing or failing to comply with final decisions~~dissuasive~~.

[31] *Pioneer Electronics (USA), Inc. v. Superior Court,* 40 Cal. 4th 360 (2007).

[32] *Id.*, 374.

2. Member States shall ensure that penalties ~~may~~ take the form of fines.

3. When deciding about the allocation of revenues from fines, Member States shall take into account the collective interests of consumers.

4. Member States shall notify the Commission of the enactment of provisions referred to in paragraph 1 ~~to the Commission~~ by [*date for transposition of the Directive*] at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 15

Payment of Attorneys' fees and Expenses and a~~A~~ssistance for qualified entities

1. Member States shall ensure courts or administrative authorities have power to order a defendant to pay the attorneys' fees and actual expenses of counsel for representative parties or qualified entities where any final decisions providing for measures referred to in Articles 5 and 6 were in favor of the plaintiff, or where the court or administrative authority approved a settlement referred to in Article 8. Attorneys' fees shall be paid based on the amount of time spent on the case or a percentage of the value of redress actually provided to consumers.

   Attorneys' fees based on the amount of time spent on the case shall be calculated by multiplying the hours spent performing non-duplicative work on the case by each attorneys' reasonable hourly rates. The court or administrative authority may increase that amount by a multiple if the action has:

   (a) resulted in relief benefitting the general public or a large group of persons; or

   (b) required plaintiffs' counsel to undertake significant economic risk or substantial investment in bringing the action.

Comment: *This provision for attorneys' fees is consistent with the suggested contingency fee provision in Article 7(1) which permits attorneys' fees if a case is successful.*

In general, in the U.S., attorneys' fees are calculated one of two ways, or a combination of both ways. One way attorneys' fees are calculated is to base them on a percentage of the amount of money intended to be distributed to class members, usually 20-30% of the value intended to go to the class.[33]

A second way attorneys' fees are calculated is based on the amount of time spent on the case, with a "multiplier" to enhance the amount if exceptional results are obtained for consumers. A multiplier means that the court multiplies the amount calculated based on the amount of time spent on the case by some factor, such as 2, 3, or 4, to increase the

[33] National Consumer Law Center, note 19, at § 19.3.5.

amount of fees.[34] *When applying a multiplier, courts will also calculate attorneys' fees based on a percentage of the amount of money intended to be distributed to class members for the purpose of ensuring that the multiplier is fair.*

It is usually up to the court to select between which method to use when calculating attorneys' fees.[35]

The U.S. Chamber supports the "loser pays" principle, which would make unsuccessful representative parties and qualified entities responsible for a defendant's attorneys' fees, "to prevent the emergence of a culture of suing."[36] *This is not a concept that is utilized in class actions in the U.S. and would mean that ordinary citizens or non-profit organizations with limited resources might have to pay the massive attorneys' fees of a giant company if they lost in court. The potential economic risk would prevent most if not all consumers or qualified entities from ever bringing a legitimate case – especially one involving unprecedented facts or new legal theories.*

2~~1~~. Member States shall take the necessary measures to ensure that procedural costs related to representative actions do not constitute financial obstacles for qualified entities to effectively exercise the right to seek the measures referred to in Articles 5 and 6, such as limiting applicable court or administrative fees, granting them access to legal aid where necessary, or by providing them with public funding for this purpose.

Comment: *Providing qualified entities with the option of receiving attorneys' fees on contingency pursuant to Article 7(1) and 15(1), as well as funding through Article 15(2), will ensure that entities have the resources to pursue representative actions.*

3~~2~~. Member States shall take the necessary measures to ensure that in cases where the representative parties or qualified entities are required to inform consumers concerned about the ongoing representative action the related cost may be recovered from the trader if the action is successful.

4~~3~~. Member States and the Commission shall support and facilitate the cooperation of qualified entities and the exchange and dissemination of their best practices and experiences as regards the resolution of cross-border and domestic infringements.

5. Consumers covered by a settlement who voice their concerns about a settlement through an attorney shall be entitled to attorneys' fees based on the amount of time spent on the case if the court or administrative authority determines that their efforts resulted in:

(a) changes to a settlement beneficial to the consumers covered by the settlement; or

[34] *Id.*, § 19.3.6.

[35] *Id.*

[36] U.S. Chamber, note 4.

(b) a request by the court or administrative authority for additional information from the parties to a settlement.

Comment: *As discussed in the comment to Article 8(7), to encourage the important role of consumers who voice their concerns about a settlement play in ensuring the fairness of settlements, attorneys representing objectors in the U.S. should be entitled to obtain attorneys' fees. However, to prevent frivolous or abusive objections, we propose that, in order to obtain fees, the consumers who voice concerns about a settlement must obtain a finding by the court that they improved the settlement or raised a concern that led the court or administrative authority to further investigate the fairness of the settlement. This ensures that attorneys are compensated only for work on concerns that are legitimate and for the benefit of consumers.*

Article 16

Cross-border representative actions

1. Member States shall take the measures necessary to ensure that any representative party or qualified entity qualified ~~designated in advance~~ in one Member State in accordance with Article 4(1) may apply to the courts or administrative authorities of another Member State to bring a representative action in another Member State ~~upon the presentation of the publicly available list referred to in that Article. The courts or administrative authorities shall accept this list as proof of the legal standing of the qualified entity without prejudice to their right to examine whether the purpose of the qualified entity justifies its taking action in a specific case~~.

Comment: *This edit is consistent with the edit to Article 4(1) removing the requirement that Member States maintain a list of designated qualified entities in order to bring a representative action.*

2. Member States shall ensure that where the infringement affects or is likely to affect consumers from different Member States, the representative action may be brought to the competent court or administrative authority of a Member State by several representative parties and qualified entities from different Member States, acting jointly or represented by a single representative party or qualified entity, for the protection of the collective interest of consumers from different Member States.

Comment: *As with the proposed additions of Article 5(4) and 5(5) that provide for a system to consolidate multiple representative actions involving multiple attorneys within one Member State, a system for adjudicating multiple representative actions in different Member States would promote efficiency and create uniform results for harmed consumers across the EU. Consider delegating power to an entity such as the Court of Justice of the European Union to coordinate and manage multiple similar representative actions across different Member States. We have not attempted to draft such a provision.*

The U.S. Chamber opposes cross-border representative actions, arguing that "[i]n order to prevent forum shopping among Member States, any collective redress regime must provide that a claimant may bring a claim only in the jurisdiction where the defendant is a resident."[37] *If a defendant violated the law all across the EU, it does not make sense to limit actions to the one Member State in which the defendant resides when a defendant has been doing business across the EU – doing so would rob harmed consumers in other Member States of the opportunity to be made whole. Moreover, the U.S. Chamber's argument is belied by the entire theory of the EU, which is to facilitate commerce and to provide a standardized system of laws between Member States.*

~~3. For the purposes of cross-border representative actions, and without prejudice to the rights granted to other entities under national legislation, the Member States shall communicate to the Commission the list of qualified entities designated in advance. Member States shall inform the Commission of the name and purpose of these qualified entities. The Commission shall make this information publicly available and keep it up to date.~~

Comment: *Because we propose elimination of the requirement of maintaining a list of designated qualified entities, we deleted this paragraph.*

4~~3~~. If a Member State or the Commission raises concerns regarding the compliance by a qualified entity with the criteria laid down in Article 4(1), the Member State ~~that designated that entity~~ shall investigate the concerns and, where appropriate, revoke the designation if one or more of the criteria are not complied with.

Chapter 3

Final provisions

Article 17

Repeal

Directive 2009/22/EU is repealed as of [*date of application of this Directive*] without prejudice to Article 20(2).

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table set out in Annex II.

Article 18

Monitoring and evaluation

[37] U.S. Chamber, note 4.

1. No sooner than 5 years after the date of application of this Directive, the Commission shall carry out an evaluation of this Directive and present a report on the main findings to the European Parliament, the Council and the European Economic and Social Committee. The evaluation shall be conducted according to the Commission's better regulation guidelines. In the report, the Commission shall in particular assess the scope of application of this Directive defined in Article 2 and Annex I.

2. No later than one year after the entry into force of this Directive, the Commission shall assess whether the rules on air and rail passenger rights offer a level of protection of the rights of consumers comparable to that provided for under this Directive. Where that is the case, the Commission intends to make appropriate proposals, which may consist in particular in removing the acts referred to in points 10 and 15 of Annex I from the scope of application of this Directive as defined in Article 2.

3. Member States shall provide the Commission on an ongoing annual basis, for the first time at the latest 4 years after the date of application of this Directive, with the following information necessary for the preparation of the report referred to in paragraph 1:

   (a) the number of representative actions brought pursuant to this Directive before administrative and judicial authorities;

   (b) for each representative action filed:

      (1) the representative party or the ~~type of~~ qualified entity bringing the action~~s~~;

      (2) the type of ~~the~~ infringement tackled within the representative action~~s~~, the parties to the representative action~~s~~ and the economic sector concerned by the representative action~~s~~;

      (3) the length of the proceeding~~s~~ from initiating an action until the adoption of a final injunction~~s~~ order~~s~~ referred to in Article 5, redress order~~s~~ or declaratory decision~~s~~ referred to in Article 6 or final approval of ~~the~~ a settlement referred to in Article 8;

      (4) the outcome~~s~~ of the representative action~~s~~;

Comment: *Data on representative actions is crucial to determine the success of this Directive. It would facilitate that goal if Member States were to collect data on representative actions annually on an ongoing basis, not just for the first four years after this Directive goes into effect. Additionally, information should be collected about each specific action. As written, Article 18(3) would merely require Member States to collect aggregate information about all representative actions filed in a year. Specific information about each case that is filed will be much more effective to use to assess the success of this Directive.*

~~(b)~~(c) the number of qualified entities participating in cooperation and exchange of best practices mechanism referred to in Article 15(~~4~~3).

Article 19

Transposition

1. Member States shall adopt and publish, by [*18 months from the date of entry into force of this Directive*] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

   Member States shall apply those provisions from [*6 months after the transposition deadline*].

   When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive.

Article 20

Transitional provisions

1. Member States shall apply the laws, regulations and administrative provisions transposing this Directive to infringements that started after [*date of application of this Directive*].

2. Member States shall apply the laws, regulations and administrative provisions transposing Directive 2009/22/EC to infringements that started before [*date of application of this Directive*].

Article 21

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 22

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament *For the Council*

The President *The President*

EXHIBIT 1

Legal Times
WEEK OF MAY 9, 2005 • VOL. XXVIII, NO. 19
ALM

Let a Hundred Cases Wither

Proposal to require opt-in class actions would weaken consumers' weapon, freeing companies to cheat again.

BY DAVID ARKUSH
AND BRIAN WOLFMAN

"Let a Hundred Cases Bloom," wishfully proclaims the headline of Mark K. Moller's *Legal Times* commentary arguing for opt-in rather than opt-out class actions (Feb. 21, Page 62). Moller likens a properly functioning court system to a free market (good) and opt-out class actions to central planning (bad).

This analogy may offer a fun thought experiment, but it's ultimately silly. A little analysis shows that requiring plaintiffs to individually opt in to class actions, rather than including them unless they choose to opt out, will simply kill off a whole lot of class actions.

Moller's argument is based on choice and competition. We should treat potential class members as "lawsuit consumers" for whom lawyers should compete, he argues. Forcing lawyers to sell themselves—and each potential class action—to every class member would spawn many smaller actions rather than a single massive case regarding any given controversy.

Whereas a single judge might botch the case, these multiple lawsuits would increase the chances of the courts getting it right for most people. One judge is no more likely to reach the proper result than Soviet central-planners were able to guess the correct price for wheat. But in a market system, if one judge errs, others may do better.

The more one thinks about this argument, the less convincing it becomes.

MISPLACED VALUE

First, it reflects a strange and overstated pessimism toward the legal system. American judges are bound by statutes, regulations, case law, and the Constitution. It is hard to believe that they have as little chance of getting their decisions correct as did Soviet central-planners. But if they do, then why are we quibbling over the details of Federal Rule of Civil Procedure 23 rather than addressing much greater problems?

Just as the argument overstates the failings of the courts, it undervalues what class actions can do. For example, the worth of the one specific case discussed in the article—Aetna's massive settlement of doctors' claims that the insurance company systematically reduced, denied, and delayed payments—is made to sound like just another windfall for lawyers that hardly benefited class members. This is because the discussion focuses on monetary relief rather than the far more valuable prospective relief that doctors received.

On top of $100 million in damages, the October 2003 settlement in *In re Managed Care Litigation* compels sweeping changes in Aetna's billing practices that may, in the judge's words, "eliminate the worst of the improper practices involved in managed care." Among other provisions, the agreement requires Aetna to use medical community standards in determining "medical necessity," mandates more transparency in claims processing, ends Aetna's practice of automatically downgrading certain reimbursements after claims are filed, and permits doctors to enforce any law or regulation against Aetna even when the law provides no private right of action. The American Medical Association said at the time that the settlement should "raise the bar for the entire health insurance industry on fair and open business practices."

These reforms are worth more than three times the value of the Aetna settlement's monetary relief. Moller diminishes them by calling them mere "promises" and focuses on money damages instead.

WHO GETS THE CASES?

But aside from its outsized skepticism toward the courts and

its undervaluing of class actions, Moller's argument suffers from a much greater problem: It fails to prove its key assertion that an opt-in regime would generate dozens of class actions over a given controversy rather than just one or two, or that it would foster new competition among lawyers.

One imagines that if the United States were to implement an opt-in class action regime, a small handful of leading plaintiffs firms might simply corner the new market for opt-in class members. Who else would have the resources to solicit thousands of clients? Who would claimants trust with their claims aside from the firms with the strongest records of success? What solo practitioner or small firm would begin the process of collecting clients while knowing that other lawyers—even those who lack experience in the relevant law but are better at marketing themselves—could wind up attracting the bulk of the potential class?

In fact, given the myriad logistical and financial impediments to building a class action client by client by client, couldn't an opt-in rule result in fewer cases overall?

LITTLE CLAIMS LOSE OUT

This brings us to the most important problem with the opt-in plan: It will do the opposite of what its supporters claim. Rather than help consumers by allowing them to choose among dozens of class actions over a given controversy, an opt-in regime would harm consumers by eliminating a wide array of class actions altogether. This is evident from the role that choice plays in class action litigation today.

Under the current regime, class members already have some power to choose their own counsel. Whether they shop around—or whether lawyers compete for them—has little to do with whether or not a default rule places them in a given action.

Instead, the key is whether individual claims are worth fussing over. When class members have large claims, they can (and often do) opt out to litigate alone or in smaller groups. Sometimes lawyers even compete over them.

But when claims are small, class members rarely opt out. This is because rational people do not invest time in small claims. The claimants do not investigate their cases or hunt for lawyers, and lawyers usually do not find it feasible to seek out small-claims clients and pitch a case to each of them.

In short, when claims are large enough to support individual litigation (and class members are provided with effective notice of their rights), the default rule is mainly irrelevant. But when individual claims are small, the default rule controls.

CORPORATE HUSTLERS WIN

With this in mind, let's imagine we implement an opt-in rule as the default. For people with large claims who receive proper notice of an action, the rule has little effect. Those people already sometimes opt out and litigate alone or in non-class groups.

But for people with small claims, we see a big difference: The inertia that formerly benefited them now cuts against them, and their cases virtually disappear. They will not research their claims and hunt for lawyers, and lawyers will not attempt to build cases for them.

Say, for instance, that several hundred thousand credit-card holders are taken for $50 in hidden fees that pay for no additional benefit. Rational cardholders will not find those $50 claims worth the effort of bringing their own lawsuits or looking around for a pending class action. And rational lawyers will not attempt to build cases $50 client by $50 client, nor will they choose to fight a major corporate defendant on behalf of one or even a handful of clients for such a small reward.

Thus, without an opt-out class action rule, it is likely that no one will sue. The credit-card company will pocket millions in ill-gotten gains and, more important, will be undeterred from fleecing its customers in the future.

The Supreme Court recognized this problem in a 1985 opinion, *Phillips Petroleum Co. v. Shutts,* noting that most small claimants "would have no realistic day in court if a class action were not available" and that opt-in class actions would not suffice. "Requiring a plaintiff to request inclusion," the Court explained, "would probably impede the prosecution of those class actions involving an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit."

A LONG-RUNNING BATTLE

This is all elementary, and it is part of the reason why the Federal Rules Committee created the opt-out class action for damages in 1966. Before that revision, damages claims could only be aggregated in what were called "spurious" class actions—spurious because, like the proposed opt-in actions, they were not class actions at all. They were large joinders.

Companies that are subjected to small-claims class actions have resisted this reform and tried to reverse it. In the past, they have been more straightforward about their intent. In 1996, for example, they proposed to the Federal Rules Committee a "just ain't worth it" rule that would have required a judge to toss out a class action whenever the judge felt that probable relief to class members did not "justif[y] the costs and burdens of class litigation."

This was problematic for several reasons. Whose "costs and burdens" would be weighed? How could such an assessment be made at the outset of litigation, before the extent of the damages was known? But most troubling was that the proposed rule neglected to account for the value of prospective relief and deterrence of future misconduct, just as Moller does in his analysis of the Aetna settlement. Fortunately, the proposal failed.

The current packaging of the opt-in idea is more clever. Moller pitches opt-in class actions as a consumer protection plan. His argument and that of the proposed Right to Choose Your Lawyer Act show that opponents of consumers' legal rights have grown more savvy but are still playing the same game.

Unless one favors letting corporate defendants get away with misconduct, there is no reason to support such proposals. An opt-in regime would send a clear message to corporations: Feel free to bilk your customers so long as you do it in small amounts.

"Let a hundred cases bloom," indeed. "Let a hundred cases wither on the vine" would be more apt.

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EXHIBIT 2

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MYTHBUSTER!

PUNITIVE DAMAGES: RARE, REASONABLE AND LIMITED

"Punitive damages are not awarded for the purpose of compensating injured plaintiffs, but are almost exclusively reserved for civil claims in which the defendant's conduct was considered grossly negligent or intentional. Punitive damages are intended to serve as a means for punishing the defendant and deterring others from committing similar actions."[1]

Contrary to popular myth, punitive damages are rarely awarded.

- In 2005, the most recent year studied by the U.S. Department of Justice (DOJ), punitive damages were awarded in only 5 percent of civil cases where plaintiffs prevailed at trial.[2]

- Punitive damages were awarded in only 3 percent of tort cases with plaintiff winners[3]; for contract cases, it was 8 percent.[4]

- **Medical Malpractice:** In 2005, punitive damages were awarded in only 1 percent of cases where medical malpractice victims established liability at trial.[5]

- **Product Liability:** In 2005, punitive damages were awarded in only 1 percent of product liability cases with a successful plaintiff.[6] This includes asbestos and other product liability trials.

- **Trends:** After examining long-term data from state trials in the nation's 75 most populous counties, the DOJ found that the incidence of punitive damages has not increased:

    1. The percentage of plaintiff winners receiving punitive damages before civil juries is consistently low — 6 percent in 1992, 4 percent in 1996, 6 percent in 2001 and 5 percent in 2005[7];

    2. The percentage of prevailing plaintiffs awarded punitive damages in all tort trials is consistently low — 3.3 percent in 1996, 5.3 percent in 2001 and 3.6 percent in 2005[8];

    3. The percentage of successful medical malpractice plaintiffs receiving punitive damages is consistently low — 1.1 percent in 1996, 4.9 percent in 2001 and 2.6 percent in 2005[9];

    4. The percentage of plaintiff winners awarded punitive damages in product liability trials is consistently low — 7.7 percent in 1996, 4.2 percent in 2001 and 1.3 percent in 2005[10]; and

    5. The percentage of winning plaintiffs receiving punitive damages in contract cases was no greater in 2005 than in 1996, with plaintiffs' success rate totaling 8 percent both years.[11]

Punitive damages have decreased in frequency.

Long-term DOJ data from state tort trials in the nation's 75 most populous counties show that:

- **Tort Trials Overall:** The percentage of successful plaintiffs awarded punitive damages in tort trials declined by 33.3 percent between 2001 and 2005.[12]

- **Medical Malpractice:** From 2001 to 2005, the percentage of prevailing plaintiffs awarded punitive damages decreased by 46.1 percent.[13]

- **Product Liability:** The percentage of plaintiff winners receiving punitive damages dropped by 70.4 percent between 2001 and 2005.[14]

Most punitive damage awards are modest in amount.

- In 2005, the median overall punitive damage amount awarded to plaintiff winners in civil cases was $64,000.[15] The median punitive damage award for all tort cases was $55,000.[16]

- In 76 percent of the 632 civil trials with both punitive and compensatory awards, the ratio of punitive to compensatory damages was 3 to 1 or less.[17]

Juries and judges use similar reasoning when making punitive damage award decisions in tort cases.

- There was no detectible difference in the percentage of litigants awarded punitive damages when comparing tort bench and jury trials in 2005.[18]

- The median punitive damage awards in tort jury ($100,000) and bench ($54,000) trials were not statistically different.[19]

There are some arbitrary limits on the amount of punitive damages that can now be awarded in a case.

- **Supreme Court:** In *State v Farm Mut. Auto Ins. Co. v. Campbell (*and in the earlier case, *BMW of N. Am., Inc. v. Gore*) [20] the court, while hesitating to say too much about the appropriateness of specific punitive damages awards, said that "the degree of reprehensibility of the defendant's conduct" is the most important criteria, followed by the relationship between compensatory and punitive damages (the Court mentioned a single digit ratio) and relationship between the punitive damages and civil penalties. However, in the recent case *Philip Morris USA v. Williams, 07-1216,* the Court let stand a $79.5 million award against a tobacco company with a much higher ratio, where it was argued that the defendant's misconduct was particularly reprehensible and the harm was physical, as opposed to economic in nature.

- **States.** Of the 45 states that allow punitive damages in this country, at least one-third have enacted some form of cap, or limit, on the ability of judges and juries to award punitive damages. Over 30 state legislatures have made it more difficult for injured consumers to prove punitive damages by raising the standard of proof required for awarding them. Several states order victims to pay a portion of punitive damages into state-designated funds. Other states require or permit bifurcated trials where the injured person is forced to essentially try a case twice, first

proving liability and second, arguing the size of the award. And in some states, juries are prevented from deciding the amount of a punitive damages award -- only the judge is permitted do that.[21]

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Updated April 2011

NOTES

[1] U.S. Department of Justice, Bureau of Justice Statistics, "Punitive Damage Awards in State Courts, 2005," NCJ 233094 (March 2011) at 1 (citing *Black's Law Dictionary*, 1990), found at http://bjs.ojp.usdoj.gov/content/pub/pdf/pdasc05.pdf.
[2] *Id.* at 1, 4 (Table 5).
[3] *Id.* at 4 (Table 5).
[4] *Ibid.*
[5] *Ibid.*
[6] *Ibid*.
[7] U.S. Department of Justice, Bureau of Justice Statistics, "Civil Bench and Jury Trials in State Courts, 2005," NCJ 223851 (October 2008)(revised April 9, 2009) at 10, found at http://bjs.ojp.usdoj.gov/content/pub/pdf/cbjtsc05.pdf.
[8] U.S. Department of Justice, Bureau of Justice Statistics, "Tort Bench and Jury Trials in State Courts, 2005," NCJ 228129 (November 2009) at 12 (Table 12), 13, found at http://bjs.ojp.usdoj.gov/content/pub/pdf/tbjtsc05.pdf.
[9] *Id.* at 12 (Table 12).
[10] *Ibid*.
[11] U.S. Department of Justice, Bureau of Justice Statistics, "Contract Bench and Jury Trials in State Courts, 2005," NCJ 225634 (September 2009) at 6, found at http://bjs.ojp.usdoj.gov/content/pub/pdf/cbajtsc05.pdf.
[12] "Tort Bench and Jury Trials in State Courts, 2005," *supra* n.8, at 12 (Table 12).
[13] *Ibid*.
[14] *Ibid*.
[15] "Punitive Damage Awards in State Courts, 2005," *supra* n.1, at 1, 5 (Table 8).
[16] *Id*. at 5 (Table 8).
[17] *Id*. at 1, 5 (Table 8).
[18] *Id.* at 1, 6 (Table 10).
[19] "Tort Bench and Jury Trials in State Courts, 2005," *supra* n.8, at 6, 7 (Table 6).
[20] *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 581 (1996).
[21] This is based on the Center for Justice & Democracy White Paper, *What You Need to Know About Punitive Damages* (2001); http://centerjd.org/archives/issues-facts/punitives.pdf. Today, there are likely more state punitive damages limits on the books.

EXHIBIT 3

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COURTHOUSE CORNERSTONE:

Contingency Fees and Their Importance for Everyday Americans

The contingency fee system ensures that someone with a legitimate injury case, regardless of their financial means, has access to a competent attorney. It is a remarkable system that functioned for centuries without any government interference.

But in the 1980's, lobbyists for big corporations, medical societies, and the insurance industry began to attack and undermine the contingency fee system by pushing for statutory limits on contingency fees, turning a free-market approach to providing legal representation into a botched system of government-imposed wage and price controls, and interfering directly with the contractual arrangements between people and their own attorneys.

Recently, there has been some movement to repeal unfair contingency fee limits, a trend that hopefully will continue.

For centuries, contingency fees have been considered the "key to the courthouse door" for everyday Americans, ensuring access to attorneys and the civil justice system.

- Contingency fee attorneys take cases without charging the victim any money up front. The attorney is paid only if the case is successful and as a percentage of the judgment they obtain.

- Contingency fees are guided by ethical rules that have kept fees from becoming excessive. Research shows that the typical contingency fee ranges from 25% to 33%, and in the majority of cases is 33%.

- The system allows victims to hire not just any attorney, but a competent attorney in a specialized area, just as insurance companies or corporate defendants do.

- Even critics of contingency fees acknowledge their importance in enabling the sick and injured to obtain access to the courts.

Contingency fee attorneys take huge risks since, if they lose a case, they are paid nothing for their time or the expenses they have fronted.

- Even when cases are successful, attorneys still face financial risks depending on how much is ultimately recovered, the timing of any final judgment or settlement, or whether a judgment will even be paid.

- Contingency fees are appropriate in low risk cases and in those that settle early. Winning is never guaranteed, and sometimes early settlements occur precisely *because* of the value a contingency fee attorney brings to a case.

Contingency fees further protect the civil justice system by making attorneys both selective and efficient.

- Because of the financial risks that attorneys take in contingency fee cases, they cannot afford to bring cases that are "frivolous" or without merit.

- This universal "screening" function has been accepted by many conservative analysts and even by the insurance industry.

- Evidence of how well this screening function works is in the statistics.

    - Surveys show attorneys accept a small percentage of cases from potential clients.

    - Personal injury suits are a very small percentage of civil litigation and the rate of case filings has been dropping for years.

The contingency fee system aligns the attorney's interest with that of their client, while also promoting efficiency of judicial resources.

- Because their payment is linked to the outcome of the case and the attorney is upaid while working on a case, contingency fee attorneys have a strong interest in working hard for their clients and resolving cases efficiently.

- Defense attorneys, on the other hand, who are paid by the hour, profit from dragging out their cases and delaying settlements and judgment. Insurers themselves also profit the longer payment is delayed.

Half the states in this country have some type of law dealing with contingency fees and most of those block victims' ability to hire counsel.

- Most states that limit contingency fees use sliding scales, with the most severe limits on the highest award.

- The impact is primarily on victims with the most serious harm or complex cases, where attorneys cannot afford to front high litigation costs knowing the possible recoverable damages are so limited.

- In states where plaintiffs' attorney fees are limited, corporations and insurance companies have no reciprocal limits on what they pay their own high-priced attorneys. That means wrongdoers can continue to hire the best attorneys money can buy while the sick and injured cannot.

- Recently, advocates for contingency fee limits have used manipulative PR efforts to suggest that such laws are pro-consumer – i.e., they allow injured patients to keep more of their recovery -when in reality, they prevent injured patients from obtaining competent counsel.

- There has also been some movement to repeal unfair fee schedules. In January 2013, the Governor of Illinois signed new legislation, which replaces that state's restrictive fee schedule in medical malpractice cases with a standard one-third, and eliminates attorneys' ability to petition a court for higher fees.

EXHIBIT 4

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION — RIVERSIDE

JOHN TRUE and Gonzalo M. Delgado, individually and on behalf of all others similarly situated, Plaintiffs, v. AMERICAN HONDA MOTOR CO., INC., Defendant.	Case No. EDCV 07-287-VAP (OPx) **OBJECTIONS OF CLASS MEMBERS JOSEPH K. GOLDBERG, VALERIE M. NANNERY, AND KATHERINE A. BURGHARDT** Date: January 11, 2010 Time: 10:00 a.m. Courtroom 2

OBJECTIONS OF CLASS MEMBERS JOSEPH K. GOLDBERG, VALERIE M. NANNERY, AND KATHERINE A. BURGHARDT

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INTRODUCTION

Because the overwhelming majority of class members would receive no meaningful relief if the proposed settlement in this case is approved, and because the settlement makes arbitrary distinctions among members of the class, class members Joseph K. Goldberg, Valerie M. Nannery, and Katherine A. Burghardt object to the settlement.

The settlement's primary relief consists of marketing gimmicks that will benefit Honda more than the class. Most class members would release all of their claims in exchange for (1) a Honda-produced DVD with tips on how to get better gas mileage and (2) the opportunity to participate in a coupon-like rebate program that would require class members to buy one of Honda's less-fuel-efficient models. The DVD, however, is worthless. The information is already available free, will be available for viewing on the settlement website anyway, and does not address the claims in this lawsuit. The coupon-like rebate program is similarly worthless for the overwhelming majority of class members, and suffers from the same flaws that have led to widespread criticism of coupon settlements by Congress, courts, and commentators. The redemption rates will be far lower than predicted by class counsel and the settlement erects unnecessary barriers that will further decrease participation.

In addition, fewer than two percent of class members are eligible to make a claim for a $100 cash payment, and to do so they must complete a series of steps within a 60-day window—obstacles that will discourage claims and further lower the redemption rate. Because the proposed settlement would provide no benefit to the vast majority of the class, the settlement should be rejected.

BACKGROUND

A. The Underlying Class Action

This class action alleges that Honda induced consumers to purchase the Honda Civic Hybrid with false or misleading statements regarding the Civic Hybrid's fuel efficiency and cost savings. Doc. 48. The complaint asserts state-law claims under the

Unfair Competition Law (UCL), Cal. Bus. & Pro. Code § 17200, *et seq.*, False Advertising Law (FAL), Cal. Bus. & Pro. Code § 17500, *et seq.*, Consumers Legal Remedies Act (CLRA), Cal. Civil Code § 1750 *et seq.*, and for common-law unjust enrichment.

According to the plaintiffs, the Civic Hybrid sells for about $2,500 to $7,000 more than a comparably equipped standard-engine Honda Civic.[1/] Consumers paid this "hybrid premium" to purchase the Civic Hybrid because Honda's advertisements led them to believe that they would enjoy substantially better fuel economy than they actually obtained. In fact, the fuel efficiency and cost savings of the Civic Hybrid are substantially less than that advertised by Honda, and the Civic Hybrid gets only marginally better gas mileage than the standard-engine Honda Civic.

After this Court denied Honda's motion to dismiss the complaint, *True v. American Honda Motor Co., Inc.*, 520 F. Supp. 2d 1175, 1183 (C.D. Ca. 2007), the parties took discovery and then entered into settlement negotiations resulting in an agreement that was filed with the Court on March 2, 2009.[2/] Doc. 91.

B. The Proposed Settlement Agreement

Under the terms of the proposed settlement, class members would release all of their claims in exchange for a DVD with tips on how to improve their gas mileage. In addition, some class members may be eligible to seek additional relief under one of three mutually exclusive options.

[1/] In their complaint (Doc. 1), opposition to the defendant's motion to dismiss (Doc. 19), and first amended complaint (Doc. 48), the plaintiffs alleged that this "hybrid premium" was about $7,000. In their brief in support of preliminary approval of the settlement (Doc. 97), they say that they can demonstrate through expert testimony that the "hybrid premium" was at least $2,500. In their supplemental brief (Doc. 105), the plaintiffs further explained that their expert had determined that the Honda Civic EX was the standard-engine model most comparable to the Civic Hybrid, and that based on publicly available pricing data, the average hybrid premium for each model year during the class period ranged from $2,240 to $3,090.

[2/] The settlement agreement has been modified by a letter agreement dated July 9, 2009, and filed with the Court on July, 13, 2009. Doc. 112-2, Exh. 1.

Under "Option A," a class member who (1) purchased (rather than leased) a new model year 2003-2008 Civic Hybrid, (2) sells or trades it in, (3) purchases an eligible Honda vehicle,[3/] (4) satisfies the qualifying preconditions for obtaining a claim form, and (5) submits a claim form with proper documentation by October 31, 2011, can obtain a $1,000 rebate of the money the class member pays for a new Honda. The qualifying preconditions require the class member to access the settlement website, enter the VIN of the Civic Hybrid, watch a video on how to improve gas mileage, obtain a preassigned claim number, and download a claim form. Option A is non-transferable.

Under "Option B," a class member who (1) retains ownership or has a leasehold on a Civic Hybrid and (2) purchases an eligible Honda vehicle, (3) satisfies the qualifying preconditions for obtaining a claim form, and (4) submits a claim form with proper documentation by October 31, 2011, can obtain a $500 rebate of the money the class member pays for a new Honda. Option B is transferable to certain family members if the transferee submits proof of the family relationship.

Under "Option C," a class member (1) who before March 2, 2009 complained about the fuel economy of the class member's Civic Hybrid to Honda, an authorized Honda dealer who reported it to Honda, or to class counsel, (2) whose complaint resulted in a written record created in the ordinary course of business, and (3) who satisfies the qualifying preconditions for obtaining a claim form and (4) submits the claim form within 60 days after it becomes available, can receive $100 from Honda.

The agreement provides that class counsel may seek attorney's fees of up to $2,950,000, and includes a "clear-sailing" clause providing that Honda will not contest

[3/] An eligible Honda vehicle is a new model year 2009, 2010 or 2011 Honda or Acura, excluding the Honda Fit, Honda Insight, Civic Hybrid, Honda CRZ or any Honda Certified Used Car or Acura Certified Pre-Owned Vehicle.

class counsel's fee request.[4/] It also provides for incentive payments of $12,500 and $10,000 to the two class representatives, respectively.[5/]

Plaintiffs filed a motion for preliminary approval of the settlement (Doc. 92), which this Court denied (Doc. 100) because the Court lacked "sufficient information to determine whether the proposed class satisfies the requirements of Rule 23 and whether the proposed settlement is fair, adequate, and reasonable." *Id.,* 9:7-10. In particular, the Court held that plaintiffs had failed to meet their burden under Rule 23(e) because the Court could not determine the fairness and adequacy of the settlement without additional information concerning the strength of plaintiffs' case, the value of the proposed relief, and the likely number of class members who would take up each of the relief options. Plaintiffs filed a supplemental motion for preliminary approval of the settlement (Doc. 104) and submitted additional information. Following a hearing on the supplemental motion, plaintiffs filed a second supplemental motion for preliminary approval (Doc. 111) to address issues that arose at the hearing. On August 27, 2009, the Court entered an order granting preliminary approval to the agreement. Doc. 114.

IDENTITY OF OBJECTORS AND INTENT TO APPEAR

These objections are filed on behalf of class members Joseph K. Goldberg, Valerie M. Nannery, and Katherine A. Burghardt. *See* Declarations of Objectors Goldberg, Nannery, and Burghardt, attached as Exhibits 1, 2, and 3. Each objector purchased a

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[4/] *See, generally,* William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 Tul. L. Rev. 813 (2003).

[5/] Objectors recognize that reasonable incentive awards are often appropriate to compensate class representatives for the time spent performing duties that are not undertaken by absent class members, including time spent in depositions and responding to other discovery. But because named plaintiffs "may be tempted to accept suboptimal settlements at the expense of the class members," *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 720 (E.D.N.Y. 1989), courts must carefully scrutinize incentive awards. *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1148 (11th Cir. 1983). The size of the proposed incentive awards in this settlement underscore the unfairness of the settlement to the vast majority of class members who will release their claims in exchange for absolutely nothing of value.

new Civic Hybrid in model years 2003 through 2008. The accompanying declaration of each objector contains all of the information required by paragraph 12 of the second revised preliminary approval order (Doc. 114), and the additional information required by paragraph 9.c.(1)(vii) of the class notice (Doc. 112-2, Exh. 3). Objectors intend to appear at the Final Approval Hearing through counsel and present argument in support of their objections. *See* Notice of Appearance. Counsel have executed declarations, attached as Exhibits 4 and 5, setting forth the information required by paragraph 9.c.(1)(vii) of the class notice.

STANDARDS UNDER RULE 23(e)

A district court may approve a class action settlement "only after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). The settling parties bear the burden of showing that the settlement meets this standard. *Id.* The purpose of this requirement is "the protection of those class members . . . whose rights may not have been given due regard by the negotiating parties." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 624 (9th Cir. 1982). The proposed settlement here requires a higher level of scrutiny because it was reached prior to class certification, *see Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620-21 (1997); *In re GM Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 787-88 (3d Cir. 1995); *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 520 (1st Cir. 1991), and because of the inherent tension attributable to class counsel's self-interest in achieving a settlement that, like this one, involves a substantial fee. *See Staton*, 327 F.3d at 959-60; *see also Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000).

Although a court may need to balance several factors to determine whether a proposed settlement is fair, reasonable, and adequate, "[t]he relative importance to be attached to any particular factor will depend upon the nature of the claims, the types of relief sought, and the unique facts and circumstances presented by the individual case." *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291(9th Cir. 1992) (citing

Officers for Justice, 688 F.2d at 625). The essence of the inquiry is whether the settlement reflects a reasonable compromise in light of the prospects of further litigation. A critical element of this analysis, particularly in cases such as this one where the class seeks a monetary recovery, is consideration of the value of the proposed settlement in comparison to an appropriately discounted valuation of the possible recovery if the case were to proceed to judgment and the fairness of the distribution of any benefits among the class members.

Such an analysis is particularly difficult where the value of the in-kind relief, like the DVD provided by this settlement, is not apparent from the face of the agreement. Similarly, coupon settlements, such as the rebate opportunities provided by this agreement, must be carefully scrutinized because their potential value to the class is diminished by low redemption rates. The Court has a responsibility to ensure that the settlement provides real value by offering relief that the class will actually use. *See* 2003 Advisory Committee Notes, Fed. R. Civ. P. 23(h) ("Settlements involving nonmonetary provisions for class members also deserve careful scrutiny to ensure that these provisions have actual value to the class."); Class Action Fairness Act, 28 U.S.C. § 1712(e) (setting standards for judicial scrutiny of coupon settlements). As explained below, the Court should deny final approval of the proposed settlement in this case because the settlement would leave the vast majority of class members with no relief at all, and because it makes arbitrary distinctions among class members.

ARGUMENT

I. The Fuel Economy Video and DVD Provide No Value to the Class.

If the proposed settlement is approved, Honda will produce a "Fuel Economy Video" with "information concerning how Settlement Class Members can drive and maintain their vehicles, including the [Civic Hybrid], in order to maximize and optimize their fuel economy." Doc. 91, 5:3-6. The video will be posted on the settlement website, where it can be viewed by class members as a precondition to receiving a claim form to pursue the other relief potentially available under Options

A, B, and C. *Id.,* 10:13-12. The video will also be put on DVDs that will be mailed to all class members. *Id.,* 15:10-12.

A. The information to be included on the DVD is already available free.

The DVD has not yet been produced, and it will be produced only if the settlement is approved, but the settling parties have submitted a "Preliminary Outline for Fuel Economy DVD" that describes its proposed content. Doc. 104-2, Exh. F-16. That outline describes information that is already widely available free, making it apparent that the DVD will provide no real value to the class.[6/]

Specifically, many free and publicly-available websites contain substantially the same information on how to maximize or optimize fuel economy as the proposed DVD. *See* Declaration of Julian Helisek, attached as Exhibit 7. Similarly, the information listed on the outline that is specific to the Civic Hybrid is information that is already included in each class member's Civic Hybrid owner's manual and on Honda's own websites. *Id.* Thus, the DVD is unlikely to provide class members with any information that is not already available to them. Tellingly, Honda has not asserted that any information that will be included in the video is otherwise unavailable.

Anticipating these objections, class counsel argues that the DVD has value to the class because there are "videos currently available for sale on the internet providing instructions and tips for maximizing fuel economy." Doc. 105, 12:11-12. The mere fact that something is offered for sale on the internet does not demonstrate its value to the class or show that it is not available elsewhere free.

[6/]In a recent order denying final approval of a proposed class action settlement, Chief Judge Walker of the Northern District of California found that the defendant's agreement to provide each class member with anti-spam software was of little value because similar software is available to most internet users free. *In Re TD Ameritrade Accountholder Litigation*, No. 07-2852 (N.D. Cal. Oct. 23, 2009) (order denying final approval of proposed class action settlement). A copy of Judge Walker's order is attached as Exhibit 6.

B. The DVD does not address the claims in the lawsuit.

Plaintiffs allege that class members were induced to pay substantially more for the Civic Hybrid than they would have paid for a conventional Honda Civic because Honda engaged in false and deceptive advertising about the fuel economy of the Civic Hybrid. The lawsuit seeks restitution in the form of a refund of the "hybrid premium." It does not seek educational materials on how to maximize fuel economy. Because the DVD would not provide restitution, the DVD is not directed toward the claims in the lawsuit, and the DVD cannot be considered adequate consideration for a release of the class members' monetary claims. *See In re Ford Motor Co. Bronco II Product Liability Litigation*, 981 F. Supp. 969, 971-72 (E.D. La. 1997) (refusing to preliminarily approve a proposed settlement that included a safe-driving video because, despite claims that the video would provide an educational benefit, the proposed settlement included none of the monetary relief sought in the complaint).

Class counsel cites *Shaw v. Toshiba American Information Systems, Inc.*, 91 F. Supp. 2d 942 (E.D. Tex. 2000), in support of the assertion that "the DVD is of real, economic value, designed to meet the Complaint's allegations[.]" Doc. 105, 17:24-25. But *Shaw* held that "[a] settlement should not be disapproved simply because it contains an in-kind benefit component if the benefits are of *real, economic value* to the class members." 91 F. Supp. 2d at 960 (emphasis added). *Shaw* held that the in-kind relief in that case—a software patch, disk drive, and hardware fix—"provided significant value to class members." *Id.* Moreover, *Shaw* was brought to remedy a particular product defect that the in-kind benefits would cure. As explained above, the DVD in this case has no economic value and does not cure the problem of Honda having misled the class into paying a hybrid premium.

Class counsel also cites *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269 (W.D. Tex. 2007), as support for the proposition that an education program can, in some circumstances, provide valuable relief. Doc. 105 at 17. But the issue here is not whether any educational program can *ever* be a valuable part of a settlement package.

Rather, the issue is whether the fuel economy DVD contemplated by this settlement would provide a benefit that addresses the claims in the lawsuit. *DeHoyos* was a challenge to an insurance company's use of a particular credit-scoring algorithm that had a disparate impact on minorities. The court found that the total settlement package—which included a new credit-scoring formula, an appeals process, a credit-education program, increased minority marketing, and monetary relief—provided sufficient relief to warrant approval. *DeHoyos*, 240 F.R.D. at 303-10. Further, the credit education program that was part of the settlement package was "not currently available," but would be "developed and implemented by two leading minority advocacy groups." *Id.* at 306. In contrast, the information that will be on the video proposed in this settlement is already available, and because it will be produced by Honda for viewing by Honda customers, it will likely promote Honda's products and provide far more benefit to Honda than to the class.

Even if the proposed video was directed towards the claims in this case, class counsel has not presented any evidence that watching the video will actually improve class members' fuel economy or in what amounts. Although class counsel presents a table to show "[t]he potential economic value to Class Members of the DVD" based on various percentages of improvement in fuel economy "that may be realized after viewing the DVD and following its instructions," (Doc. 105, 11:5-15), counsel acknowledges in a footnote that the "calculation of savings is for illustrative purposes only[.]" *Id.*, n.23.

C. Because the video can be viewed on the settlement website, there is no reason to send each class member a DVD.

The same video that the settling parties propose to send to each class member will be available on the settlement website. The settlement provides that class members who enter the VIN of their Civic Hybrid and watch the video can obtain a preassigned claim number and download a claim form (Doc. 91, 10:16-19), but the documents filed in connection with the proposed settlement do not indicate whether those who do not

enter a VIN will still be able to view the video online. To the extent that the online video will be available to all class members, or to the general public, there is no reason to send each class member an individual DVD. The cost of producing and mailing individual DVDs could be avoided and the savings passed on to the class members.

II. The Potential Rebates Under Options A and B Provide Little or No Value.

A. In general, coupon settlements are disfavored.

Non-cash coupon settlements, which offer class members a chance to get a discount or rebate on future purchases from the defendant, have been widely criticized by Congress, courts, and commentators—and for good reason.[7/] As Congress noted when it enacted the Class Action Fairness Act of 2005: "Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where . . . counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value." Pub. L. 109-2, § 2(a)(3), codified at 28 U.S.C. § 1711, note (Findings and Purposes at (a)(3)); s*ee 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"); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 221 (D. Me. 2003) ("[A] settlement is not fair where all the cash goes to expenses and lawyers, and the members receive only discounts of dubious value."); *Clement v. Am. Honda Fin. Corp*., 176 F.R.D. 15, 27 (D. Conn. 1997) (disapproving settlement that provided coupons as a credit against class members' next purchase or lease of a Honda because "the coupons are essentially worthless to class members"); 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").

As the National Association of Consumer Advocates, in its *Standards and*

[7/] Although the rebate opportunities potentially available under Options A and B do not involve a physical coupon, the nature of the relief is much the same as a traditional coupon. Indeed, as explained in section B.3. below, the rebate program here is in some ways worse than a typical coupon settlement.

Guidelines for Litigating and Settling Consumer Class Actions, 255 F.R.D. 215, 235 (2009) ("NACA Guidelines"), explains, coupon settlements should be avoided because:

> 1. Except in unusual circumstances, there is usually no principled reason why delivery of cash settlements cannot be achieved, aside from the fact that the defendant prefers not to do so.
>
> 2. For most of the class, redemption may not be an option, because they are unwilling or unable to make a future purchase from the defendant. Thus the class members are not equally compensated—some get more, others get less. This situation is at its most aggravated when the certificate requires purchase of a new car or other "big ticket" item.
>
> 3. Even where the coupon is for a small ticket item or is freely transferable, the defendant may be able to use its specialized knowledge of the industry to recover the cost of the coupon in the marketing of the relevant product.
>
> 4. Policy considerations disfavor rewarding the wrongdoing defendant with new sales from the victims of its illegal practices.

All of these factors disfavor the approval of the proposed settlement in this case. Moreover, as discussed below, the rebate program proposed here suffers from additional shortcomings.

B. The wildly optimistic redemption rates predicted by class counsel are based on a flawed analysis, ignore the experience of similar settlements, and do not account for the many obstacles to participation in this settlement.

This Court denied plaintiffs' first motion for preliminary approval of the settlement because, among other things, class counsel failed to provide estimates of the number of class members who would make use of the rebate opportunities available under Options A and B. Doc. 100, 20:13-21. Unfortunately, although class counsel has now provided an estimate, the predicted redemption rates lack credible support.

1. The Dreze analysis is unsupported and contains multiple errors.

In their supplemental brief, class counsel rely on a declaration from Xavier Dreze (Doc. 104-2, Exh. C) who "estimates that 7% of Class Members will elect Option A, and 6% of Class Members (or an eligible family member thereof) will elect Option B[.]" Doc. 105, 13:2-4. Although Dreze does not explain his methodology, he apparently estimated the number of class members with potential interest in purchasing another Honda during the rebate period and multiplied that number by an estimated response factor of 40% for Option A and 20% for Option B. *See* Declaration of Clarence Ditlow, Exh. 8, 6:19-7:6. Dreze's methodology suffers from multiple independent errors which are described in the Ditlow Declaration.

First, Dreze began with an estimate of the number of Civic Hybrids still owned by class members by subtracting the number of trade-ins, but he did not account for vehicles that are out of class member use because they were totaled in crashes or otherwise scrapped. *Id.*, 7:10-15. *Second*, Dreze uses a two-year window for the rebate program, but in fact the program will last no more than 19 months. *Id.*, 7:16-23. *Third*, Dreze fails to account for class member demand for Honda vehicles, other than the Civic Hybrid, that are excluded from the rebate program. *Id.*, 7:24-8:5. Each of these errors inflates Dreze's estimate of the number of class members who may be in the market for a Honda during the rebate program, and results in an upwardly-skewed estimate of the number of class members with potential interest in purchasing another Honda during the rebate period.

The most fundamental flaw in Dreze's analysis is his use of 40% and 20% as estimated response factors. Dreze does not explain why he chose those percentages and he cites no sources for them. Dreze states only that "[r]edemption rates in class actions have varied widely, ranging from less than one percent to over 90 percent. As a result, estimates of cash back redemption rates were not derived from one source, rather, were based on a review of publically available evidence and scholarly writing on settlements." Doc. 104-2, Exh. C, 3:18-22. Whatever their source and derivation,

the factors used by Dreze that drove his estimate that Options A and B would have a combined redemption rate of 13% are clearly flawed because the actual redemption rates for coupon settlements providing discounts or cash back on the purchase of a new vehicle from a defendant in settlements of the type proposed here are typically 2% or less.

2. The GM truck cases and Ford Explorer cases suggest that the redemption rate here will be no more than 2%.

In the GM truck cases, plaintiffs alleged that the trucks had a design defect that increased the likelihood of fuel tank ruptures in side-impact crashes. Identical settlements were reached in two separate cases. One case was in federal court in the Eastern District of Pennsylvania and covered GM truck owners in all states but Texas; the other case was in state court in Texas and applied only to truck owners there. The proposed settlements limited class members' recovery to discount coupons to buy new GM trucks. The proposed coupons were valid for 15 months and provided a $1,000 discount on the purchase of a new GM Truck or minivan. Additionally, class members could transfer the coupon to third parties, but then the coupon was worth only $500. Although the trial courts in both cases approved the settlements, the settlements were rejected and strongly criticized on appeal. *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir.); *Bloyed v. Gen. Motors Corp.*, 881 S.W.2d 422 (Tex. App.—Texarkana 1994), *aff'd and remanded, Gen. Motors Corp. v. Bloyed*, 916 S.W.2d 949 (Tex. 1996). One of the major criticisms was that the coupons would have low redemption rates and would leave most class members with no benefit.

The GM truck cases were eventually settled in a Louisiana state-court action. In the Louisiana case, the settlement was much improved from the earlier cases because it provided coupons of up to $1,000 toward the purchase of almost any new GM vehicle, took steps to create a secondary market for the coupons, and more than doubled the life of the coupons. *White v. Gen. Motors Corp.*, 835 So. 2d 892, 896-97

(La. App. 1 Cir. 2002). But even with all of these improvements to the coupon portion of the settlement, less than 100,000 of the 5.8 million eligible settlement class members redeemed their coupons, a redemption rate of less than 1.7%. Ditlow Declaration, Exh. 8, 4:15-19.

In the Ford Explorer class action cases, plaintiffs claimed that Ford concealed a dangerous design flaw that increases the tendency of the vehicles to roll over, causing consumers to buy or lease Explorers, and to pay more than what they should have. The cases were consolidated and a class action settlement approved in *Ford Explorer Cases*, J.C.C.P. Nos. 4266 & 4270, California Superior Court, County of Sacramento. The settlement class consisted of about one million consumers. The settlement provided a process by which class members could claim coupons, valid for 12 months, worth $500 toward the purchase or lease of a new Ford Explorer or $300 toward the purchase or lease of any other new Ford, Lincoln, or Mercury vehicle. On June 26, 2009, class counsel in *Ford Explorer Cases* filed an Interim Report on Settlement Claims and Voucher Redemption (attached as Exhibit 8(a)) showing that only 75 discount certificates had been redeemed, representing a redemption rate of about .0075%. Ditlow Declaration, Exh. 8, 5:1-14.

The GM Truck cases and Ford Explorer cases provide the best estimate of the likely redemption rates for the rebate program proposed here, but the cases were apparently ignored by Dreze when he made his redemption rate estimate of 13%. Similarly, class counsel apparently ignored the GM Truck and Ford Explorer redemption rates when they opined, without citation, that the figures predicted by Dreze "are consistent with redemption rates in settlements of this nature." *Id.* Although they expressed support for Dreze's estimate, class counsel noted that "Honda does not endorse his findings and conclusions and takes no position with respect thereto." Doc. 105, 10:27-28. This is significant because "the defendant will usually be in a superior position to predict the ultimate redemption rate and benefit to the class[.]" NACA Guidelines, 255 F.R.D. at 236-37.

3. The rebate program here imposes significant obstacles to participation beyond those in the GM Trucks and Ford Explorer cases.

Based solely on the redemption rates in the GM Trucks and Ford Explorer coupon settlements, it is highly unlikely that the redemption rate here would reach even 2%, much less the 13% estimated by Dreze. But the settlement here presents three *additional* obstacles to class member participation.

First, although it could easily do so, Honda will not simply mail a discount coupon to each class member. Rather, rebates can be obtained only if the class member (1) goes to the settlement website, (2) enters the VIN of his or her Civic Hybrid, (3) watches the fuel economy video, (4) obtains a preassigned claim number, (5) downloads a claim form, (6) purchases an eligible Honda vehicle, *and* (7) submits all of the required documentation (8) by October 31, 2011. Only if all eight of those requirements are satisfied will the class member receive a rebate check. These requirements present additional barriers to participation that will push redemption rates even lower than the typical coupon settlement.

Second, the redemption rate is likely to be significantly reduced by unnecessary restrictions on transferability. The $1,000 rebate potentially available under Option A is completely non-transferable. The $500 rebate potentially available under Option B is transferable only to immediate family members.

Third, the fact that the rebate is limited to class members who purchase particular Honda vehicles will further reduce participation. The rebates cannot be used for the purchase of the Honda Fit, Honda Insight, Civic Hybrid, or Honda CRZ. Class counsel does not explain why these vehicles are excluded, but they are the most fuel-efficient Honda models (Ditlow Decl., Exh. 8, 5:11-6:18) and include the least expensive Honda. *Id.*, 4:24-26. In other words, they are the models with features closest to those that attracted class members to the Civic Hybrid in the first place. The exclusion of these vehicles also highlights an additional shortcoming in Dreze's analysis. Dreze based his estimates, in part, on "the percentage of repeat hybrid customers[.]" Dreze

Decl., 3:17-18. But this settlement specifically *excludes* Honda's hybrids from the rebate program. Thus, to the extent that Civic Hybrid owners are interested in buying another hybrid, the rebates offered through the settlement will do them no good. Indeed, the rebates will benefit only the small number of class members who have the means and desire to buy a non-excluded Honda vehicle before October 11, 2011, and offers nothing to the vast majority of class members who are unable or unwilling to do so.

III. The Cash Payment Available Under Option C Potentially Benefits Only A Fraction of the Class and Imposes Obstacles that Will Lower the Redemption Rate.

The only part of the proposed settlement that offers a cash payment is Option C, but only 2,671 of the 158,639 class members–less than 2% of the class–are even eligible to submit a claim for the $100 payment. Dreze estimates that 22% of the eligible class members (*i.e.*, 0.37% of the total class) will claim the $100 payment, but he does not explain how he arrived at that estimate. In fact, the redemption rate for Option C will likely be even lower than Dreze predicts because there are several serious impediments to participation. Specifically, to claim the $100, an eligible class member must (1) go to the settlement website, (2) enter the VIN of his or her Civic Hybrid, (3) watch the fuel economy video, (4) obtain a preassigned claim number, (5) download a claim form, and (6) submit it to Honda, (7) all within 60 days of the posting of the video. The settling parties appear to have no plans to notify class members when the video becomes operational; rather, the class members must regularly check the website to see if the video is up.

Class counsel does not explain the purpose of these requirements, which appear to have been imposed solely to reduce the number of claims. Honda has the names and addresses of every class member eligible for Option C, and could easily mail each such class member a check, which would dramatically increase participation in the settlement.

Further, class counsel has not presented any principled reason for restricting the cash option to only those class members who, before March 2, 2009, complained about the fuel economy of the class member's Civic Hybrid to Honda, an authorized Honda dealer who reported it to Honda, or to class counsel, and whose complaint resulted in a written record created in the ordinary course of business. In its order denying preliminary approval of the settlement, the Court directed the parties to explain why Option C is limited to those whose complaints were reduced to writing and maintained by Honda. Doc. 100, 21:16-21. Class counsel's response was that because Honda dealers are independent, complaints to the dealers may not have been communicated to Honda.[8/] Doc. 105, 14:16-22. But that is no answer to the Court's question. Class counsel has still not explained why certain class members are treated differently based on a factor outside the member's control—whether Honda has a written record of a complaint.

Indeed, the proposed settlement creates two subclasses—those who are eligible for Option C and those who are not. The creation of subclasses often raises serious conflict-of-interest issues that may require separate counsel for each subclass. *See, e.g., Diaz v. Romer*, 961 F.2d 1508, 1511 (10th Cir. 1992) (upholding district court's order creating subclasses with separate counsel where proposed consent order settling class action created a conflict of interest between two parts of the class); *see also* Fed. R. Civ. P. 23(c)(5) (allowing court to create subclasses "[w]hen appropriate"). The creation of de facto subclasses, especially without adequate explanation of the reasons for treating the subclasses differently, is yet another reason why the proposed settlement is not fair and should be rejected.

[8/] For example, Objector Goldberg, who took his Honda Civic in for service because of his concern over poor gas mileage, was informed by the Settlement Administrator that he is not among the class members eligible for Option C. *See* Goldberg Decl., Exh. 1, 2:3-8.

IV. The Strength of Plaintiffs' Case, Compared to the Minuscule Relief Under the Settlement, Militates Against Approval.

If this Court agrees with Objectors that the proposed settlement will convey no value to the vast majority of class members, then it need not proceed any further. And even using Dreze's estimates of potential redemption rates, class counsel admits that "the number of Class Members receiving just the DVD is estimated to be 137,148," representing over 86% of the class. Doc. 105, 12:28. Such a settlement simply cannot be approved, consistent with Rule 23's command that a settlement be "fair, adequate, and reasonable." If, however, the Court believes the settlement delivers some overall net benefit to the class as a whole, then the Court should weigh its valuation of the settlement against the risks and possible rewards of litigation. But such a balancing analysis further highlights the inadequacy of the settlement because, in contrast with the paltry relief under the settlement, the plaintiffs' case is strong and Honda's potential exposure is high.

At the time the settlement was reached, the plaintiffs had already survived a motion to dismiss on multiple grounds, including preemption and the sufficiency of the pleadings, *True*, 520 F. Supp. 2d at 1181-83, and a California appellate court had reversed a grant of summary judgment for Honda on two of the state-law claims. *Paduano v. American Honda Motor Co., Inc.*, 169 Cal. App. 4th 1453, 1472-73 (2009) (reversing summary judgment for Honda on false-or-misleading-advertising claims under the CLRA and UCL). These decisions show that plaintiffs have a strong likelihood of getting their case to trial.

Moreover, class counsel's primary argument for why the risks of litigation justified settlement has been wiped out by the California Supreme Court. In the preliminary approval motion, class counsel observed that the California Supreme Court had granted review in the *Tobacco II* cases and argued that the "the unknown outcome of these cases poses a significant litigation risk to Plaintiffs and favors settlement." Doc. 105, 7:5-11. Specifically, class counsel said that "[i]f the California Supreme

Court holds that *actual* reliance is now required under all circumstances and that reliance cannot be presumed, such a holding could preclude a class claim under the UCL and FAL, eliminating two of the three theories underlying Plaintiffs' class action Lawsuit." *Id.* The California Supreme Court has now decided the cases, and, fortunately for plaintiffs, the decision does not undermine the strength of their case. *In re Tobacco II Cases*, 207 P.3d 20, 40-41 (Cal. 2009) (holding that a plaintiff need not plead and prove individualized reliance on specific misrepresentations or false statements that were part of an advertising campaign).

As for Honda's exposure to liability, this lawsuit is directed toward securing a refund of the hybrid premium paid by each class member. With 158,639 class members and an average hybrid premium of about $2,500, Honda's potential liability could easily exceed $400,000,000.

The strength of the plaintiffs' case and the defendant's potential exposure are thus wildly incommensurate with a settlement consisting chiefly of useless DVDs and coupons.

CONCLUSION

The Court should deny final approval of the proposed class action settlement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed through the CM/ECF system which will automatically generate a Notice of Electronic Filing (NEF) and send it by e-mail to all attorneys in the case who are registered as CM/ECF users and have consented to electronic service. In addition, and in accordance with second revised preliminary approval order and the class notice, this document was sent to the Settlement Administrator, on December 14, 2009, by U.S. Mail to the following address:

Honda HCH Settlement Administrator
P.O. Box 2709
Torrance, California 90509-2709

/s/ Michael T. Kirkpatrick
Michael T. Kirkpatrick

EXHIBIT 5

Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide 2010

Major Checkpoints

- ❑ ***Will notice effectively reach the class?***
  The percentage of the class that will be exposed to a notice based on a proposed notice plan can always be calculated by experts. A high percentage (e.g., between 70–95%) can often reasonably be reached by a notice campaign.
- ❑ ***Will the notices come to the attention of the class?***
  Notices should be designed using page-layout techniques (e.g., headlines) to command class members' attention when the notices arrive in the mail or appear on the Internet or in printed media.
- ❑ ***Are the notices informative and easy to understand?***
  Notices should carry all of the information required by Rule 23 and should be written in clear, concise, easily understood language.
- ❑ ***Are all of the rights and options easy to act upon?***
  There should be no unnecessary hurdles that make it difficult for class members to exercise their rights to opt out, object, submit a claim, or make an appearance.

Before Certification/Preliminary Settlement Approval

- ❑ ***Can any manageability problems from notice issues be overcome?***
  Consider potential problems in reaching and communicating with class members—e.g., language barriers, class size, geographic scope—and whether a notice plan will be able to overcome such problems.
- ❑ ***Can a high percentage of the proposed class be reached (i.e., exposed to a notice)?***
  Consider the breakdown of known and unknown class members, the age of any mailing lists, and the parties' willingness to spend necessary funds to fully reach the class.
- ❑ ***Is it economically viable to adequately notify the class?***
  If the cost to reach and inform a high percentage of the class is not justified by a proposed settlement, an opt-out class may not be appropriate. Inability to support proper notice may also be evidence that the settlement is weak.
- ❑ ***Will unknown class members understand that they are included?***
  If a well-written notice will leave class members in doubt as to whether they are included, consider whether the class definition, or the class certification, is appropriate.

Upon Certification/Preliminary Settlement Approval

- ❑ ***Do you have a "best practicable" notice plan from a qualified professional?***
  A proper notice plan should spell out how notice will be accomplished, and why the proposed methods were selected. If individual notice will not be used to reach everyone, be careful to obtain a first-hand detailed report explaining why not. See "Notice Plan" section below.

- ❑ ***Do you have unbiased evidence supporting the plan's adequacy?***
  Be careful if the notice plan was developed by a vendor who submitted a low bid and might have incentives to cut corners or cover up any gaps in the notice program. In order to find the "best practicable" notice as Rule 23 requires, your own expert report may be advisable. This is especially true in the diminished adversarial posture in which settlement places the parties. It is also true at preliminary approval, before outsiders are aware of the proposed notice plan, which itself may limit the parties' awareness, in turn impacting your final approval decision.
- ❑ ***Have plain language forms of notice been created?***
  Draft forms of the notices should be developed, in the shape, size, and form in which they will actually be disseminated, for your approval before authorizing notice to the class. See "Notice Documents" below.
- ❑ ***Will a qualified firm disseminate notice and administer response handling?***
  There are many experienced firms that compete for administration of notice dissemination and claims and response handling. Appointing a qualified firm is important because errors may require re-notification, drain funds, delay the process, and threaten recognition of your final judgment.

Notice Plan

- ❑ ***Is the notice plan conducive to reaching the demographics of the class?***
  The notice plan should include an analysis of the makeup of the class. There may be more women than men; it may skew older; it may be less educated than average. Each audience can be matched with the most efficient and effective methods of notice for reaching those people.
- ❑ ***Is the geographic coverage of the notice plan sufficient?***
  Notice for a class action should take steps to reach people wherever they may be located, and also take into account where most class members reside.
  - ❍ ***Is the coverage broad and fair? Does the plan account for mobility?***
    Class members choose to live in small towns as well as large cities. Be careful with notice exclusively targeted to large metropolitan newspapers. Class members move frequently (14–17% per year according to the U.S. Census Bureau), so purchasers in one state may now reside in another.
  - ❍ ***Is there an extra effort where the class is highly concentrated?***
    Evidence may show that a very large portion of class members reside in a certain state or region, and notice can be focused there, while providing effective, but not as strong, notice elsewhere.
- ❑ ***Does the plan include individual notice?***
  If names and addresses are reasonably identifiable, Rule 23(c)(2) requires individual notice. Be careful to look closely at assertions that mailings are not feasible.
  - ❍ ***Did you receive reliable information on whether and how much individual notice can be given?***
    Consider an expert review of the information you have been provided regarding the parties' ability to give individual notice. The parties may have agreed to submit a plan that does not provide sufficient individual notice in spite of the rule.

- ***Will the parties search for and use all names and addresses they have in their files?***
  If the parties suggest that mailings are impracticable, look to distinguish between truly unreasonable searches (e.g., the defendant has nuggets of data that could be matched with third-party lists by a new computer program and several man-years) and situations where a search would be difficult but not unreasonably burdensome (e.g., lists reside directly in the defendant's records but are outdated or expensive to mail to because of the volume). Rule 23 generally requires the latter.
- ***Will outdated addresses be updated before mailing?***
  The plan should detail steps to update addresses before mailing, including postal service change-of-address records, and third-party address databases if the list is very old. Watch out for potentially ineffective "last known address" mailings.
- ***Has the accuracy of the mailing list been estimated after updating efforts?***
  Look for information that indicates how accurate the mailing addresses will be after the planned address updating effort.
- ***Has the percentage of the class to be reached by mail been calculated?***
  The parties should be able to indicate how great a percentage of the overall class will be reached by individual notice, so that the extent of any necessary additional notice can be determined.
- ***Are there plans to re-mail notices that are returned as undeliverable?***
  Even after updating addresses before mailing, mail will be returned as undeliverable. Further lookup tactics and sources are often available, and it is reasonable to re-mail these notices.
- ***Will e-mailed notice be used instead of postal mailings?***
  If available, parties should use postal mailing addresses, which are generally more effective than e-mail in reaching class members: mail-forwarding services reach movers, and the influx of "SPAM" e-mail messages can cause valid e-mails to go unread. If e-mail will be used—e.g., to active e-mail addresses the defendant currently uses to communicate with class members—be careful to require sophisticated design of the subject line, the sender, and the body of the message, to overcome SPAM filters and ensure readership.

☐ ***Will publication efforts combined with mailings reach a high percentage of the class?***
The lynchpin in an objective determination of the adequacy of a proposed notice effort is whether all the notice efforts together will reach a high percentage of the class. It is reasonable to reach between 70–95%. A study of recent published decisions showed that the median reach calculation on approved notice plans was 87%.

☐ ***Are the reach calculations based on accepted methodology?***
An affiant's qualifications are important here. Reach calculation methodology is commonly practiced in advertising and media-planning disciplines. Claims administrators are often accountants by training and may lack personal knowledge or the training to conduct reach analyses.

- ***Is the net reach calculation thorough, conservative, and not inflated?***
  Circulation figures for separate dissemination methods cannot simply be added to determine reach. Total audience must be calculated for each publication and the net must be calculated for a combination of publications. Be sure the reach calculation removes overlap between those people exposed to two or more dissemination methods (e.g., a person who receives a mailing may also be exposed to the notice in a publication).

- ❍ ***Do the reach calculations omit speculative reach that only might occur?***
  Watch for estimated reach calculations that are based in part on speculative notice that might occur, e.g., news coverage about the lawsuit or settlement. Often, these news articles do not ultimately explain class members' rights, and the content is not in the court's control.
- ❍ ***Is any Internet advertising being measured properly?***
  Audiences of Internet websites are measured by "impressions." Total, or "gross," impressions of the entire website do not reveal how many people will view the notice "ad" appearing periodically on a particular page. Inflated audience data via Internet ads is common. It is very expensive to reach a significant percentage of a mass audience with Internet banner ads. Watch for suggestions that Internet ads and social network usage can replace all other methods. Reach, awareness, and claims will likely be very low when such a program is complete.

❑ ***Is non-English notice necessary?***
Consider the demographics of the class to determine whether notice is necessary in Spanish or another language. The number of class members whose native language is not English should guide you on whether to actively disseminate notice in other languages, or to simply make foreign language notices available at a website.

❑ ***Does the notice plan allow enough time to act on rights after notice exposure?***
Class members need time to receive a notice by mail or in a publication. A minimum of 30 days is necessary from completed dissemination before deadlines, with 60–90 days preferred. This allows for re-mailings, fulfillment of requests for more information, and consideration of rights and options.

❑ ***Will key documents be available at a neutral website?***
Class members should have access to information beyond the notice. Besides the summary notice and detailed notice (following the FJC examples at www.fjc.gov), it is reasonable to post the following documents at a neutral administrator's website dedicated to the case: the plaintiffs' complaint, the defendants' answer, your class-certification decision (in the event of a class certified for trial), and the settlement agreement and claim form (in the event of a settlement). Other orders, such as your rulings on motions to dismiss or for summary judgment, should ordinarily be made available as well.

❑ ***Can the class get answers from a trained administrator or from class counsel?***
Even the best notice will generate questions from class members. A toll-free number call center, an interactive website staffed by trained administrators, and class counsel who are accessible to the people they represent are reasonable steps to help class members make informed decisions.

Notice Documents ***(also see Plain Language Notice Guide, below)***

❑ ***Have you approved all of the forms of the notices?***
Before authorizing the parties to begin disseminating notices, you should ask for and approve all forms of notice that will be used. This includes a detailed notice; a summary notice; and information that will appear at the website and in any other form, such as an Internet banner, TV notice, and radio notice. See www.fjc.gov for illustrative notice forms for various cases. It is best to see and approve the forms of notice the way they will be disseminated, in their actual sizes and designs.

- ❑ ***Are the notices designed to come to the attention of the class?***
  The FJC's illustrative notices, as also described in the accompanying "***Plain Language Notice Guide***," explain how to be sure the notices are "noticed" by the casual-reading class member. With "junk mail" on the rise, and the clutter of advertising in publications, legal notices must stand out with design features long-known to communications pros.
  - ❍ ***Does the outside of the mailing avoid a "junk mail" appearance?***
    Notices can be discarded unopened by class members who think the notices are junk mail. A good notice starts with the envelope design, examples of which are at www.fjc.gov.
  - ❍ ***Do the notices stand out as important, relevant, and reader-friendly?***
    It is important to capture attention with a prominent headline (like a newspaper article does). This signals who should read the notice and why it is important. The overall layout of the notice will dictate whether busy class members will take time to read the notice and learn of their rights.
- ❑ ***Are the notices written in clear, concise, easily understood language?***
  Required by Rule 23 since 2003, it is also simply good practice to recognize that communicating legal information to laypeople is hard to do.
- ❑ ***Do the notices contain sufficient information for a class member to make an informed decision?***
  Consider the amount of information provided in the notice. Watch for omission of information that the lawyers may wish to obscure (such as the fee request) but that affects class members nonetheless.
- ❑ ***Do the notices include the Rule 23 elements? Even the summary notice?***
  Summary notices, whether mailed or published, encourage readership, and the FJC illustrative notices show that even summary notices can include all elements required by Rule 23(c)(2)(B). But an overly short summary notice, one that mostly points interested readers to a detailed notice, can result in most class members (who read only the summary notice) being unaware of basic rights.
- ❑ ***Have the parties used or considered using graphics in the notices?***
  Depending on the class definition or the claims in the case, a picture or diagram may help class self-identify as members, or otherwise determine whether they are included.
- ❑ ***Does the notice avoid redundancy and avoid details that only lawyers care about?***
  It is tempting to include "everything but the kitchen sink" in the detailed notice. Although dense notices may appear to provide a stronger binding effect by disclosing all possible information, they may actually reduce effectiveness. When excess information is included, reader burnout results, the information is not communicated at all, and claims are largely deterred.
- ❑ ***Is the notice in "Q&A" format? Are key topics included in logical order?***
  The FJC illustrative notices take the form of answers to common questions that class members have in class action cases. This format, and a logical ordering of the important topics (taking care to include all relevant topics) makes for a better communication with the class.
- ❑ ***Are there no burdensome hurdles in the way of responding and exercising rights?***
  Watch for notice language that restricts the free exercise of rights, such as onerous requirements to submit a "satisfactory" objection or opt-out request.

- ❑ ***Is the size of the notice sufficient?***
  Consider the balance between cost efficiency and effectiveness. A smaller publication notice will save money, but too small and it will not afford room for a noticeable headline, will not fit necessary information, and will not be readable if using fine print.

Claims Process

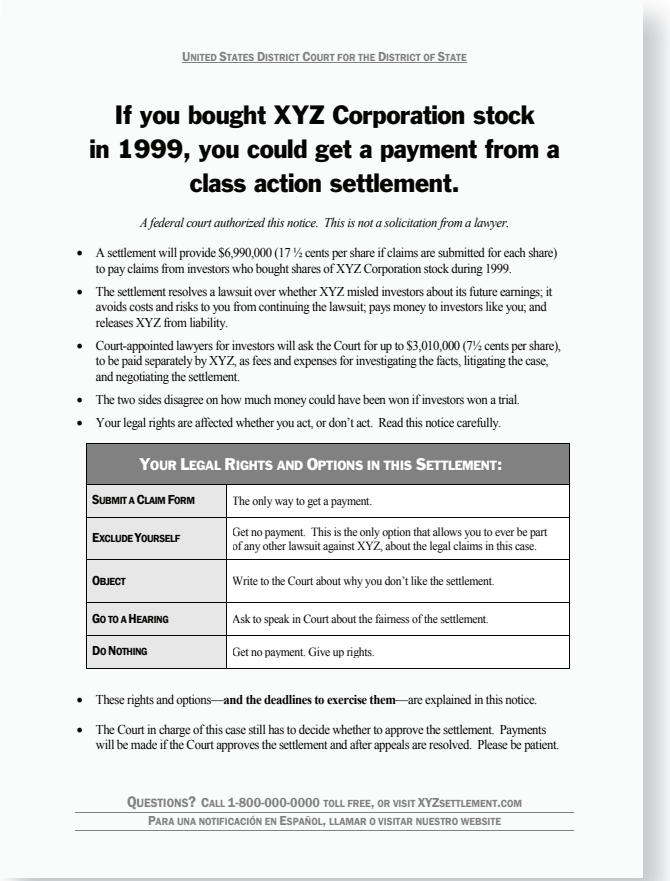
- ❑ ***Is a claims process actually necessary?***
  In too many cases, the parties may negotiate a claims process which serves as a choke on the total amount paid to class members. When the defendant already holds information that would allow at least some claims to be paid automatically, those claims should be paid directly without requiring claim forms.
- ❑ ***Does the claims process avoid steps that deliberately filter valid claims?***
  Close attention to the nature of a necessary claims process may help eliminate onerous features that reduce claims by making claiming more inconvenient.
- ❑ ***Are the claim form questions reasonable, and are the proofs sought readily available to the class member?***
  Watch for situations where class members are required to produce documents or proof that they are unlikely to have access to or to have retained. A low claims rate resulting from such unreasonable requirements may mean that your eventual fairness decision will overstate the value of the settlement to the class and give plaintiff attorneys credit for a greater class benefit than actually achieved.
- ❑ ***Is the claim form as short as possible?***
  A long, daunting claim form is more likely to be discarded or put aside and forgotten by recipients. Avoid replicating notice language or injecting legalistic terminology into the claim form which will deter response and confuse class members.
- ❑ ***Is the claim form well-designed with clear and prominent information?***
  Consider whether the claim form has simple, clearly worded instructions and questions, all presented in an inviting design. The deadlines and phone numbers for questions should be prominent.
- ❑ ***Have you considered adding an online submission option to increase claims?***
  As with many things, convenience is of utmost importance when it comes to claims rates. Today, many class members expect the convenience of one-click submission of claims. Technology allows it, even including an electronic signature. Claim forms should also be sent with the notice, or published in a notice, because many will find immediate response more convenient than going to a website.
- ❑ ***Have you appointed a qualified firm to process the claims?***
  You will want to be sure that the claims administrator will perform all "best practice" functions and has not sacrificed quality in order to provide a low price to win the administration business.

- ❑ ***Are there sufficient safeguards in place to deter waste, fraud, and/or abuse?***
  The claims process, the claim form itself, and the claims administrator all play roles in ensuring that approved claims are valid claims, so that payments go to class members who meet the criteria. Closely monitoring the process, perhaps through a special master—or at least by requiring the parties to file full reports of claims made—is a good idea.

After Notice/Before Trial or Final Settlement Approval

- ❑ ***Did the notice plan achieve what it promised?***
  Look for evidence that the notice plan reached the class members as well as anticipated.
- ❑ ***What is the reaction of the class?***
  You will want to look at the number and nature of any objections, as well as the number of opt-outs and claims. Special note: waiting for the claims deadline to expire before deciding on final approval ensures that you can look at a full picture of the fairness of the settlement. By so doing you will be able to judge the actual value of the settlement to the class and calculate attorney fees in relation to that value.
- ❑ ***Have you made sufficient findings in the record?***
  Consider, based on the evidence, making detailed findings so as to inhibit appellate review or to withstand a subsequent collateral review of your judgment.
- ❑ ***Is any subsequent claims-only notice necessary?***
  If you find the settlement fair, reasonable, and adequate, but the number of claims is low, you may consider additional notice to the class after final approval.

Detailed Notice—First Page



UNITED STATES DISTRICT COURT FOR THE DISTRICT OF STATE

If you bought XYZ Corporation stock in 1999, you could get a payment from a class action settlement.

A federal court authorized this notice. This is not a solicitation from a lawyer.

- A settlement will provide $6,990,000 (17 ½ cents per share if claims are submitted for each share) to pay claims from investors who bought shares of XYZ Corporation stock during 1999.
- The settlement resolves a lawsuit over whether XYZ misled investors about its future earnings; it avoids costs and risks to you from continuing the lawsuit; pays money to investors like you; and releases XYZ from liability.
- Court-appointed lawyers for investors will ask the Court for up to $3,010,000 (7½ cents per share), to be paid separately by XYZ, as fees and expenses for investigating the facts, litigating the case, and negotiating the settlement.
- The two sides disagree on how much money could have been won if investors won a trial.
- Your legal rights are affected whether you act, or don't act. Read this notice carefully.

YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT:	
SUBMIT A CLAIM FORM	The only way to get a payment.
EXCLUDE YOURSELF	Get no payment. This is the only option that allows you to ever be part of any other lawsuit against XYZ, about the legal claims in this case.
OBJECT	Write to the Court about why you don't like the settlement.
GO TO A HEARING	Ask to speak in Court about the fairness of the settlement.
DO NOTHING	Get no payment. Give up rights.

- These rights and options—**and the deadlines to exercise them**—are explained in this notice.
- The Court in charge of this case still has to decide whether to approve the settlement. Payments will be made if the Court approves the settlement and after appeals are resolved. Please be patient.

QUESTIONS? CALL 1-800-000-0000 TOLL FREE, OR VISIT XYZSETTLEMENT.COM
PARA UNA NOTIFICACIÓN EN ESPAÑOL, LLAMAR O VISITAR NUESTRO WEBSITE

• Page one is an overall summary of the notice. The objective is to use the fewest words to say the most. It is a snapshot of the case, of the reasons for the notice, and of the rights that class members have.

• The court's name at the top conveys the importance of the notice.

• A headline in a large font captures attention. It conveys what the notice is about and who is included, and it suggests a benefit to reading the entire notice.

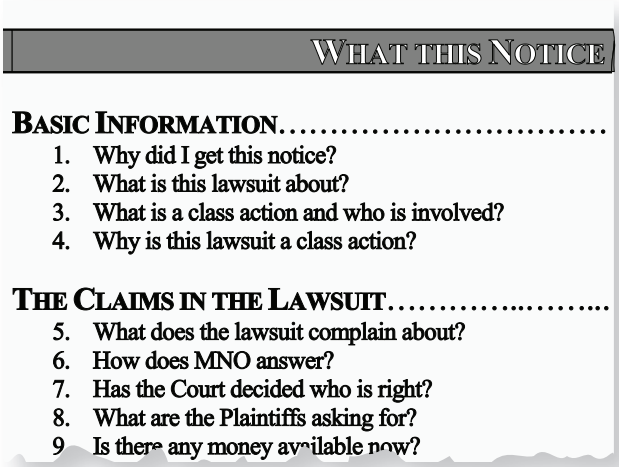
• The words in italics below the headline communicate the official nature of the notice and provide a contrast from a lawyer's solicitation. Be sure to avoid a traditional legalistic case caption.

• Short bullet points highlight the nature of the case and the purpose of the notice. Bullet points also communicate who is included, the benefits available (if it is a settlement), and steps to be taken—identifying deadlines to observe. The first page should pique class members' interest and encourage them to read the entire notice.

• The table of rights explains the options available. These are deliberately blunt. Be careful to avoid redundancy with the information inside the notice.

• The first page should prominently display a phone number, e-mail address, or website where the class can obtain answers to questions.

• If appropriate for the class, include a non-English (e.g., Spanish) language note about the availability of a copy of the notice in that language.



WHAT THIS NOTICE

BASIC INFORMATION.....

1. Why did I get this notice?
2. What is this lawsuit about?
3. What is a class action and who is involved?
4. Why is this lawsuit a class action?

THE CLAIMS IN THE LAWSUIT.....

5. What does the lawsuit complain about?
6. How does MNO answer?
7. Has the Court decided who is right?
8. What are the Plaintiffs asking for?
9. Is there any money available now?

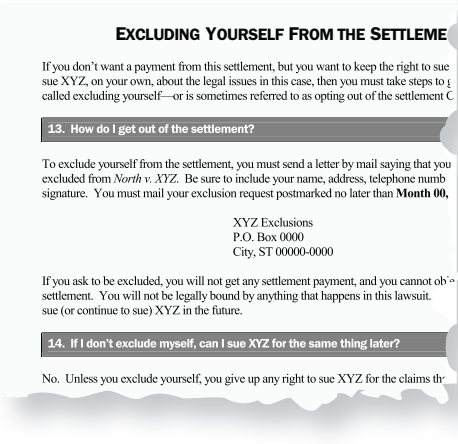
Detailed Notice—Table of Contents

• Organize the topics into different sections and place the information in a logical order.

• A "Q&A" or "Answers to Common Questions" format helps class members find the information that is important to their decision-making process.

• Customize the topics to the facts of the case, but keep the overall notice short: 8–11 pages should be plenty even for complex matters.

• Don't avoid obvious questions (or answers) that class members will have.



EXCLUDING YOURSELF FROM THE SETTLEME

If you don't want a payment from this settlement, but you want to keep the right to sue sue XYZ, on your own, about the legal issues in this case, then you must take steps to called excluding yourself—or is sometimes referred to as opting out of the settlement C

13. How do I get out of the settlement?

To exclude yourself from the settlement, you must send a letter by mail saying that you excluded from *North v. XYZ*. Be sure to include your name, address, telephone numb signature. You must mail your exclusion request postmarked no later than **Month 00,**

XYZ Exclusions
P.O. Box 0000
City, ST 00000-0000

If you ask to be excluded, you will not get any settlement payment, and you cannot ob settlement. You will not be legally bound by anything that happens in this lawsuit. sue (or continue to sue) XYZ in the future.

14. If I don't exclude myself, can I sue XYZ for the same thing later?

No. Unless you exclude yourself, you give up any right to sue XYZ for the claims th

Detailed Notice—Inside Content

- Short answers are best. Be sure that the text answers the question being asked and does not "spin" the information in a way to achieve a desired result—e.g., do not use language that encourages class members to accept a proposed settlement.

- Watch for redundant and lengthy information, but also substantive omissions. Be frank and open for better reader comprehension and, as a result, a stronger binding effect.

- Every detail does not belong in the notice, but all rights and options do. Explain settlement benefits and state the fees that the lawyers will seek. Watch for burdensome requirements that might inhibit objections, opt outs, or claims.

- Use plain language. You may closely follow the illustrative models at www.fjc.gov.

Summary Notice

- The summary notice should be short but comprehensive. Refer to all of the requirements of Rule 23 in a simple and clear summary fashion. Follow the FJC models wherever possible.

- The "Legal Notice" banner at the top helps stop a publisher from typesetting the word "advertisement" at the top, which would create a perception that the notice is a solicitation. Do not use the legal case caption style.

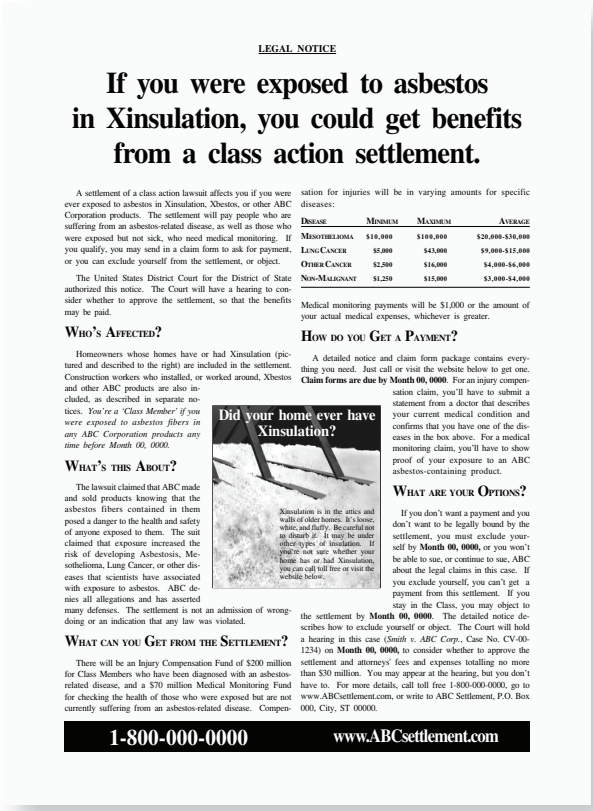
- The headline in large font captures the attention of readers who glance at the page. It flags what the notice is about, who is included, and it signals a benefit to be derived by reading the notice.

- The initial paragraphs provide a snapshot of all key information.

- Be sure to explain class membership in a simple way. Consider a graphic to help readers understand that they are included.

- Make a brief but clear reference to the substance of the case and the claims involved.

- Identify clearly what class members could get and how they would get it. These are the most common questions from class members.



LEGAL NOTICE

If you were exposed to asbestos in Xinsulation, you could get benefits from a class action settlement.

A settlement of a class action lawsuit affects you if you were ever exposed to asbestos in Xinsulation, Xbestos, or other ABC Corporation products. The settlement will pay people who are suffering from an asbestos-related disease, as well as those who were exposed but not sick, who need medical monitoring. If you qualify, you may send in a claim form to ask for payment, or you can exclude yourself from the settlement, or object.

The United States District Court for the District of State authorized this notice. The Court will have a hearing to consider whether to approve the settlement, so that the benefits may be paid.

WHO'S AFFECTED?

Homeowners whose homes have or had Xinsulation (pictured and described to the right) are included in the settlement. Construction workers who installed, or worked around, Xbestos and other ABC products are also included, as described in separate notices. *You're a 'Class Member' if you were exposed to asbestos fibers in any ABC Corporation products any time before Month 00, 0000.*

WHAT'S THIS ABOUT?

The lawsuit claimed that ABC made and sold products knowing that the asbestos fibers contained in them posed a danger to the health and safety of anyone exposed to them. The suit claimed that exposure increased the risk of developing Asbestosis, Mesothelioma, Lung Cancer, or other diseases that scientists have associated with exposure to asbestos. ABC denies all allegations and has asserted many defenses. The settlement is not an admission of wrongdoing or an indication that any law was violated.

WHAT CAN YOU GET FROM THE SETTLEMENT?

There will be an Injury Compensation Fund of $200 million for Class Members who have been diagnosed with an asbestos-related disease, and a $70 million Medical Monitoring Fund for checking the health of those who were exposed but are not currently suffering from an asbestos-related disease. Compensation for injuries will be in varying amounts for specific diseases:

DISEASE	MINIMUM	MAXIMUM	AVERAGE
MESOTHELIOMA	$10,000	$100,000	$20,000-$30,000
LUNG CANCER	$5,000	$43,000	$9,000-$15,000
OTHER CANCER	$2,500	$16,000	$4,000-$6,000
NON-MALIGNANT	$1,250	$15,000	$3,000-$4,000

Medical monitoring payments will be $1,000 or the amount of your actual medical expenses, whichever is greater.

HOW DO YOU GET A PAYMENT?

A detailed notice and claim form package contains everything you need. Just call or visit the website below to get one. **Claim forms are due by Month 00, 0000**. For an injury compensation claim, you'll have to submit a statement from a doctor that describes your current medical condition and confirms that you have one of the diseases in the box above. For a medical monitoring claim, you'll have to show proof of your exposure to an ABC asbestos-containing product.

Did your home ever have Xinsulation?

Xinsulation is in the attics and walls of older homes. It's loose, white, and fluffy. Be careful not to disturb it. It may be under other types of insulation. If you're not sure whether your home has or had Xinsulation, you can call toll free or visit the website below.

WHAT ARE YOUR OPTIONS?

If you don't want a payment and you don't want to be legally bound by the settlement, you must exclude yourself by **Month 00, 0000,** or you won't be able to sue, or continue to sue, ABC about the legal claims in this case. If you exclude yourself, you can't get a payment from this settlement. If you stay in the Class, you may object to the settlement by **Month 00, 0000**. The detailed notice describes how to exclude yourself or object. The Court will hold a hearing in this case (*Smith v. ABC Corp.*, Case No. CV-00-1234) on **Month 00, 0000,** to consider whether to approve the settlement and attorneys' fees and expenses totalling no more than $30 million. You may appear at the hearing, but you don't have to. For more details, call toll free 1-800-000-0000, go to www.ABCsettlement.com, or write to ABC Settlement, P.O. Box 000, City, ST 00000.

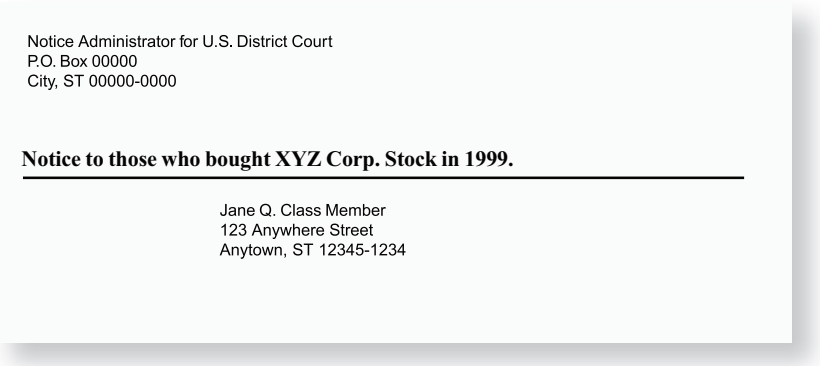
1-800-000-0000 **www.ABCsettlement.com**

- Be sure to include clear references to opt out, objection, and appearance rights. State the amount of the lawyers' fee request.

- Include a prominent reference to the call center and website.

Outside of Mailing

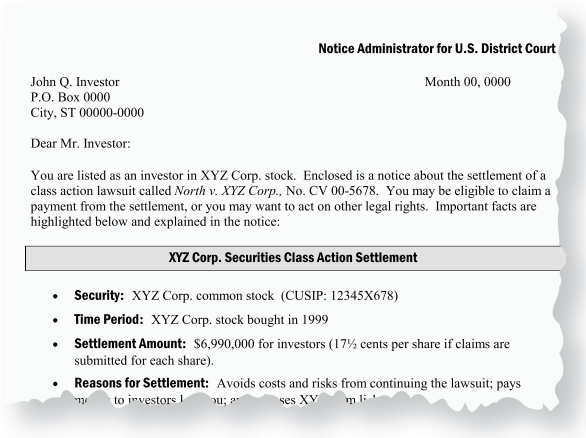
- Design the notice to make it distinguishable from "junk mail."
- A reference to the court's name (at the administrator's address) ensures that the class recognizes the notice's legitimacy.
- "Call-outs" on the front and back encourage the recipient to open and read the notice when it arrives with other mail.


Notice Administrator for U.S. District Court
P.O. Box 00000
City, ST 00000-0000

Notice to those who bought XYZ Corp. Stock in 1999.

Jane Q. Class Member
123 Anywhere Street
Anytown, ST 12345-1234

- The call-out on the front (shown on example above) identifies what the notice is about and who is affected. On the back you may highlight the settlement benefits, or the rights involved.
- Use these techniques even if the mailed notice is designed as a self-mailer, i.e., a foldover with no envelope.


Notice Administrator for U.S. District Court

John Q. Investor
P.O. Box 0000
City, ST 00000-0000

Month 00, 0000

Dear Mr. Investor:

You are listed as an investor in XYZ Corp. stock. Enclosed is a notice about the settlement of a class action lawsuit called *North v. XYZ Corp.*, No. CV 00-5678. You may be eligible to claim a payment from the settlement, or you may want to act on other legal rights. Important facts are highlighted below and explained in the notice:

XYZ Corp. Securities Class Action Settlement

- **Security:** XYZ Corp. common stock (CUSIP: 12345X678)
- **Time Period:** XYZ Corp. stock bought in 1999
- **Settlement Amount:** $6,990,000 for investors (17½ cents per share if claims are submitted for each share).
- **Reasons for Settlement:** Avoids costs and risks from continuing the lawsuit; pays

Cover Letter (when compliance with PSLRA is needed)

- Identify the court's administrator as the sender—this conveys legitimacy.
- The content should be very short. Remember that this is not the notice.
- A reference in bold type to the security involved flags the relevance of the letter.
- The bullet points track each PSLRA cover letter requirement. Avoid lengthy explanations that are redundant with the notice. Be blunt for clarity.
- The content in the FJC's PSLRA cover letter can simply be customized for the case at hand. The design encourages interest, reading, and action.

EXHIBIT 6

Pioneer Electronics (USA), Inc. v. Superior Court

Supreme Court of California

January 25, 2007, Filed

S133794

Reporter
40 Cal. 4th 360 *; 150 P.3d 198 **; 53 Cal. Rptr. 3d 513 ***; 2007 Cal. LEXIS 553 ****; 2007 Daily Journal DAR 1187; 2007 Cal. Daily Op. Service 934; CCH Prod. Liab. Rep. P17,677

PIONEER ELECTRONICS (USA), INC., Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; PATRICK OLMSTEAD, Real Party in Interest.

Prior History: [**1]** Superior Court of Los Angeles County, No. BC257222, Wendell Mortimer, Jr., Judge. Court of Appeal of California, Second Appellate District, Division Four, No. B174826.

Pioneer Electronics (USA), Inc. v. Superior Court, 128 Cal. App. 4th 246 [27 Cal. Rptr. 3d 17, 2005 Cal. App. LEXIS 539] (Cal. App. 2d Dist., 2005)

Disposition: The judgment of the Court of Appeal is reversed and the cause remanded to that court for further proceedings consistent with this opinion.

Case Summary

Procedural Posture

In a class action, the California Court of Appeal, Second District, Division Four, issued a writ of mandate, vacating a trial court's order that adopted real party in interest named plaintiff's proposed language for a letter to petitioner DVD player seller's customers. The seller was ordered to make no disclosure of complaining customers' identifying information to the named plaintiff without their affirmative consent. Review was granted.

Overview

The named plaintiff claimed that he needed the identifying information (names, addresses, etc.) to facilitate communication with potential class members. The court concluded that the trial court's order was sufficient and involved no serious breach of privacy in violation of Cal. Const., art. I, § 1. It seemed unlikely that the complaining customers, having already voluntarily disclosed their identifying information to the seller in the hope of obtaining some form of relief, would have a reasonable expectation that such information would be kept private and withheld from a class action plaintiff, unless they expressly consented to such disclosure. Because the proposed disclosure did not involve disclosing one's personal medical history or current medical condition or details regarding one's personal finances or other financial information, it was not particularly sensitive. The trial court could reasonably conclude that, on balance, the named plaintiff's interest in obtaining contact information regarding the complaining customers outweighed the possibility that some of the customers might fail to receive their notice and thus lose the opportunity to object to disclosure.

Outcome

The judgment of the intermediate appellate court was reversed, and the case was remanded to that court for further proceedings.

Counsel: Hughes Hubbard & Reed, William T. Bisset, Charles Avrith, David A. Lombardero and Alicia D. Mew for Petitioner.

Sidley Austin, Jeffrey A. Berman, James M. Harris and Steven A. Ellis for Employers Group as Amicus Curiae on behalf of Petitioner.

Jocelyn D. Larkin, Brad Seligman and Sarah Varela for Asian Law Caucus, Disability Rights Advocates, Disability Rights and Education Defense Fund, Equal Justice Society, Equal Rights Advocates, The Impact Fund, Legal Aid Society-Employment Law Center, Lawyers' Committee for Civil Rights of the San Francisco Bay Area, Mexican American Legal Defense and Educational Fund, Public Counsel and Western Center on Law and Poverty as Amici Curiae on behalf of Petitioner.

No appearance for Respondent.

Lange & Koncius, Joseph J. M. Lange, Jeffrey A. Koncius; Milberg Weiss Bershad & Schulman, Sanford P. Dumain, Michael R. Reese, **[****2]** Ann M. Lipton,

Jeff S. Westerman, Sabrina S. Kim; Robert I. Lax & Associates and Robert I. Lax for Real Party in Interest.

The Sturdevant Law Firm, James C. Sturdevant, Mark T. Johnson and Sylvia Sokol for Consumer Attorneys of California as Amicus Curiae on behalf of Real Party in Interest.

David R. Labahn for California District Attorneys Association as Amicus Curiae on behalf of Real Party in Interest.

Judges: Chin, J., expressing the unanimous view of the court.

Opinion by: Chin

Opinion

[199] [***514]** **CHIN, J.**—Purchasers of possibly defective DVD players communicated with the seller, expressing their discontent and relating their identifying information (names, addresses, etc.). We consider here the extent to which California's right to privacy provision (Cal. Const., art. I, § 1) protects these purchasers from having their identifying information disclosed to plaintiff during civil discovery proceedings in a consumers' rights class action against the seller. The named plaintiff in the action assertedly needs this information from the seller to facilitate communication with potential class members. We focus on the **[***515]** requisite notice and opportunity to **[****3]** assert a privacy right that should accompany a precertification communication to members of the putative class before such disclosure may occur.
[*364]

The Court of Appeal ruled that trial courts in such cases must assure not only that all prospective or potential class members receive actual notice of their right to grant or withhold consent to the release of their personal identifying information, but also that such consent must be exhibited by each potential class member's own positive act of agreeing to disclosure, rather than by the mere passive failure to object. Because this ruling is overprotective of the purchasers' privacy rights, inconsistent with established privacy principles, and likely to cause adverse consequences in future cases, we will reverse.

I. *FACTS*

The following uncontradicted facts were taken largely from the Court of Appeal's opinion in this case. Patrick Olmstead purchased a DVD player from Pioneer Electronics (USA), Inc. (Pioneer). Claiming it was defective, he brought suit against Pioneer on his own behalf and on behalf of a putative **[**200]** class of persons who purchased the same model of allegedly defective DVD player. Responding to a discovery request **[****4]** by Olmstead (see Code Civ. Proc., § 2017.010), Pioneer produced redacted documents relating to complaints it received from approximately 700 to 800 consumers regarding the DVD players. Olmstead, seeking further identifying information about these persons, moved to compel Pioneer to provide unredacted copies of any consumer complaints it had received about the allegedly defective DVD players. The motion also asked Pioneer to disclose the names and contact information (addresses and telephone numbers) of each complainant. Pioneer refused to comply, citing the state's privacy provision (Cal. Const., art. I, § 1) and asserting a right of privacy on behalf of these persons.

At a March 2004 hearing, the trial court acknowledged that disclosure of the information sought was indeed affected by the privacy provision, stating that "the names are probably protected unless there's a *Colonial Life* letter that goes out." (The court was referring to this court's decision in *Colonial Life & Accident Ins. Co. v. Superior Court* (1982) 31 Cal.3d 785, 787–790 [183 Cal. Rptr. 810, 647 P.2d 86], upholding a trial court order allowing disclosure by an insurer of the names **[****5]** and addresses of certain previously insured claimants to the plaintiff in a bad faith settlement action, if those earlier claimants specifically authorized disclosure by signing and dating an enclosed form so stating.) The court in the present case ordered Pioneer "to write a '*Colonial* [*Life*]' letter and then reveal the names of those consumers who do not object."

The court's decision was refined in an order drafted later that month. In it, the court stated that it "is in receipt of two versions of a '*Colonial Life*' letter to customers" and that "[t]he major difference is whether or not an affirmative **[*365]** response should be required. In order for the letter to have any meaning, it should require an affirmative response, as did the letter in the *Colonial Life* case." The court then authorized the following text:

"Dear Consumer: [¶] In August, 2001, litigation was filed in California in which the plaintiff alleges that Pioneer DVD Players are not compatible with the DVD Video Standard and as such, are incapable of playing all DVD discs. As part of the litigation, Pioneer was required to

provide the plaintiff's counsel with a copy of the record that it made of information or complaints **[****6]** you provided some time ago when you contacted Pioneer's customer service **[***516]** department about your Pioneer DVD Player. Before doing so, however, Pioneer removed all identifying information regarding your name, address and telephone number. The court has now directed that Pioneer send you this notice so that you can decide whether to authorize Pioneer to disclose your personal information to the plaintiff's counsel so they may contact you.

"If you agree to the disclosure of this information to the plaintiff's counsel, please check the box on the enclosed form and return it to the address shown on the form. *Not responding to this letter will be treated as declining contact from Plaintiff's counsel.*" (Italics added.) In other words, the trial court's initial order, as refined above, contemplated that disclosure of the identifying information would be improper in the absence of an affirmative response by the Pioneer customer affected. Plaintiff Olmstead, believing this order too restrictive, moved for reconsideration and clarification. In April 2004, the court vacated its March order and adopted plaintiff's new proposed language for the letter to Pioneer's customers.

This new letter **[****7]** stated that, "If you do not agree to the disclosure of this information to the plaintiff's counsel, please check the box on the enclosed form and return it to the address shown on the form. *Not responding to this letter will be treated as agreeing to contact by Plaintiff's counsel.*" (Italics added.) The effect of these changes was to state that customer identifying information *would* be released *unless* the addressed consumer objected. As the trial court stated, "It seems to me that this information, just the names, addresses and contact information is not particularly sensitive. It's not medical information. It's not personal finances. It's merely the name, and if the people don't want to be contacted, they can say so."

[201]** The trial court stayed its April order pending writ review by the Court of Appeal, which granted Pioneer's petition for writ of mandate, and issued the writ vacating the trial court's order. We will reverse.

II. *DISCUSSION*

Does a complaining purchaser possess a right to privacy protecting him or her from unsolicited contact by a class action plaintiff seeking relief from the **[*366]** vendor to whom the purchaser's complaint was sent? As noted, in **[****8]** the order now under review, the trial court ordered defendant Pioneer to inform the approximately 700 to 800 complaining Pioneer customers, by letter, about the lawsuit, plaintiff Olmstead's request for identifying information in order to contact them, and their right to object to release of that information. The letter also would have informed them that their failure to respond would be treated as consent to release of the information.

Pioneer argues, and the Court of Appeal held, that the court should have gone further and ordered that Pioneer make no such disclosure of the identifying information to plaintiff without the affirmative consent of Pioneer's former customers. As noted, the Court of Appeal concluded that protecting disclosure of an individual's name and other identifying information is a matter embraced within the state Constitution's privacy provision (Cal. Const., art. I, § 1), that adequate steps to assure actual notice is a prerequisite to an assumed waiver of a customer's right of privacy, and that the measures ordered in this case were inadequate. As will appear, we believe that under the circumstances in this case, the trial court's order was sufficient and involved **[****9]** no serious breach of privacy.

Initially, we note that we are dealing with a proposed *precertification* notice to **[***517]** prospective class members. Although the Consumers Legal Remedies Act (Civ. Code, § 1750 et seq.) expressly authorizes postcertification notices in class actions (see *id.,* § 1781, subds. (d), (e)), no comparable provision exists for precertification notices. In *Atari, Inc. v. Superior Court* (1985) 166 Cal. App. 3d 867 [212 Cal. Rptr. 773], the court found "no persuasive objection to use of this kind of *precertification* communication by class-action plaintiffs to potential class members where, as here, the trial court has been given the opportunity in advance to assure itself that there is no specific impropriety." (*Id.* at p. 871; see also *Howard Gunty Profit Sharing Plan v. Superior Court* (2001) 88 Cal.App.4th 572, 580 [105 Cal. Rptr. 2d 896]; cf. *Parris v. Superior Court* (2003) 109 Cal.App.4th 285, 290, 292–293, 295–300 [135 Cal. Rptr. 2d 90].)

A. *Court of Appeal Decision*

The Court of Appeal in this case assumed that Pioneer's former customers had a constitutional privacy right to object to Pioneer disclosing **[****10]** their identifying information to plaintiff Olmstead, and further ruled that without an affirmative letter of consent, no waiver of that right would occur. The Court of Appeal reasoned, "[a]

consumer cannot be deemed to have intended to waive his or her right of privacy unless and until the consumer has notice of the need and opportunity to assert it. Here, the challenged order does not adequately assure that the consumer will receive actual notice. Absent notice, **[*367]** the consumer is unaware of the need to assert his or her privacy interest and is thereby deprived of a meaningful opportunity to do so. Absent an affirmative response from the consumer, there is no adequate basis to infer that the consumer has consented to the release of personal information. [¶] We shall order, on remand, that the trial court fashion an order that provides reasonable assurance that the consumers receive actual notice of the right to grant or withhold consent to release of personal information, and that such information not be released as to any consumer unless that consumer affirmatively agrees to such release."

On the other hand, plaintiff Olmstead reasons that consumers who initially contacted Pioneer **[****11]** to express dissatisfaction with its product have a reduced expectation of privacy or confidentiality in the contact information they freely offered to Pioneer for the purpose, presumably, of allowing further communication regarding their complaints. Plaintiff contends that, after balancing all the **[**202]** interests involved, the trial court's order requiring notice to Pioneer's customers and giving them the opportunity to object to transmission of their identifying information adequately protected their privacy interests. As will appear, we agree.

In reaching its decision, the Court of Appeal relied in part on ballot arguments leading to the adoption of the privacy provision of the state Constitution in 1972. These arguments explained that the right of privacy could be defined as the "right to be left alone," and observed that "the right to be left alone … is a fundamental and compelling interest. … It prevents government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve other purposes or to embarrass us." (Ballot Pamp., **[****12]** Gen. Elec. (Nov. 7, 1972), argument in favor of Prop. 11, p. 27; see *Hill v. Colorado* (2000) 530 U.S. 703, 716 [147 L. Ed. 2d 597, 120 S. Ct. 2480] [privacy right to be free in one's home from unwanted communication]; see also *Hill v. National Collegiate Athletic* **[***518]** *Assn.* (1994) 7 Cal.4th 1, 81 [26 Cal. Rptr. 2d 834, 865 P.2d 633] (dis. opn. of Mosk, J.) (*Hill*).)
[*368]

The Court of Appeal also cited the Information Practices Act of 1977 (Civ. Code, § 1798 et seq.), an act that contains legislative findings that "(a) The right to privacy is being threatened by the indiscriminate collection, maintenance, and dissemination of personal information and the lack of effective laws and legal remedies[;] [¶] (b) The increasing use of computers and other sophisticated information technology has greatly magnified the potential risk to individual privacy that can occur from the maintenance of personal information[; and] [¶] (c) In order to protect the privacy of individuals, it is necessary that the maintenance and dissemination of personal information be subject to strict limits." (Civ. Code, § 1798.1.)

The Court of Appeal relied in part on a case **[****13]** upholding the right of householders not to receive advertising and solicitations by mail (*Rowan v. Post Office Dept.* (1970) 397 U.S. 728, 737 [25 L. Ed. 2d 736, 90 S. Ct. 1484]), but that case held that a householder may circumscribe the right of a mailer to communicate with him "by an affirmative act of … giving notice that he wishes no further mailings from that mailer." (*Ibid.*; see *Planned Parenthood Golden Gate v. Superior Court* (2000) 83 Cal.App.4th 347, 357–359 [99 Cal. Rptr. 2d 627] [disclosure of names, addresses, and telephone numbers of association members for contact purposes implicates privacy interest in sanctity of home].) In other words, in *Rowan* the supposed privacy infringement would continue unless the householder requested otherwise. This is consistent with the trial court's order in the present case, which required the consumer to notify Pioneer of his or her objection to disclosure.

As the Court of Appeal observed, Pioneer, as custodian of the relevant documents, has standing to assert the privacy interests of its customers in the identifying information they gave to Pioneer. (See *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 658 [125 Cal. Rptr. 553, 542 P.2d 977] **[****14]** (*Valley Bank*).) But *Valley Bank* also supports the trial court's order here, placing the burden of making a privacy objection on the customer.

In that case, a bank sued the real parties in interest for the balance due on a promissory note. The real parties in interest asserted a fraud defense and sought discovery of certain banking records of various bank customers. The bank requested a protective order on behalf of these known individuals and entities. (Code Civ. Proc., § 2019, subd. (b)(1).) The trial court ordered disclosure of the information subject to limitations as to time and particular financial transactions. (*Valley Bank,*

supra, 15 Cal.3d at pp. 654–655.)

We pointed out in *Valley Bank* that, unlike the attorney-client or physician-patient privilege, there is "no bank-customer privilege," and that under "existing law, when bank customer information is sought, the bank has no obligation to notify the customer of the proceedings, and disclosure freely takes place unless the bank chooses to protect the customer's interests and elects to seek a protective order on his behalf." (*Valley* **[**203]** *Bank, supra*, 15 Cal.3d at pp. 656, 657.) **[****15]** Nonetheless, we concluded the state's privacy provision "extends to one's confidential financial affairs as well as to the details of one's personal life" (*id.* at p. 656), and we stated that " '[a] bank customer's reasonable expectation is that, *absent compulsion by legal process,* the matters he reveals to the bank will be **[***519]** utilized by the bank only for internal banking purposes.' " (*Id.* at p. 657, quoting *Burrows v. Superior Court* (1974) 13 Cal.3d 238, 243 [118 Cal. Rptr. 166, 529 P.2d 590].)

To protect a bank customer's privacy rights, we employed a balancing test, "[s]triking a balance between the competing considerations, … before **[*369]** confidential customer information may be disclosed in the course of civil discovery proceedings, the bank must take reasonable steps to notify its customer of the pendency and nature of the proceedings *and to afford the customer a fair opportunity to assert his* [*or her*] *interests by objecting to disclosure*, by seeking an appropriate protective order, or by instituting other legal proceedings to limit the scope or nature of the matters sought to be discovered." (*Valley Bank, supra*, 15 Cal.3d at p. 658, **[****16]** italics added; see also *Olympic Club v. Superior Court* (1991) 229 Cal. App. 3d 358, 361, 365 [282 Cal. Rptr. 1] [applying *Valley Bank* approach to "associational privacy interests"].)

Thus, although *Valley Bank* acknowledged the bank's obligation to *notify* bank customers of their option to seek legal relief before the bank released confidential customer information, we did not require the bank to obtain an affirmative consent from those customers before allowing such information to be released. The Court of Appeal below deemed the *Valley Bank* approach "inadequate when applied to a mass mailing to persons whose identities are not known by the party seeking discovery. The proposed mailing in this case would be to some 700 to 800 consumers. [¶] Unless reasonable measures are taken to assure actual notice to these consumers, they will not be afforded a reasonable opportunity to object."

The Court of Appeal thus preferred an approach which would place the burden on the discovery proponent to obtain written authorization from each person whose privacy was to be invaded. In support, the court cited *Colonial Life & Accident Ins. Co. v. Superior Court, supra*, 31 Cal.3d 785, **[****17]** which allowed disclosure to the plaintiff in a bad faith insurance action of the names and addresses of third parties filing similar claims against that insurer only if those parties specifically authorized the release of such information by signing and dating an enclosed form that so stated. The *Colonial Life* approach, however, was mandated by the express provisions of the Insurance Information and Privacy Protection Act (Ins. Code, § 791 et seq.), preventing an insurer from disclosing personal information obtained about a person during an insurance transaction *without the person's written authorization* (*id.*, § 791.13).

The Court of Appeal in the present case opined that because no "ongoing business relationship" existed between Pioneer and its complaining DVD player customers, it was unlikely they could be expected to open a letter from Pioneer and obtain actual notice of the "impending impingement upon their privacy and the opportunity to assert their privacy rights." The court also noted that no safeguards existed "to warn the consumers not to simply throw away unopened Pioneer's letters as junk mail, or against the prospect that the mail simply **[****18]** is not delivered." The court concluded that "[w]aiver [of the **[*370]** customers' privacy rights] must depend on an affirmative manifestation of consent by the consumer, whether by written correspondence, e-mail, facsimile, or other writing. [¶] The requirement of actual notification and an affirmative reply as requisites to disclosure of personal identifying information is not burdensome. But [it is] **[***520]** essential to protection of the privacy interests safeguarded by the right to privacy."

As will appear, the Court of Appeal's approach was too strict and failed to consider the nature of the privacy invasion involved here and apply a balancing test that weighs the various competing interests, as outlined in our case law.

[204]** B. *The* Hill *Decision and Its Balancing Test*

(1) Notwithstanding the broad descriptions of the privacy right in the ballot arguments and legislative findings relied on by the Court of Appeal, we have explained that the right of privacy protects the individual's *reasonable*

expectation of privacy against a *serious* invasion. (*Hill, supra*, 7 Cal.4th at pp. 36–37.) *Hill* observed that whether a legally recognized privacy interest exists **[****19]** is a question of law, and whether the circumstances give rise to a reasonable expectation of privacy and a serious invasion thereof are mixed questions of law and fact. (*Hill, supra*, 7 Cal.4th at p. 40.) "If the undisputed material facts show no reasonable expectation of privacy or an insubstantial impact on privacy interests, the question of invasion may be adjudicated as a matter of law." (*Ibid.*)

(2) *Hill* sets forth in detail the analytical framework for assessing claims of invasion of privacy under the state Constitution. First, the claimant must possess a "legally protected privacy interest." (*Hill, supra*, 7 Cal.4th at p. 35.) An apt example from *Hill* is an interest "in precluding the dissemination or misuse of sensitive and confidential information ('informational privacy') … ." (*Id.* at p. 35.) Under *Hill*, this class of information is deemed private "when well-established social norms recognize the need to maximize individual control over its dissemination and use to prevent unjustified embarrassment or indignity." (*Ibid.*) Additionally, *Hill* recognized the interest "in making intimate personal decisions **[****20]** or conducting personal activities without observation, intrusion, or interference ('autonomy privacy')." (*Ibid.*) As with claims of informational privacy, we must examine whether established social norms protect a person's private decisions or activities from "public or private intervention." (*Id.* at p. 36.)

(3) Second, *Hill* teaches that the privacy claimant must possess a reasonable expectation of privacy under the particular circumstances, including "customs, practices, and physical settings surrounding particular activities … ." (*Hill, supra*, 7 Cal.4th at p. 36.) As *Hill* explains, "A 'reasonable' **[*371]** expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms." (*Id.* at p. 37.) "[O]pportunities to consent voluntarily to activities impacting privacy interests obviously affect[] the expectations of the participant." (*Ibid.*)

(4) Third, *Hill* explains that the invasion of privacy complained of must be "serious" in nature, scope, and actual or potential impact to constitute an "egregious" breach of social norms, for trivial invasions afford no cause of action. (*Hill, supra*, 7 Cal.4th at p. 37.) **[****21]**

(5) Assuming that a claimant has met the foregoing *Hill* criteria for invasion of a privacy interest, that interest must be measured against other competing or countervailing interests in a " 'balancing test.' " (*Hill, supra*, 7 Cal.4th at p. 37; see *Parris* **[***521]** *v. Superior Court, supra*, 109 Cal.App.4th at pp. 300–301 [balancing privacy rights of putative class members against discovery rights of civil litigants]; see also *Britt v. Superior Court* (1978) 20 Cal.3d 844, 855–856 [143 Cal. Rptr. 695, 574 P.2d 766] [balancing right of associational privacy with discovery rights of litigants]; *Valley Bank, supra*, 15 Cal.3d at p. 657 [balancing test in bank customer privacy case]; *Planned Parenthood Golden Gate v. Superior Court, supra*, 83 Cal. App. 3d at pp. 358–369 [balancing associational privacy rights].) "Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests." (*Hill, supra*, 7 Cal.4th at p. 38.) Protective measures, safeguards and other alternatives may minimize the privacy intrusion. "For example, if intrusion **[****22]** is limited and confidential information is carefully shielded from disclosure except to those who have a legitimate need to know, privacy concerns are assuaged." (*Ibid.*)

[205]** C. *Trial Court's Order Involved No Abuse of Discretion*

Under our decision in *Valley Bank*, trial courts are vested with discretion in considering "[t]he variances of time, place, and circumstance" under which bank customer identifying information may be divulged to third parties. (*Valley Bank, supra*, 15 Cal.3d at p. 658.) Similarly, in applying the *Hill* balancing test, trial courts necessarily have broad discretion to weigh and balance the competing interests. (*Hill, supra*, 7 Cal.4th at pp. 37–38.) Did the trial court abuse its discretion here?

The record shows that the trial court, reconsidering its earlier order requiring receipt of an affirmative authorization from Pioneer customers before disclosure could occur, carefully balanced the competing interests and expressly found "that there are minimal privacy interests involved here. Revealing names, addresses and contact information on persons who have already complained about their Pioneer DVD players **[****23]** would not be particularly sensitive or intrusive. The proposed letter which the Court now adopts **[*372]** does allow anyone who does not wish to be bothered to say so, and they will not be contacted." As we explain, we find no abuse of discretion.

1. Reduced expectation of privacy—The trial court recognized that the personal identifying information at

issue here was probably entitled to some privacy protection, and the court ultimately required notice to each affected Pioneer customer of the proposed disclosure and a chance to object to it. Did these customers have a reasonable expectation that the information would be kept private *unless they affirmatively consented*? We think not.

Pioneer's complaining customers might reasonably expect to be notified of, and given an opportunity to object to, the release of their identifying information to third persons. Yet it seems unlikely that these customers, having already voluntarily disclosed their identifying information to that company in the hope of obtaining some form of relief, would have a reasonable expectation that such information would be kept private and withheld from a class action plaintiff who possibly seeks similar relief **[****24]** for other Pioneer customers, *unless the customer expressly consented to such disclosure*. If anything, these complainants might reasonably expect, and even hope, that their names and addresses **[***522]** would be given to any such class action plaintiff.

2. No serious invasion of privacy—Second, for much the same reasons that Pioneer customers had a reduced expectation of privacy, the trial court could properly find that no serious invasion of privacy would ensue if release of complaining customer identifying information was limited to the named plaintiff in a class action filed against Pioneer, following written notice to each customer that afforded a chance to object. As the trial court stated, the proposed disclosure was not "particularly sensitive," as it involved disclosing neither one's personal medical history or current medical condition nor details regarding one's personal finances or other financial information, but merely called for disclosure of contact information already voluntarily disclosed to Pioneer.

As previously noted, under *Hill, supra*, 7 Cal.4th at page 35, protectable privacy interests generally fall into two categories: "informational privacy," **[****25]** protecting the dissemination and misuse of sensitive and confidential information, and "autonomy privacy," preventing interference with one's personal activities and decisions. The limited disclosure to plaintiff of mere contact information regarding possible class action members would not appear to unduly interfere with either form of privacy, given that the affected persons readily may submit objections if they choose. Pioneer has never suggested that plaintiff threatens to engage in any abusive conduct, or otherwise misuse the information it sought.
[*373]

(6) Contact information regarding the identity of potential class members is generally discoverable, so that the lead plaintiff may learn the names of other persons who might assist in prosecuting the case. (E.g., *Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 820–821, 836 **[**206]** [97 Cal. Rptr. 2d 226]; *Budget Finance Plan v. Superior Court* (1973) 34 Cal. App. 3d 794, 799–800 [110 Cal. Rptr. 302]; see Code Civ. Proc., § 2017.010.) Such disclosure involves no revelation of personal or business secrets, intimate activities, or similar private information, and threatens no undue intrusion into **[****26]** one's personal life, such as mass-marketing efforts or unsolicited sales pitches. Moreover, the order in this case imposed important limitations, requiring written notice of the proposed disclosure to all complaining Pioneer customers, giving them the opportunity to object to the release of their own personal identifying information. Under these circumstances, the court's order involved no serious invasion of privacy.

The Court of Appeal expressed the concern that the notice letters to be sent to Pioneer's complaining customers might never be delivered and read. We believe this concern is misplaced, assuming the notice clearly and conspicuously explains how each customer might register an objection to disclosure. In *Valley Bank*, rather than insist on absolute certainty of delivery, we held instead that "reasonable steps" should be taken to notify bank customers of the disclosure of their identifying information. (*Valley Bank, supra*, 15 Cal.3d at p. 658.) Ordinary mailed notice is deemed a reasonable notification procedure in a variety of contexts, including service of process and legal notices (Code Civ. Proc., §§ 1012–1013), **[****27]** service of subpoenas duces tecum (*id.*, § 1985.3, subd. (b)), service of class action notices (*Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 812–813 [86 L. Ed. 2d 628, 105 S. Ct. 2965]), and service of jury summonses (Code Civ. Proc., § 208). A faxed or e-mailed notice might be reasonable and appropriate where the complaining customer **[***523]** had originally contacted Pioneer by those means.

3. Balancing opposing interests—Pioneer's failure to demonstrate that its customers entertained a reasonable expectation of privacy, or would suffer a serious invasion of their privacy, could end our inquiry as these elements are essential to any breach of privacy cause of action under *Hill* before any balancing of

interests is necessary. (See *Hill, supra*, 7 Cal.4th at pp. 39–40.) But a brief examination of the respective interests involved here helps reinforce our conclusion that the trial court's order was not an abuse of discretion.

(7) The court could reasonably conclude that, on balance, plaintiff's interest in obtaining contact information regarding complaining Pioneer customers outweighed the possibility that some of these customers **[****28]** might fail to receive their notice and thus lose the opportunity to object to disclosure. **[*374]** Our discovery statute recognizes that "the identity and location of persons having [discoverable] knowledge" are proper subjects of civil discovery. (Code Civ. Proc., § 2017.010; see Judicial Council of Cal. Form Interrogatories Nos. 12.1–12.7.) In a real sense, many of Pioneer's complaining customers would be *percipient witnesses* to relevant defects in the DVD players.

From the standpoint of fairness to the litigants in prosecuting or defending the forthcoming class action, Pioneer would possess a significant advantage if it could retain for its own exclusive use and benefit the contact information of those customers who complained regarding its product. Were plaintiff also able to contact these customers and learn of their experiences, he could improve his chances of marshalling a successful class action against Pioneer, thus perhaps ultimately benefiting some, if not all, those customers. It makes little sense to make it *more* difficult for plaintiff to contact them by insisting they first affirmatively contact Pioneer as a condition to releasing the same **[****29]** contact information they already divulged long ago.

Additionally, adoption of the Court of Appeal's constitutionally based rule requiring an affirmative waiver from persons whose personal identifying information is sought by others could have potentially adverse effects in cases brought to redress a variety of social ills, including consumer rights litigation. For example, Code of Civil Procedure section 1985.3 permits discovery of a consumer's records held by record holders (e.g., banks, lending institutions, utilities) if the consumer is given prior notice and an opportunity to **[**207]** object or seek a protective order. (Code Civ. Proc., § 1985.3, subds. (b), (e).) Amicus curiae California District Attorneys Association observes that the Court of Appeal's privacy rule could override this and similar statutory provisions and restrict law enforcement efforts in investigating and prosecuting "consumer and investor fraud, elder financial abuse schemes, food and drug hazards, and breaches of consumer product warranty, health, and safety standards," until written consents appear from affected persons whose identifying information is **[****30]** sought.

Similarly, amicus curiae Consumer Attorneys of California notes that the Court of Appeal's ruling, by preventing or substantially delaying identification of witnesses and potential class members, could make it more difficult to obtain class certification, thereby reducing the effectiveness of class actions as a means to provide relief in consumer protection cases.

D. *Conclusion*

(8) For all the foregoing reasons, we think the trial court properly evaluated the alternatives, balanced the competing interests, **[***524]** and permitted disclosure of contact information regarding Pioneer's complaining customers **[*375]** unless, following proper notice to them, they registered a written objection. These customers had no reasonable expectation of any greater degree of privacy, and no serious invasion of their privacy interests would be threatened by requiring them affirmatively to object to disclosure.

III. *DISPOSITION*

The judgment of the Court of Appeal is reversed and the cause remanded to that court for further proceedings consistent with this opinion.

George, C. J., Kennard, J., Baxter, J., Werdegar, J., Moreno, J., and Corrigan, J., concurred. **[****31]**

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