

1 THEODORE H. FRANK (SBN 196332)  
2 tedfrank@gmail.com  
3 M. FRANK BEDNARZ (*pro hac vice* motion pending)  
4 frank.bednarz@gmail.com

5 **CENTER FOR CLASS ACTION FAIRNESS**  
6 1718 M Street NW  
7 No. 23-6  
8 Washington, DC 20036  
9 (703) 203-3848

10 Attorneys for Objector Robyn Major

11 UNITED STATES DISTRICT COURT  
12 CENTRAL DISTRICT OF CALIFORNIA  
13 EASTERN DIVISION - RIVERSIDE

14 John True, *et al.*,

15 *Plaintiffs,*

16 vs.

17 American Honda Motor Company, Inc.,

18 *Defendant.*

19 Robyn Major,

20 *Objector.*

Case No. 07-cv-00287 VAP (OPx)

**CLASS ACTION**

**OBJECTION TO PROPOSED SETTLEMENT**

Judge: Virginia A. Phillips

Date: January 11, 2010

Time: 10:00 a.m.

Courtroom: 2

**TABLE OF CONTENTS**

1

2 TABLE OF CONTENTS ..... i

3 TABLE OF AUTHORITIES ..... i

4 INTRODUCTION ..... 1

5 I. The Objector Is a Member Of The Class.....2

6 II. The Settling Parties Have Failed To Carry Their Burden To Show That

7 The Settlement Is Fair. ....2

8 A. The Settlement’s Options A and B are Settlement Coupons.....3

9 B. Coupon Redemption Will Likely Be Low and Low-Value.....4

10 C. Option C Does Not Significantly Benefit the Class,

11 and Class Members Are Deterred From Seeking

12 the Modest Recovery They Are Entitled. ....8

13 D. The DVD Fuel Economy Video Provides

14 No Real Benefit to the Class. ....9

15 E. The Injunctive Relief Is Illusory. .... 10

16 F. The Settlement Therefore Cannot Survive Judicial Scrutiny. .... 11

17 III. The Arbitrariness of Eligibility for Option C Provides

18 Independent Grounds For Rejection of the Settlement. .... 12

19 IV. If The Court Approves The Settlement, Any Attorneys’

20 Fees Should Be Contingent Upon Meeting Specific

21 Benchmarks In Coupon Redemption..... 13

22 CONCLUSION ..... 14

**TABLE OF AUTHORITIES**

**Cases**

27 *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) ..... 11

28 *Diaz v. Trust Territory of Pacific Islands*, 876 F.2d 1401 (9th Cir. 1989) ..... 11

1 *Dunleavy v. Nadler*, 213 F.3d 454 (9th Cir. 2000) .....11

2 *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1302 (S.D. Fla. 2007) ....3

3 *Ford Explorer Cases*, J.C.C.P. Nos 4266 & 4270, Superior Court  
 4 for the State of California, Sacramento County, available at:  
<http://www.explorerclaims.com/Documents.aspx> .....5, 11

5 *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20 (2d Cir. 1987) .....11

6 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998) .....11

7 *In re General Motors Corp. Pickup Truck Fuel Tank Prod. Liab. Litig.*,  
 8 55 F.3d 768 (3rd Cir. 1995).....4, 7

9 *In re Grand Theft Auto Video Game Consumer Litig.*,  
 251 F.R.D. 139 (S.D.N.Y. 2008).....5

10 *In re Joint Eastern and Southern Dist. Asbestos Litig.*,  
 11 982 F.2d 721 (2d Cir. 1992),  
 modified on reh'g on other grounds sub nom.  
 12 *In re Findley*, 993 F.2d 7 (2d Cir. 1993).....12-13

13 *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781 (7th Cir. 2004) ..... 11, 13

14 *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003) .....10

15 *Moody v. Sears*, 2007 NCBC 13 (N.C. Bus. Ct. May 7, 2007) .....5

16 *Murray v. GMAC*, 434 F.3d 948 (7th Cir. 2006) .....12

17 *Silberblatt v. Morgan Stanley*, 2007 WL 4145403 (S.D.N.Y. Nov. 19, 2007) .....10

18 *Silber v. Mabon*, 957 F.2d 697 (9th Cir. 1992) .....11

19 *Synfuel Tech. v. DHL Indus., Inc.*, 463 F.3d 646 (7th Cir. 2006) .....10

20 *Union Life Fidelity Ins. Co. v. McCurdy*, 781 So. 2d 186 (Ala. 2000).....5

21 **Rules and Statutes**

22 Fed. R. Civ. Proc. 23(a)(4).....14

23 Fed. R. Civ. Proc. 23(e) .....1, 14

24 28 U.S.C. § 1711 note § 2(a)(3)(A) .....4, 10

25 28 U.S.C. § 1712(a) .....3

26 28 U.S.C. § 1712(d) .....11

27 40 C.F.R. § 600.307-95(a)(2)(iv) .....8

28

**Other Authorities**

1

2 *2007 Civic Hybrid Online Reference Owner's Manual*.....9

3 Dee-Ann Durbin, *Study: Hybrid car owners are most loyal,*

4 *USA Today*, August 11, 2008 .....5

5 *Fuel Economy Guide*, model years 2000-2010.....9

6 *'Hypermilers' wring out every last bit of mpg*, MSNBC.com, May 29, 2007 .....9

7 Jeffrey S. Jacobson, *Defining "Coupon" Under the Class Action Fairness Act,*

8 *Product Liability Law 360*, Jan. 15, 2008.....10

9 Ashby Jones, *The Ford Rollover Litigation: The Scoop On the Coupons,*

10 *Wall Street Journal Law Blog*, August 3, 2009 .....5

11 Makiko Kitamura and Tetsuya Komatsu, *Honda to Lower U.S. Incentives on*

12 *Demand, Output Cuts*, Bloomberg News, May 15, 2009.....6

13 *Manual for Complex Litigation* (4th ed. 2008), § 21.71 .....3

14 S. Rep. 109-14, U.S.Code Cong. & Admin.News 2005 .....7

15 James Tharn & Brian Blockovich, *Coupons and the Class Action Fairness Act,*

16 *18 Geo. J. Legal Ethics* 1443 (2005) .....5

17 David Welch and David Kiley, *After the Clunker Party, an Auto Sales Hangover,*

18 *Business Week*, September 1, 2009.....6

19

20

21

22

23

24

25

26

27

28

## INTRODUCTION

1  
2 Plaintiffs brought suit against American Honda Motors Co., Inc. (“Honda”) claiming that thousands of consumers were each defrauded out of nearly \$7000 by  
3 purchasing the Honda Civic Hybrid instead of a conventional Honda Civic. Parties have  
4 negotiated a settlement that largely consists of coupons (called “rebates”) unlikely to be  
5 redeemed. As such, the settlement provides class members with little real benefit, but  
6 proposes to pay plaintiffs’ attorneys \$2.95 million cash. The Court’s first instinct in  
7 denying preliminary approval to this settlement was correct: such attenuated class benefit  
8 and exorbitant fees cannot be justified—especially given the early procedural posture of  
9 the case.  
10

11 The class recovers little from the settlement. As the Court correctly observed,  
12 “Class members who do not want to, or are not able to, buy an Eligible Vehicle, and who  
13 did not make a qualifying complaint, will be ineligible to receive any payments or  
14 discounts.” Order Denying Prel. Appr., Dkt. No. 100 at 5-6.

15 The settlement’s fine points further disinherit the class. Members must patronize  
16 Honda for the whole cost of a new car upfront, only to receive a rebate afterwards.  
17 Members may not receive rebates on the Civic Hybrid and other fuel-efficient models.  
18 Members must follow a contorted procedure to claim their coupons, which requires them  
19 to watch a Fuel Economy Video of unknown length—even if they no longer own a Civic  
20 Hybrid. The 2% of the class entitled to a modest \$100 payment are not given notice of  
21 that option, and few of them will redeem it according the plaintiffs’ own estimates. This  
22 settlement recovers a pittance for the class, while plaintiffs’ counsel is paid \$2.95  
23 million—in cash, not DVDs or rebates.

24 The fairness of the settlement must be judged by comparing the actual redeemed  
25 and realized class benefits to the attorneys’ fees awarded in the case. If this coupon  
26 settlement has the typical 1% redemption rate for coupons, the requested fees far outstrip  
27 the benefits to the class. Rule 23(e)(2) requires this court to reject the settlement.  
28

1 Robyn Major, the Objector, represents thousands of class members who believe  
2 that the coupon and DVD are worthless and who will receive no benefit from the  
3 proposed settlement.

4 These objections also serve as notice that counsel M. Frank Bednarz intends to  
5 appear at the January 11 approval hearing on behalf of Ms. Major.

6 **I. The Objector Is a Member Of The Class.**

7 Robyn Major (700 E. Sharpnack Street, Philadelphia, PA 19119, 215-843-9562)  
8 purchased a 2008 Honda Civic Hybrid from Sloane Honda in Philadelphia, Pennsylvania  
9 in July 2008.

10 The putative settlement class includes “All persons who purchased or leased a new  
11 Honda Civic Hybrid automobile model years 2003 through 2008 in the United States of  
12 America including the District of Columbia.” Ms. Major therefore has standing to object.

13 **II. The Settling Parties Have Failed To Carry Their Burden To Show That The**  
14 **Settlement Is Fair.**

15 Under the proposed settlement, most of the 158,000 class members receive coupons  
16 on a new Honda, which they can only use by again dealing with the company. Class  
17 members can choose between two coupons: Option A, which allows a \$1000 rebate on the  
18 purchase of certain new Honda vehicles if they trade in their Civic Hybrid; or Option B,  
19 which allows a \$500 rebate with no trade in requirement. A small minority may choose  
20 Option C and receive \$100, but only if Honda or Putative Class Counsel possess a written  
21 record proving that the class member complained about fuel economy to Honda before  
22 March 2009. Class members will receive a DVD containing fuel economy tips, which  
23 class counsel unrealistically values at \$99 per copy, although similar tips are available for  
24 free online. Finally, Honda will modify its advertising for 24 months, changing an  
25 advertising disclaimer from “actual mileage may vary” into “actual mileage will vary.”

26 This relief is largely illusory and does not justify the likely request for \$2.95  
27 million in attorneys’ fees.

1           **A. The Settlement's Options A And B Are Settlement Coupons.**

2           The proposed settlement allows the putative class to selected one of three exclusive  
3 remedies. However, according to plaintiffs' own figures, Option C, is unavailable to over  
4 98% of the class. *See* Dkt. No. 104, Exhibit C-2 (Expert report of Professor Xavier Dreze,  
5 indicating size of class eligible for Option C as about 2635). *See also* section II.C. *infra*.  
6 Therefore, most class members may only redeem Options A and B coupons.

7           Option A allows class member to receive a \$1000 rebate when they sell or trade in  
8 their Civic Hybrid to buy a new Honda or Acura automobile before October 31, 2011.  
9 Option A is nontransferable. Option B allows a \$500 rebate on the purchase of a new  
10 Honda or Acura without imposing a trade-in requirement. Option B may be transferred,  
11 but only to family. Both options exclude rebates for the purchase of certain models  
12 (namely, the Civic Hybrid, Fit, Insight, CRZ, and certified pre-owned vehicles).

13           Both options are settlement coupons and should be evaluated as such. Although the  
14 proposed settlement carefully avoids calling these rebate options "coupons," they share  
15 the central characteristic of all coupons: recipients must purchase another product in order  
16 to redeem value from the options. Coupon settlements are problematic because: (1) they  
17 often do not provide meaningful compensation to class members; (2) they often fail to  
18 disgorge ill-gotten gains from the defendant; and (3) they often require class members to  
19 do future business with the defendant in order to receive compensation. *See Figueroa v.*  
20 *Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1302 (S.D. Fla. 2007). These "Options"  
21 exhibit all three problems, and should be considered coupons by another name.

22           Because this is a coupon settlement, it does not make sense to claim, as plaintiffs  
23 do, that "Honda has no 'reversionary interest' in this settlement." Plts.' Supp. Mot., Dkt.  
24 No. 105 at 10. There is no reversionary interest only because Honda has not pledged one  
25 dollar toward the settlement fund to begin with.

26           The settlement fund therefore consists of whatever amount Honda will ultimately  
27 pay the class in coupon redemption plus the requested attorneys' fees. The sum of class  
28 benefits and attorneys' fees should be "treated as a settlement fund for the benefit of the

1 class, with the agreed-on fee amount constituting the upper limit on the fees that can be  
2 awarded to counsel.” Manual for Complex Litigation (4th ed. 2008), § 21.71, p. 525. The  
3 attorneys’ fees may be measured against this total fund to determine whether the allocation  
4 between attorneys and the class is reasonable. *See id.* Because this is a coupon settlement,  
5 attorneys’ fees “shall be based on the value to class members of the coupons that are  
6 redeemed” rather than the theoretical value of the coupons available for redemption. 28  
7 U.S.C. §1712(a). *See also In re General Motors Corp. Pickup Truck Fuel Tank Prod.*  
8 *Liab. Litig.*, 55 F.3d 768, 820-21 (3rd Cir. 1995) (considering automotive coupons and  
9 “separate” attorneys fees as a common fund “in economic reality”).

10 **B. Coupon Redemption Will Likely Be Low And Low-Value.**

11 To use the coupon rebate, class members must follow a torturous procedure and pay  
12 thousands of dollars to Honda. First, class members must visit the settlement website and  
13 correctly enter their 17-digit vehicle identification number (VIN). Settlement ¶ III.5.A.  
14 Class members are then required to watch the Fuel Economy Video, which is of unknown  
15 length and has not been produced to date. *Id.* This will allow members to obtain their  
16 assigned claim number, which is different from their VIN. *Id.* Class members must then  
17 act within 18 months to buy a new Honda vehicle. Settlement ¶¶ III.6-7. Class members  
18 will need to commit about \$15,000-40,000 to a Honda or Acura dealer (less any trade-in  
19 value), taking care to not purchase an ineligible car. Finally, members must print out a  
20 six-page claim form, complete it with their claim number and submit the information  
21 accurately and completely under penalty of perjury. Settlement ¶¶ V.14.

22 Would-be claimants can begin this task only if they are aware of the settlement and  
23 only if they intend to buy a new Honda before October 31, 2011. Class members who are  
24 signed into a long-term lease or who simply cannot afford to buy a new car are barred  
25 from any benefit whatsoever.

26 The low redemption rate for class action coupons is well-known, and was one of the  
27 motivating factors behind the Class Action Fairness Act. *See* 28 U.S.C. § 1711 note  
28 § 2(a)(3)(A). The rule of thumb is that a redemption rate for a coupon without a



1 secondary market is between 1% and 3%. *See generally* James Tharn & Brian  
2 Blockovich, *Coupons and the Class Action Fairness Act*, 18 Geo. J. Legal Ethics 1443  
3 (2005). But even that figure may be an overestimate. *See, e.g., In re Grand Theft Auto*  
4 *Video Game Consumer Litig.*, 251 F.R.D. 139 (S.D.N.Y. 2008) (only 2676 claimants out  
5 of 10 million class members); *Moody v. Sears*, 2007 NCBC 13 (N.C. Bus. Ct. May 7,  
6 2007) (337 redemptions in 1.5 million-member class); *Union Life Fidelity Ins. Co. v.*  
7 *McCurdy*, 781 So. 2d 186, 188 (Ala. 2000) (113 redemptions in 104,000-member class).  
8 One comparable settlement recently resolved several state class action suits that were filed  
9 against Ford Motor Company prior to the passage of CAFA. The suits alleged that Ford  
10 had falsely advertised and concealed unfavorable facts about their Explorer SUV. The  
11 settlement offered 1 million class members a \$300-500 discount certificate on the  
12 purchase of a new Ford, Lincoln, or Mercury.<sup>1</sup> As with the proposed settlement, the  
13 coupons' transferability was strictly limited to family members. In the end, only *seventy-*  
14 *five* class members redeemed their coupons.<sup>2</sup>

15 The redemption rate in the proposed settlement will be diminished because Honda's  
16 most fuel efficient vehicles are excluded. Rebates cannot be received for purchase of any  
17 Honda hybrid model—the Civic Hybrid, Insight, and CRZ—nor for the Honda Fit, which  
18 has excellent mileage for a non-hybrid. Hybrid car owners are especially inclined to buy  
19 new hybrids or fuel efficient non-hybrids like the Honda Fit. Hybrid owners are more  
20 likely than other motorists to buy the same make *and model* in the future.<sup>3</sup> Yet rebates for  
21

22 <sup>1</sup> *See* Settlement Agreement and Release, *Ford Explorer Cases*, J.C.C.P. Nos 4266 &  
23 4270, Superior Court for the State of California, Sacramento County, available at:  
24 <http://www.explorerclaims.com/Documents.aspx>

25 <sup>2</sup> *See* Ashby Jones, *The Ford Rollover Litigation: The Scoop On the Coupons*, *Wall Street*  
26 *Journal Law Blog*, August 3, 2009, available at: [http://blogs.wsj.com/law/2009/08/03/the-](http://blogs.wsj.com/law/2009/08/03/the-ford-rollover-litigation-the-scoop-on-the-coupons/)  
[ford-rollover-litigation-the-scoop-on-the-coupons/](http://blogs.wsj.com/law/2009/08/03/the-ford-rollover-litigation-the-scoop-on-the-coupons/)

27 <sup>3</sup> *See* Dee-Ann Durbin, *Study: Hybrid car owners are most loyal*, *USA Today*, August 11,  
28 2008, available at: [http://www.usatoday.com/money/autos/2008-08-11-study-car-](http://www.usatoday.com/money/autos/2008-08-11-study-car-loyalty_N.htm?loc=interstitialskip)  
[loyalty\\_N.htm?loc=interstitialskip](http://www.usatoday.com/money/autos/2008-08-11-study-car-loyalty_N.htm?loc=interstitialskip)

1 the Civic Hybrid and similar cars have been systematically excluded from the settlement,  
2 reducing the likelihood that many class members will actually redeem their coupons.

3 Redemption rates will also suffer because of the weak automotive market. Demand  
4 for new cars has contracted due to the recession, and Honda has slashed production and  
5 incentives.<sup>4</sup> Many class members would have already purchased a car in previous months  
6 due to large and unprecedented manufacturer rebates, government programs, and dealer  
7 incentives.<sup>5</sup> Other class members are out of work and struggling to make ends meet.  
8 They will not likely buy a new Honda soon. Still other class members, like Ms. Major,  
9 are disillusioned with Honda after their disappointment with the Civic Hybrid mileage,  
10 and do not wish to continue to do business with Honda.

11 Even accounting for low redemption rates, the face value of redeemed coupons  
12 overestimates their value to the class. First, coupons are always worth less than cash.  
13 Submitting rebates costs both time and money. Class members are required obtain  
14 payment or financing for the full cost of a new Honda vehicle, and they must complete  
15 appropriate paperwork on their own time.

16 Second, redeemed coupons tend to be less valuable to shoppers than their face  
17 value. To illustrate this, imagine that a grocery shopper values a can a soup at \$1, but the  
18 soup is priced at \$1.20. The shopper normally would not buy the soup, and would  
19 perhaps buy other groceries instead. But with a 25 cent coupon, the shopper is willing to  
20 purchase the soup. Although the coupon has been used in the place of 25 cents cash, the  
21 shopper only values the coupon for the five cent consumer surplus from purchase.

22  
23  
24  
25 <sup>4</sup> See Makiko Kitamura and Tetsuya Komatsu, *Honda to Lower U.S. Incentives on*  
26 *Demand, Output Cuts*, Bloomberg News, May 15, 2009, available at:  
<http://www.bloomberg.com/apps/news?pid=20601209&sid=aMRdQLKOYLCL>.

27 <sup>5</sup> See David Welch and David Kiley, *After the Clunker Party, an Auto Sales Hangover*,  
28 *Business Week*, September 1, 2009, available at:  
[http://www.businessweek.com/bwdaily/dnflash/content/sep2009/db2009091\\_796652.htm](http://www.businessweek.com/bwdaily/dnflash/content/sep2009/db2009091_796652.htm)

1 Similarly, any redeeming class member who would not have otherwise purchased  
2 an eligible vehicle necessarily values the settlement coupon at less than face value. Their  
3 value from the coupon is not the full \$500 or \$1000, but is only the difference between the  
4 consumer surplus they enjoy from a slightly discounted Honda and the consumer surplus  
5 from the (non)-purchase they would have otherwise made.

6 Insofar as the settlement stimulates sales that would not have otherwise occurred,  
7 Honda benefits from these coupons more than the class. Every redeemed \$500 or \$1000  
8 coupon potentially earns Honda profit in an economy where new car sales are scarce.  
9 Indeed, Honda voluntarily offered customers an average of \$1000 in promotional  
10 incentives to reduce excess inventory in early 2009.<sup>6</sup> The coupon rebates authorized by  
11 the proposed settlement resemble a marketing strategy more than meaningful class  
12 recovery. Notably, the settlement excludes rebates on the Honda Fit compact, a model  
13 that has experienced rising demand in the US.<sup>7</sup> Presumably, this model was excluded  
14 along with the promising hybrid models (Civic Hybrid, Insight, and CRZ) because from a  
15 marketing standpoint they sell well enough without rebates.

16 Coupon Options A and B, which are the only recovery available to most of the  
17 class, is precisely the sort of worthless remedy that CAFA was meant to curtail. It is an  
18 “[a]busive class action settlement[] in which plaintiffs receive promotional coupons or  
19 other nominal damages while class counsel receive large fees.” S. Rep. 109-14, at 32,  
20 U.S. Code Cong. & Admin. News 2005, pp. 3, 32. *See also In re General Motors Corp.*,  
21 55 F.3d at 807 (overturning approval of settlement that would have provide \$1000  
22 coupons on the purchase of a new GM truck, which the court found to be “a sophisticated  
23 GM marketing program.”).

24  
25  
26 <sup>6</sup> See Naoko Fujimura and Tetsuya Komatsu, *Honda Raises U.S. Rebates to Record on*  
27 *Aging Models*, Bloomberg News, February 6, 2009, available at:  
<http://www.bloomberg.com/apps/news?pid=20601101&sid=aOVoudDTmfN0>.

28 <sup>7</sup> *Id.*

1 This Court should not approve a settlement that amounts to a watered-down loyalty  
2 promotion for the benefit of American Honda Motors.

3 **C. Option C Does Not Significantly Benefit the Class, And Class Members**  
4 **Are Deterred From Seeking the Modest Recovery They Are Entitled.**

5 According to the proposed settlement, class members who have a written complaint  
6 on file with Honda or the plaintiffs' attorneys may claim \$100 by selecting Option C.  
7 However, recovery Option C is a small and capricious recovery that will only be  
8 redeemed by a calculatedly small handful of customers.

9 Option C leaves many allegedly wronged customers without remedy. Dissatisfied  
10 Civic Hybrid customers could not have known that they were expected to lodge fuel  
11 economy complaints directly to Honda. Customers who only complained to a dealer or  
12 casually called customer service may have no written record. Insofar that Honda failed to  
13 create or maintain records of customer complaints Honda has reduced its potential  
14 liability under this proposed settlement.

15 Moreover, the Putative Class Attorneys fail to protect the interests of the class in  
16 Option C, by failing to recover funds for class members who can be easily located.  
17 According to plaintiffs' own estimates, only 580 out of 158,000 class members will claim  
18 the \$100 payment, for a projected value of \$57,973. *See* Prof. Xavier Dreze's analysis,  
19 Dkt. No. 104, Exhibit C-2. This figure is said to represent 22% of the class eligible for  
20 Option C. *Id.* Therefore, Honda and plaintiffs' counsel have records of only about 2635  
21 such complaints (less than 2% of the class), and according to plaintiffs' expert estimate,  
22 and most of them will never realize that they qualify for \$100 in free money. Considering  
23 that these customers' VINs and sales addresses are now known to the settling parties, the  
24 settlement should simply provide them notice that they have a choice of claiming \$100 or  
25 the coupon. Instead, such class members must call a 1-800 number hotline or type their  
26 VIN into a website in order to determine whether they are eligible. Unlike the coupons,  
27 Option C expires after a narrow 60-day window. These cumbersome and restrictive  
28 procedures seem designed to inhibit rather than promote class recovery.

1           **D.     The DVD Fuel Economy Video Provides No Real Benefit To The Class.**

2           Although plaintiffs optimistically value informational DVDs at \$99 per copy, the  
3 true value to the class is effectively zero.

4           Tips on improving gas mileage are already available to the class for free online,  
5 including tips effective for the Civic Hybrid.<sup>8</sup> Specific fuel economy tips are already  
6 included in the Civic Hybrid owner's manual, which currently sits in the glove  
7 compartment of thousands of class members, including Objector.<sup>9</sup> Additionally, federal  
8 regulations require that new vehicles carry labels advising customers of the "FREE FUEL  
9 ECONOMY GUIDE available at the dealer." 40 C.F.R. § 600.307-95(a)(2)(iv). This  
10 guide, also available online,<sup>10</sup> gives car buyers tips on improving their gas mileage. If  
11 consumers actually valued the proposed video, Honda or some third party could have  
12 profitably marketed it to Civic Hybrid owners, but there is no such market. There is no  
13 value to the class because the tips contained in the video are readily available to them for  
14 free.

15           This Court should therefore zero out the alleged value of the DVD when computing  
16 the value of the settlement to the class. The lessons of the Class Action Fairness Act  
17 ("CAFA") do not apply only to coupons. As CAFA itself states, Congress enacted the  
18 statute out of concern over abuses of the class action device that "harmed" class members,  
19 "such as where ... counsel are awarded large fees, while leaving class members with  
20 coupons *or other awards of little or no value.*" 28 U.S.C. § 1711 note § 2(a)(3)(A)  
21 (emphasis added); *Synfuel Tech. v. DHL Indus., Inc.*, 463 F.3d 646, 654 (7th Cir. 2006);  
22 Jeffrey S. Jacobson, *Defining "Coupon" Under the Class Action Fairness Act*, Product  
23

24 <sup>8</sup> See e.g. 'Hypermilers' wring out every last bit of mpg, MSNBC.com, May 29, 2007,  
25 available at: <http://www.msnbc.msn.com/id/18923454/>

26 <sup>9</sup> See e.g. 2007 Civic Hybrid Online Reference Owner's Manual, p. 154-155, available  
27 online at: <http://techinfo.honda.com/rjanisis/pubs/om/NC0707/NC0707O00150A.pdf>

28 <sup>10</sup> See *Fuel Economy Guide*, model years 2000-2010, available online at:  
<http://fueleconomy.gov/feg/feg2000.htm>

1 Liability Law 360, Jan. 15, 2008. This case, offering a settlement of zero value to nearly  
2 the entire class, is squarely within the concern of CAFA. It is perfectly appropriate to  
3 omit noncash compensation to the class when considering the fairness of the settlement or  
4 the calculation of a reasonable fee. *E.g., Silberblatt v. Morgan Stanley*, 2007 WL  
5 4145403 (S.D.N.Y. Nov. 19, 2007).

6 If anything, the Fuel Economy Video is a nuisance to the class. Putative class  
7 members are required to watch the video in order to redeem their coupons—even if they  
8 sold or returned their Civic Hybrid long ago. *See* Settlement ¶ III.5. Such senseless  
9 hurdles appear designed to inhibit rather than promote class recovery. These terms  
10 demonstrate that the Putative Class Attorneys failed in their fiduciary duty to the  
11 unrepresented class members. There is no reason to agree to require class members to go  
12 through onerous and meaningless hoop-jumping to recover except a desire to rush to  
13 settlement of illusory value to maximize their own attorneys’ fees at the expense of their  
14 putative clients.

15 **E. The Injunctive Relief Is Illusory.**

16 The putative settlement requires Honda to search its Civic Hybrid advertising  
17 material for the phrase “mileage may vary.” For 24 months, Honda agrees to instead use  
18 the phrase “mileage will vary,” when doing so would not require Honda to “destroy or  
19 modify any advertising already created or contracted for as of the Effective Date.”  
20 Settlement ¶ IV.9. This subtle revision does nothing to help past buyers. Given the short  
21 term and extremely limited scope of the injunction, it is also doubtful that future  
22 customers will benefit or even notice. There is no evidence that this injunction provides  
23 value to future purchasers of Hondas, much less the class members Putative Class  
24 Attorneys purport to represent.

25 As such, the injunctive relief is irrelevant to this class action and cannot be used as  
26 support for the fairness of the settlement or attorneys’ fees.

1           **F.     The Settlement Therefore Cannot Survive Judicial Scrutiny.**

2           “Both the class representative and the courts have a duty to protect the interests of  
3 absent class members.” *Silber v. Mabon*, 957 F.2d 697, 701 (9th Cir. 1992). *Accord*  
4 *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987) (“district court ha[s] a  
5 fiduciary responsibility to the silent class members”). “Because class actions are rife with  
6 potential conflicts of interest between class counsel and class members, district judges  
7 presiding over such actions are expected to give careful scrutiny to the terms of proposed  
8 settlements in order to make sure that class counsel are behaving as honest fiduciaries for  
9 the class as a whole.” *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 785 (7th Cir.  
10 2004). *See also Diaz v. Trust Territory of Pacific Islands*, 876 F.2d 1401, 1408 (9th Cir.  
11 1989) (“The district court must ensure that the representative plaintiff fulfills his fiduciary  
12 duty toward the absent class members”).

13           Where a court is confronted with a settlement-only class certification, the court  
14 must look to factors “designed to protect absentees.” *Amchem Prods., Inc. v. Windsor*, 521  
15 U.S. 591, 620 (1997); *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003). “Settlements  
16 that take place prior to formal class certification require a higher standard of fairness.”  
17 *Molski*, 318 F.3d at 953 (*quoting Dunleavy v. Nadler*, 213 F.3d 454, 458 (9th Cir. 2000)).

18           “These concerns warrant special attention when the record suggests that settlement  
19 is driven by fees; that is, when counsel receive a disproportionate distribution of the  
20 settlement, or when the class receives no monetary distribution but class counsel are  
21 amply rewarded.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1021 (9th Cir. 1998).

22           Though plaintiffs claimed to represent and seek to bind a class of 158,000  
23 members, they have recovered cash for only themselves, their attorneys, and \$100 for  
24 perhaps 580 lucky members. Including the named plaintiff incentives, plaintiffs have  
25 recovered for the class perhaps \$70,000 and coupons for a claim that they had alleged was  
26 worth over a billion dollars plus punitive damages. If we generously assume a \$750  
27 average value and 1% redemption rate for the coupons (many times the redemption rate of  
28 Ford coupons in the Sacramento case), plaintiffs brought a billion-dollar lawsuit that they

1 are settling for \$1,255,000, a 0.1% success rate—and an amount that would imply a fee  
2 award in the \$300,000 range, rather than the \$3 million range.

3 Meanwhile, the representative class members receive “Incentive” payments of  
4 \$22,500, despite shutting out nearly all of the unrepresented class members.

5 In *Murray v. GMAC*, a 1% ratio of recovery to alleged damages and a high ratio of  
6 representative-to-individual recovery was enough to call the settlement untenable: “if the  
7 reason other class members get relief worth about 1% of the minimum statutory award is  
8 that the suit has only a 1% chance of success, then how could Murray personally accept  
9 300% of the statutory maximum? And, if the chance of success really is only 1%,  
10 shouldn't the suit be dismissed as frivolous and no one receive a penny?” *Murray v.*  
11 *GMAC*, 434 F.3d 948, 952 (7th Cir. 2006). Here, the “success” of plaintiffs is similar to  
12 the failure criticized in *Murray*. Plaintiffs are either breaching their fiduciary duties by  
13 selling the class short or are bringing an extortionate “strike suit” for their own benefit.  
14 Neither should be condoned by approving the settlement or attorneys’ fees.

### 15 **III. The Arbitrariness Of Eligibility For Option C Provides** 16 **Independent Grounds For Rejection of the Settlement.**

17 There is no reason to distinguish the “Option C” class members from the other  
18 members of the class. To obtain preliminary approval of the settlement, both parties  
19 represented to the court that the entire settlement class is similarly situated, and are  
20 estopped from claiming otherwise. Yet “customers who complained before March 2009”  
21 are being treated differently than the rest of the class—even though there is no legal basis  
22 under the state consumer protection laws to treat the two sub-classes differently.

23 As a result, the vast majority of the class that was excluded from Option C was  
24 effectively unrepresented, making the settlement inherently indefensible given the  
25 disparate treatment of class members with identical claims that plaintiffs claim merit class  
26 certification. *In re Joint Eastern and Southern Dist. Asbestos Litig.*, 982 F.2d 721, 741-43  
27 (2d Cir. 1992) (decertifying class under Rule 23(a)(4) because of conflicts of interest  
28 between different segments of class), *modified on reh'g on other grounds sub nom. In re*



1 *Findley*, 993 F.2d 7 (2d Cir. 1993); *see also Mirfasihi*, 356 F.3d at 786 (rejecting  
2 settlement where sub-class was shut out without any lower-court finding that underlying  
3 claim of sub-class was meritless).

4 This arbitrary distinction is the opposite of “fair” and provides an independent basis  
5 for rejecting the settlement.

6 **IV. If The Court Approves The Settlement, Any Attorneys’ Fees Should Be**  
7 **Contingent Upon Meeting Specific Benchmarks In Coupon Redemption.**

8 The settling parties have submitted expert evidence claiming that the redemption  
9 rate will be unusually high in this case. *Cf.* 28 U.S.C. § 1712(d). Certainly, if the coupon  
10 redemption rate were 50 to 100%, there would be a sound argument for the fairness of the  
11 settlement, as it would show that the class viewed the coupons as a tangible benefit. But  
12 if the settlement is approved based upon the § 1712(d) claim that the redemption rate will  
13 be high (totaling over \$16 million as estimated by plaintiffs), the Putative Class Attorneys  
14 should be required to put their money where their mouth is.

15 If the actual redemption rate does not match the claimed redemption rate that the  
16 parties used to gain court approval, attorneys’ fees should be denied. Without such a  
17 possibility of penalty, plaintiffs will have every incentive to exaggerate the likely recovery  
18 in order to gain settlement approval. But if Putative Class Attorneys know that they will  
19 not receive fees unless they make an accurate representation to the Court about the true  
20 value of the settlement, they will have the appropriate incentive to be truthful rather than  
21 engaging in a battle of the experts. Only then will the Court have the data it needs to  
22 determine whether the settlement is adequate.

1 **CONCLUSION**

2 Aside from valueless DVDs and injunctive relief, this is a coupon settlement, and  
3 cannot be approved as fair to the class, especially given the sad history of redemption  
4 rates for automobile coupons in class action settlements, and especially given the  
5 untenable hoops class members are required to jump through to redeem their coupons—  
6 requirements that can be seen only as a means to reduce the expense to the defendant of  
7 the settlement. The recovery of the attorneys will almost certainly outstrip the recovery of  
8 the class. The Putative Class Attorneys’ actions should be deterred, rather than rewarded;  
9 the court should reject the settlement as failing to comply with the requirements of  
10 Rule 23(a)(4) and Rule 23(e).

11 Furthermore, the arbitrary distinctions that entitle some class members to cash relief  
12 and deprive others of the same choice are without legal basis and void the fairness of the  
13 settlement, providing independent grounds for the mandatory rejection of the settlement.

14 But if the Court makes factual findings that the settlement is fair based on Putative  
15 Class Attorneys’ representations about the redemption rate, any award of fees and costs  
16 should be contingent upon the Putative Class Attorneys’ accuracy in those  
17 representations.

18 Dated: December 14, 2009

19  
20 Respectfully submitted,

21 /s/ Theodore H. Frank

22 Theodore H. Frank

23 M. Frank Bednarz

24 **CENTER FOR CLASS ACTION  
25 FAIRNESS**

26 1718 M Street NW

27 No. 23-6

28 Washington, DC 20036

(703) 203-3848

Attorneys for Objector Robyn Major

PROOF OF SERVICE

I declare that:

I am employed in the state of Illinois. I am over the age of 18 years and not party to the within action; my office address is 312 N. May Street, Suite 100, Chicago, Illinois 60607.

On December 14, 2009, I served the attached:

**OBJECTION TO PROPOSED SETTLEMENT**

X By First-Class Mail in that I caused such envelope(s) to be delivered via First-Class Mail to the addressee(s) designated.

Nicholas E. Chmicles Denise Davis Schwartzman CHIMICLES & TIKELLIS, LLP One Haverford Centre 361 West Lancaster Avenue Haverford, PA 19041	Mark S. Mester Livia M. Kiser LATHAM & WATKINS, LLP 233 South Wacker Drive Soute 5800, Sears Tower Chicago, IL 60606
Jonathan W. Cuneo William H. Anderson CUNEO GILBER & LADUCA, LLP 507 C Street, N.E. Washington, D.C. 20002	John Mendel AMERICAN HONDA MOTOR CO., INC 1919 Torrance Blvd. Torrance, CA 90501
Maxwell W. Blecher BLECHER AND COLLINS, PC 515 South Figueroa St., 17 <sup>th</sup> Floor Los Angeles, CA 90071	

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 14, 2009.

/s/ M. Frank Bednarz  
M.Frank Bednarz