IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
(OAKLAND DIVISION)

FATEMAH AZIZIAN, *et al.*, Plaintiffs, v. FEDERATED DEPARTMENT STORES, *et al.*, Defendants.	NO. 4:03-CV-03359 SBA

OPPOSITION BY OBJECTORS TRACY LYNN ANDERSON, *ET AL.*, TO THE PARTIES' MOTIONS FOR FINAL APPROVAL OF CLASS SETTLEMENT AND AWARD OF ATTORNEYS' FEES, AND SUPPLEMENTAL OBJECTIONS

INTRODUCTION

Pursuant to Fed. R. Civ. Proc. 23(h)(2), Objectors Tracy Lynn Anderson, *et al.,* (Objectors) through their undersigned counsel, hereby oppose and otherwise respond to the parties' motions and memoranda filed on May 14, 2004, seeking final approval of the class settlement and award of attorneys' fees of approximately $23 million, and hereby supplement their preliminary objections filed on March 26, 2004. In addition, Objectors object to certain aspects of the power and authority of the Special Master recently appointed in this case to hear the objections in this case and review the settlement and fee request, namely, his purported power to assess fees and costs for his services against any objector.

Objectors also reserve the right to supplement these objections following the filing of

the Special Master's report on June 29, 2004, and before and at the final hearing in this case, which was recently rescheduled by this Court per stipulation of the parties from June 8, 2004 to July 13, 2004. *See* Fed. R. Civ. Proc. 53(g)(2) (parties have 20 days after service within which to oppose or respond to a Special Master's report, order, or recommendation). The right of all objectors in this case to file further responses is particularly appropriate and justified because the time for objecting class members to respond to the parties' motions for class settlement and approval of fees has been drastocally shortened by 1) the recent appointment of the Special Master on May 25, 2004, to hold a hearing today, June 1, 2004, the day after Memorial Day, and 2) the extension of time requested and granted by the plaintiffs and defendants to file their final motions from April 26, 2004 to May 14, 2004.

Thus, after receiving the parties' final motions, memoranda, and the volumes of supporting documents on May 17, 2004, objectors have had only *nine* business days within which to review the hundreds of pages or documents, to oppose the motions, to supplement and refine their objections, and prepare for the June 1 hearing. This abbreviated time period within which to respond is in sharp contrast to the original briefing and hearing schedule that was extant on March 26, 2004, the date when objectors were required to file their objections. Under the original schedule, objectors would have had over 30 business days, from April 26, 2004 until June 8, 2004, the date of the original final settlement hearing, to review the submissions and prepare their responses.

After litigating this case for over five years, Objectors submit that this literal rush to judgment is grossly unfair to all objecting class members and deprives the Court and Special Master of receiving more meaningful comments. The time period for objecting class members

to respond was thus compressed or squeezed from both ends by extending the time for the parties to file their motions and memoranda for final approval from April 26 to May 14, and backing up the hearing date for objections from June 8 to June 1.[1]

I. OBJECTORS OBJECT TO AND REQUEST CLARIFICATION OF THE ORDER OF REFERENCE THAT PURPORTS TO AUTHORIZE THE SPECIAL MASTER TO ASSESS OBJECTORS WITH THE COST OF HIS SERVICES

On May 25, 2004, this Court entered the Stipulation and Order of Reference to the Honorable Charles B. Renfrew as Special Master with the responsibilities of hearing and resolving, if possible, the objections to the class settlement and attorney's fees. The hearing for that was set for June 1, 2004. In addition, the Special Master is to report to the Court by June 29, 2004, with respect to the proposed implementation of the settlement and the

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[1] The parties' Stipulation filed April 16, 2004 extending their time to file their motions for approval from April 26, 2004 to May 14, 2004 was predicated on the parties' assertion that this Court had originally scheduled the final hearing on May 25, 2004, but later changed the hearing date to June 8, 2004 (and which has subsequently been rescheduled for July 13, 2004). The parties assertion is puzzling inasmuch as Paragraph 11 of the Settlement Agreement dated July 16, 2003 states: "Within thirty (30) days after the last date by which Settlement Class members may exclude themselves from the settlement [March 26, 2004], Plaintiffs' Counsel *shall file* a Memorandum of Points and Authorities requesting final approval by the Court of the settlement" including an award of attorneys' fees and expenses. *Id*. (emphasis added). Thus, the date for plaintiffs' counsel's filing for final approval was keyed to the filing of the objections, not the date of the final hearing. Furthermore, the Court's Order Conditionally Certifying the Settlement Classdated dated November 21, 2003, listed April 26, 2004 as the filing date for the filing of the parties' final motions, and June 8, 2004, as the final hearing date. *Id*. at ¶¶ 20-22. Despite three written requests by the undersigned counsel to lead counsel for the parties requesting a copy of the Court's order establishing the original hearing date as May 25, 2004, no response has been forthcoming, other than the statement by plaintiffs' counsel Francis O. Scarpulla that the "original date [of May 25, 2004] and subsequent dates, for hearing the final approval of this settlement were chosen by Judge Armstrong. . . ." *See* Exhibit 1. Objectors request that they be provided with a copy of the Court's original order scheduling the final hearing in this case for May 25, 2004, as alleged by the parties' counsel.

objections filed in this case. As noted, a final hearing before this Court is currently scheduled for July 13, 2004, although that it may be necessary to postpone that date depending upon the actions of the Special Master.

The Order of Reference establishes the Special Master's pay at $700 to be paid one-half by plaintiffs and one-half by defendants, but authorizes the Special Master full discretion to order that his pay be paid "in whole or in part by one or more of the objecting parties." Order of Reference, ¶ 8. Objectors were further informed by counsel for the plaintiffs, Francis O. Scarpulla, by letter dated May 27, 2004, that this authority includes the authority of the Special Master to order objectors or their counsel to pay attorneys' fees associated with the proceedings. *See* Exhibit 1.

Objectors hereby object to this purported authority of the Special Master to order objectors at his discretion to pay all or part of his expenses for considering and resolving any objections to the proposed settlement and fee request. Nothing in the long or short-form notice of settlement to the class even suggested that class members who make any objection could be held liable for the fees of any Special Master appointed by the Court to hear and resolve their objections. This provision also raises serious due process questions and chills the objectors' rights to voice their objections and concerns.

While the Order of Reference is silent on the point, Objectors further object to any implied authority the Special Master may have to order objectors to pay other costs or attorneys' fees as indicated by plaintiffs' counsel, Mr. Scarpulla in his May 27, 2004 letter to counsel. Timely notice was not provided to objectors about the appointment of the Special Master or his authority to assess fees and costs against objectors. *See* Fed. R. Civ. Proc.

53(b)(1). In addition, with respect to the Order of Reference authorizing the imposition of sanctions for acting in bad faith, frivolously, or for delay, Fed. R. Civ. Proc. 53(c) appears to limit such sanctions for discovery abuse by the parties themselves, and is not directed at objectors.

Accordingly, Objectors hereby request a modification or clarification of the powers and authority of the Special Master to make it clear that Objectors will not be penalized for making objections by being assessed attorneys' fees or costs of the Special Master.

II. OBJECTORS OPPOSE THE STIPULATED "CLEAR ERROR" STANDARD FOR REVIEW OF FINDINGS OF FACT BY THE SPECIAL MASTER

Objectors further oppose Paragraph 7 of the Stipulation and Order which provides that the Special Master's order, report or recommendation with this Court will be reviewed for clear error with respect to findings of fact instead of *de novo*. While Objectors recognize that Fed. R. Civ. Proc. 53(g)(3)(A) provides for clear error review only by stipulation of the parties with the Court's consent, class objectors were not given an opportunity to comment on that proposal. In any event, this Court has the authority either *sua sponte* or upon motion to "withdraw its consent to a stipulation for clear-error review or finality, and then to decide de novo." Advisory Committee Note to 2003 Amendments to Rule 53, Subdivision (g).

III. THIS CASE SHOULD BE RE-NOTICED BECAUSE THE ORIGINAL NOTICE TO THE CLASS OF THE PROPOSED SETTLEMENT WAS DEFICIENT UNDER FED. R. CIV. PROC. 23 AND DUE PROCESS. AT A MINIMUM, THE BACK-END NOTICE PLAN SHOULD NOT BE APPROVED UNTIL THE PARTIES HAVE SIGNIFICANTLY REVISED IT TO MAKE IT MORE EFFECTIVE

Objectors submit that contrary to the assertions by the parties, the notice plan in this case was woefully inadequate and did not satisfy either the "best notice practicable"

requirements of Fed. R. Civ. Proc. 23(c)(2)(B) or due process. The black and white notices were buried in newspapers and the back pages of certain magazines and were not attention getting. They were unlikely to be noticed, let alone read, by most class members. And even for those class members who were lucky enough to see and read the notice, the time period provided to make an intelligent and informed decision to exclude themselves, file objections, or seek counsel or advice, was too short or too late, particularly with respect to those notices placed in the March editions of selected magazines.

For class actions, Fed. R. Civ. Proc. 23(c)(2)(B) provides in pertinent part that "the court must direct to class members the *best* notice practicable under the circumstances, *including individual notice* to all members who can be identified through reasonable effort." *Id*. (emphasis added). In their briefs, the parties try to justify the adequacy of the notice by claiming that the notice plan "was carefully designed to reach an extremely large percentage of the settlement class, and, in fact, reached 91.3% of the class members, with each class member exposed to the notice 4.4 times." Def. Mem. of Law In Support of Plaintiffs' Motion for Final Approval at 35; Pl. Mem. in Support of Final Approval at 20 (same). Putting aside the physical impossibility of "each" member being exposed to the notice 4.4 times (as opposed to the average number of exposures per class member), Objectors submit that the operative word here is "exposure," a concept that does not necessarily mean reasonable or effective notice.

The support for the parties' praise of the notice's sufficiency is the Declaration of Katherine Kinsella, President of Kinsella/Novak Communications, Ltd. (Kinsella) which designed the notice plan. According to Kinsella, the class size was estimated to be approximately 38 million consumers who purchased cosmetics over the last six months,

consisting of approximately 75% women and 25% men over the age of 18 who earn over $20,000 per year. Kinsella Dec. at ¶ 13.

We are told that the Publication Notice "was designed as a black and white advertisement to capture and hold the attention of the reader." *Id*. at ¶ 17. We are also told that the notices were placed in newspapers and magazines allegedly designed to reach the target audiences; but we are also told that the notices were buried in the back pages of magazines (*e.g.*, page 269 of the March 2004 *Better Homes and Gardens*; page 195 of the March 2004 issue of *Cosmopolitan*; page 353 of the March 2004 issue of *In Style*). *Id*. at ¶ 20. Finally, we are told that based on the circulation figures of the newspapers and magazines selected for the notices, it is estimated that 91.3% of the class members were reached on the average 4.4 times. *Id*. at ¶ 25.

Objectors seriously question and challenge Kinsella's claim that these dull looking black and white notices buried in the back of magazines and newspapers was designed to "capture and hold the attention of the reader," as Kinsella boasts, let alone being even seen by anything close to 91% of the class members. A simple headline - "FREE PRESTIGE COSMETICS AND PERFUME!" - with appropriate eye-catching graphics would certainly have grabbed the attention of the class members much better than the wordy and legalese heading in the actual black and white notice. The reader's attention would also likely have been held if the notice contained a sample listing of some or all of the cosmetics or fragrances involved in this case. There is a big difference to being "exposed" to the notice, in the sense that the notice is buried somewhere in a magazine or newspaper that may be sitting on a class member's coffee table or available in a doctor's waiting room, and actually seeing *and* reading the notice.

But even if the notices were seen by the class members who received and perused the March issues of the selected magazines, the deadline for opting out or objecting by March 26, 2004, left precious little time for class members to make an intelligent and informed decision, or seek counsel. If March magazines (intended to be read throughout the month of March) were used to provide notice, the deadline for objecting should have been at least April 26, or preferably May 26.

In short, class members were "exposed" to the notice of this proposed settlement in the same way as they might be exposed to carbon monoxide - unable to detect it until it's too late. Since this case has been in litigation for over five years, there was no good reason for the sudden and unseemly rush to curtail and limit class members' opportunity to exercise their rights.[2]

The efficacy of Kinsella's notice plan can probably be best measured by the number of class members who actually registered to be notified of the dates of the proposed product giveaway via mail or email. One may reasonably assume that if class members did indeed see

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[2] Not only was the deadline for objecting or opting out too short in many cases, the ability to file meaningful objections was furthered hampered because the fee request was not scheduled to be filed until at least 30 days *after* the objections were filed, although still before the final fairness hearing. Objectors are thus puzzled by the defendants' characterization of this objection as one claiming that the fee request should have been filed "prior to the fairness hearing." Def. Mem. at 27. It is conceded that the fee request was indeed filed prior to the hearing today, and prior to the final hearing now scheduled for July 13, 2004; rather, the objection was that the fee request should have been filed prior to the March 26 deadline for filing objections. In any event, Objectors are troubled by the defendants' assertion that the filing schedule was "typical," "set by Kinsella" and approved by this Court. *Id*. Objectors find it highly inappropriate that Kinsella, hired only to devise a notice plan, would also set the briefing schedule of the parties and objectors. Objectors request the Court and Special Master review the propriety of this practice or allow Objectors to take discovery regarding the matter.

and read the notice, they would want to be notified of the product giveaway dates rather than risk missing the information again in yet another deficient back-end notice. According to the Declaration of James G. White, Vice President for Rust Consulting, Inc., as of May 4, 2004 (which is well over a month after the cut-off date of March 26, 2004 for the filing of objections or exclusions), there were approximately 370,000 class registrants. Using this inflated figure as the number of class members who registered by the March 26 deadline, and comparing that number with the estimated class size of 38 million members, the percentage of the class who registered is *less than one percent of the class*!

Of course, another explanation for this extremely low registration rate may be that more than one percent of the members did indeed see *and* read the notice, but after reading the details of the giveaway plan, and the attendant uncertainties, hassles, and transaction costs associated with only the possibility, but not the certainty, of receiving a "free" gift such as a tube of lipstick of some unknown shade, decided that it was simply not worth their time and effort to register. Either scenario is a damning indictment on the efficacy of the notice and the value of the proposed benefits to the class.

Yet another indicator of the efficacy of the notice was the state of knowledge possessed by the defendants' relevant personnel concerning the proposed settlement. As indicated in their original preliminary objections, several cosmetic representatives at various defendant department stores in the Washington, D.C., metropolitan area were contacted randomly in late March by objecting class members, and the overwhelmingly majority of them professed ignorance about this lawsuit or the settlement. *See* Declarations of Elizabeth S. Ryan and Gillian W. Inskeep attached hereto as Exhibits 2 and 3.

Did Kinsella gather any after-the-fact information about the results of the notice plan as a form of quality control to determine its effectiveness? If so, Objectors request that they, the Special Master, and the Court be given a copy of those results. If no follow-up was conducted by Kinsella,, Objectors request that the Court or Special Master retain an independent consultant at defendants' expense to conduct a simple poll, asking a representative sample of class members if they had they seen or read any notice about this lawsuit before the March deadline. Objectors submit that the answer would be overwhelmingly negative. *Cf. In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 203 (D. Me. 2003) (the notice plan was "excellently designed, reasonably calculated to reach potential class members, and *ultimately highly successful in doing so*.") (emphasis added).

As the Supreme Court made clear more than a half century ago in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and reiterated in *Eisen v. Carlyle & Jacquelin*, 417 U.S. 156 (1974) with respect to the adequacy of notice to class members by publication alone:

> It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. . . . Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention.

417 U.S. at 175 (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. at 315. The *Eisen* Court further underscored that notice and an opportunity to be heard were fundamental requisites of the constitutional guarantee of procedural due process:

> [N]otice must be `reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. * * * But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.'

Id. at 174 (citing *Mullane*, at 315.).

Objectors submit that to provide the "best practicable notice" to class members, the notice plan should instead have consisted of a variety or mix of media, including radio and television broadcasts spots as was done in the *Compact Disc* and other similar consumer class action cases. In the *Compact Disc* case, in addition to placing print and radio spots for the class notice,

> other print and electronic media voluntarily covered the proposed settlement and the claims process extensively. As a result, over 5 million visitors logged on to the settlement website, *www.musiccdsettlement.com*, over 200,000 calls reached the toll-free number, over 100,000 requests for long-form packages were processed, and over 3.5 million claims were ultimately filed.

216 F.R.D. at 203. By sharp contrast, in a class consisting of some 38 million members, we are told that only approximately 400,000 persons, or about *one percent* of the class, visited the settlement website is this case (Rust Decl. ¶ 12), which is *only 8 percent* of the 5 million persons who visited the compact disc website. There were 90,000 telephone calls made in this case, which is less than half of those received in the *CD* case. There were approximately 5,000 requests for the long-form notice in this case, which is only 5 percent of the requests made in the *CD* case. Most significantly, there are approximately 370,000 registered class members in this case, which is approximately 10 percent of the 3.5 million registered claims in the *CD* case, and less than one percent of all class members in this case. Objectors

submit that the notice plan should have included radio or television spots, including public service announcements (PSAs), the distribution of press releases to third-parties, cable and broadcast television, radio stations, and newspapers, including consumer reporters who would likely cover this case. This case could easily have generated a tremendous amount of voluntary media coverage likely to reach class members if Kinsella's notice plan had been a little more creative and robust.[3]

Objectors take exception to the parties' criticism of their suggestion made in their preliminary objections that displays of the notice should have been made at the sale sites, namely, the cosmetic counters. After all, most class members regularly purchase cosmetics and fragrances there on a regular basis. In addition, cosmetic counters are strategically placed close to the doors of the department stores, so that class members who may not be shopping for cosmetics will nevertheless see the display notice.

Thus, a prominent notice displayed on the counter along with a preprinted pad containing copies of the notice with the toll-free number and website for more information should also have been used. Indeed, the 2003 Advisory Committee notes to Fed. R. Civ. Proc. 23(c)(2) states: "Informal methods [of notice] may prove effective. A simple posting in a place visited by many class members, *directing attention to a source of more detailed*

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[3] Kinsella touts on its website, *www.kinsella-novak.com/STRATEGIC4.html*, that it uses "third-party organizations and identifies institutions, associations and individuals that communicate with class members and can serve as credible sources of information. Working directly with third-parties, Kinsella/Novak extends and amplifies notice to class members through communication vehicles class members regularly use and trust." In this case, however, there were no multi-media or third-party efforts to reach the class. Rather, the notice plan was a rather lackluster, single-media plan.

information, may suffice." *Id*. (emphasis added). [4] Defendants discredit Objectors' suggestion that a notice should have been displayed at the cosmetic counters, stating that it was unnecessary because the "published notice reached over 90% of the settlement class." Def. Mem. at 36. However, in the very case defendants cite, *In re Lorazepam & Clorazepate Antitrust Litig*., 205 F.R.D. 369, 382 (D.D.C. 2002), the court touted the results obtained by Kinsella and Rust Consulting who devised the notice plan in that case. The notice plan there included "extensive notice" through television, newspaper, and magazine advertisements, and Internet website, toll-free telephone lines, *point-of-sale displays at over 55,000 pharmacies*, and direct mailing to over 1 million consumers. *Id*. at 378. In the instant case, there were no television or radio advertisements, there were no point-of-sale displays, and there were no direct mailings to class members.

Objectors also take exception to the defendants' reason for not contacting class members directly, namely, those persons who hold and use credit cards issued by the defendant stores. While direct notice may be somewhat over-inclusive, Rule 23(c)(2) mandates that notice "*includ[e]* individual notice to all members who can be identified through reasonable effort." Rule 23(c)(2) thus contemplates both constructive *and* individual notice to class

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[4] In this day and age of the Internet, where publicizing just the name of a website for a store, product, service, or even political candidate, is a key marketing tool for getting "people in the door," a simple eye or ear-catching advertisement such as the one below should have been used in this case:

AS A RESULT OF A NATIONWIDE CLASS ACTION LAWSUIT, YOU MAY BE ENTITLED TO FREE PRESTIGE COSMETICS OR PERFUMES!
FOR MORE DETAILS, CALL TOLL FREE 877-604-5776, OR VISIT
WWW.COSMETICSSETTLEMENT.COM

members. Just because the defendants do not have a list of *all* the names and addresses of class members, does not mean that names they do have and who are likely to be class members, should not be contacted. In addition, defendant department stores often send in the mail or insert into local newspapers colorful and eye-catching advertisements or circulars, both with respect to the their general merchandise as well as with respect to gift with purchase offers for cosmetics. Such advertisements could easily include a briefly-worded notice of the class action at a marginal cost, directing the reader to the toll-free telephone or website for more information.

Accordingly, Objectors submit that notice fell woefully short of the "best notice practicable" under Rule 23(c)(2)(B) and violated class members due process rights. If the Special Master or this Court determines that the notice was the "best notice practicable," any back-end notice should be given by a variety of media as Objectors submit should have been done for the original front-end notice.

IV. THE CLASS REACTION IN THIS CASE DOES NOT JUSTIFY APPROVAL OF THE SETTLEMENT.

The parties claim that the settlement should be approved because of the relative paucity of the number of objections filed in this case:

> Only 73 individuals out of millions nationwide have objected to the settlement; indeed, even the objectors have chosen not to opt out. The overwhelming favorable response by the actual Class members argues persuasively for final approval of the settlement.

Pl. Mem. at 14. The defendants similarly claim that because of the low number of objections, "clearly the proposed settlement class believes" the settlement is fair. Def. Mem. at 27. This argument is meritless. Putting aside the serious objections of the 11 States Attorneys General

and the millions of consumers whose interests they represent, it is rank hyperbole -- if not downright misleading -- to characterize the silence and inaction by class members who are likely ignorant of the proposed settlement, as somehow constituting an affirmative "overwhelming favorable response" in support of the settlement, or a "clear" demonstration of "belief" by class members that the settlement is fair. Nor does the truism that "even the objectors have chosen not to opt out" suggest anything positive about the settlement.

As previously argued, the notice to the class members was wholly inadequate, failing to actually inform most class members in an effective and timely manner. Accordingly, the cases cited by the parties for the proposition that a low objection rate translates into a high approval rate should not be relied upon, particularly with respect to those cases cited by defendants where *actual notice,* rather than the questionable constructive notice that was given here, was "sent out to approximately 1.8 million class members." *Schwartz v. Dallas Cowboys Football Club, Ltd*, Civ A. No. 97-5184, 2001 WL 1689714, at *3 (E.D. Pa. Nov. 21, 2001), cited in Def. Mem. at 27, n. 24.

If the parties were serious about gauging the reaction of the class members to the proposed settlement, it would be quite easy and relatively inexpensive to do sample polling about the desirability of the settlement. Class members could be asked whether they would prefer getting a coupon or voucher of "x" amount redeemable for cosmetics at their leisure over a period of time for products they use; getting cash of "y" amount; or traveling to the defendants' department stores on specific dates chosen by the defendants and waiting in line to claim a product which a) may not be of use or value to the class member, or b) may not even be available at all. Objectors request that the Special Master or Court retain a consumer

polling consultant to verify, rather than merely speculate about, what the class really thinks about this settlement.

IV. THE PARTIES HAVE FAILED TO DEMONSTRATE THAT DEFENDANTS' PRODUCTS ARE PREFERABLE TO CASH OR COUPONS

In their preliminary objections, Objectors opposed the distribution of allegedly $175 million worth of cosmetics and fragrances, and instead argued that cash or coupons were preferable than the uncertain prospect of receiving defendants' product that may not be preferred by the class member. Defendants argue only that they simply would not settle the case if they were required to pay class members an amount equal to the retail value of the products. Def. Mem. at 22. But obviously, the $175 million retail value of the products that the defendants are willing to part with represents some dollar cost equivalent to the defendants, and which may be preferable to class members.

In the *Compact Disc* case, cash was awarded on a *pro rata* basis in relation to the number of claims that were filed by a certain cut-off date. Assuming that the actual cash value of the products in this case is $100 million, and that 4 million class members file claims (which would be approximately six times the number of class members that have already registered in this case), approximately $25 in cash would be given to each person. Without providing any evidence, defendants merely state that any cash award to class members would be "so small it would be *de minimus*." Def. Mem. at 31. Plaintiffs's lead counsel, Francis Scarpulla, apparently shares the same view: "The costs of processing claims and cash transactions are so large for a consumer class, you'd be sending people checks for 15 cents." Josh Gerstein, "*Love Lipstick? A Free Tube Could Be Yours Under $175M Settlement*," New York Sun, Jan. 13,

2004 at 6. *See* Exhibit 4 to Objectors' Preliminary Objections. What is the basis for these statements?[5] In his recently filed Memorandum, Mr. Scarpulla does not reiterate this *de minimus* claim in defending the product giveaway in lieu of cash payment. Rather, he states only that defendants "would not pay in cash to Class members an amount equal to the value" of the products. Pl. Mem. at 22. But the question is, what is the dollar amount the defendants would agree to pay? We do know, for example, that at least with respect to just one of the defendants, Estee Lauder notified the Securities and Exchange Commission that "it had taken a special $22 million charge to cover its share of the settlement." Josh Gertstein, New York Sun, *supra*.

Alternatively, instead of cash, coupons or vouchers could be distributed *pro rata* up to a value of $175 million. For example, assuming that four million class members file claims, each would receive a voucher for approximately $44 to be redeemed at their convenience for cosmetics they normally use. Under the current settlement agreement, class members, in effect, do receive a voucher when they fill out the form with their name at the counter. Once they tender this "voucher" to the sales person, they are to receive cosmetics allegedly having a retail price of $18-25. Objectors submit that their proposed voucher system is infinitely more fair, reasonable, and easier to administer, than the parties' "voucher" system.

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[5] The defendants cite to *In re Mex-Money Transfer Litig.*, 164 F. supp. 2d 1002 (N.J. Ill. 2000) where an objection was made that the $4.6 million in the *cy pres* fund should instead be divided up and given to the 13.5 million identified class members. Def. Mem. 31. However, in that case, the court found that the bulk of the relief was valuable coupons worth $375 million, and that the *additional* payment of approximately $.33 to each person from the *cy pres* fund would not materially add to the class members benefit. Thus, Objectors submit that the *Mex-Money* case *supports* their position that coupons or vouchers are preferable to product giveaways.

Plaintiffs' counsel opposes the use of coupons or vouchers, baldly asserting that they "will never be redeemed." Pl. Mem. in Support of Fees at 23. As with many of the plaintiffs' counsel's assertions, there is no basis for that statement. Coupons or vouchers are prized by consumers for consumer products of this kind which are used daily and which are purchased on a relatively frequent basis, as opposed to, for example, a coupon worth $25 off one's next cruise trip or computer purchase. Again, as previously noted, the Special Master or Court could easily have a sample of class members polled to determine if they would likely redeem such a coupon or voucher.

Objectors submit that the distribution of cash or coupons would likely be preferable to the product giveaway. Just like the music recorded on compact discs, defendants' products come in many different shades and smells that are desired by some and disliked by others. Just because the products that the defendants' propose to specially manufacture and distribute may, as a whole, be considered "highly desirable" with an aggregate retail value of $175 million as the parties assert, that does not mean that the *particular* items available at a *particular* store at the time a *particular* class member fills out a form to obtain the product during the brief giveaway period will be desirable by the class member forced to take it or leave it. The same would be just as true in the *CD* antitrust case, where a CD purchaser who prefers hard rock music would not be satisfied if he or she were forced to receive what the music industry views as an otherwise "highly desirable" classical music CD.

IV. THE DISTRIBUTION PLAN IS UNFAIR TO CLASS MEMBERS, WILL BE CHAOTIC IN ITS ADMINISTRATION, AND ENGENDER DISRESPECT FOR THE JUDICIAL AND CIVIL JUSTICE SYSTEM.

Plaintiffs' counsel assert that the products "will fly off the counters of the Defendants' Department Stores once they become available." Plaintiffs' Mem. 23. Indeed they will. According to plaintiffs' counsel Francis Scarpulla, "I'm afraid there is going to be a stampede" to claim the "free" cosmetics and perfume. Detroit News, Melissa Preddy, "*Women Get Free Makeup; Lawyers Get Lion's Share in Cosmetics Lawsuit*," Feb. 2, 2004, at 1B, attached as Exhibit 4 to Objectors' Preliminary Objections. To further support Mr. Scarpulla's prediction of a chaotic "stampede," he stated, "Everyone I've talked to said there are going to be lines going out through the door. . . . They're going to have a rush on the products." Samantha Thompson Smith, "Free-for All Expected at Many Cosmetics Counters," The Raleigh News & Observer, Feb. 12, 2004. *See* Exhibit 4 to Objectors' Preliminary Objections. One can easily envision defendants' sales representatives being overwhelmed by the onslought of persons demanding their free products, and responding to this demand by simply passing out the products to anyone who wants one, regardless of whether they are a class member, or if they are, whether they were a purchaser of that particular product line.

Under the proposed giveaway program, non-class members will likely claim a gift, and both class and non-class members are likely to double-dip. The proposed claim form only requires a printed name and signature to "affirm" they are a class member and "certify" that they have not double-dipped with respect to a particular manufacturers' product line. No verification or identification is required. The "affirmation" is not even under the penalty of perjury as provided by 28 U.S.C. §1746. *See* Exhibit 4 to Yerman Declaration. In short, the

giveaway program will likely encourage false claims for gifts, and undermine respect for this Court and the legal system for approving such an easy way to abuse the distribution plan, and one that promises to be chaotic to boot. Certainly, plaintiffs' counsel do not deserve to be paid $23 million up front for devising this kind of distribution plan of questionable value.

It appears that little if any thought went into devising the sample claim form. At a minimum, two simple additions to the form will deter abuse and fraud: First, the caption of this case should be at the top of this form to alert claimants that what they are about to sign is part of an official federal court proceeding, and thus, impresses upon them the seriousness of their claim. Second, the "affirm" language should contain the standard statement "*Pursuant to 28 U.S.C. § 1746, I hereby declare, under penalty of perjury, that the foregoing is true and correct.*"[6]

Objectors further submit that the claim form should require that class members include their mailing address to discourage false claims and to aid verification should after-the-fact questions arise. Such additional information would not be burdensome and an appropriate disclaimer could be added informing the claimant that the information will not be used or shared by anyone for commercial purposes.

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[6] Remarkably, the defendants cite only a single case to justify their proposed claim form, and even they parenthetically note that it was a case where class members were "required to prove a qualifying purchase [with receipts]. . . or submit a sworn claim." Def. Mem. 35 (citing *In re Motorporst Merch. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1331 (N.D. Ga. 2000). In the instant case, no proof of purchase or sworn claim is required. Indeed, Objectors commend the *Motorsport* decision to the attention of the Special Master and Court because of the coupon feature provided in that case allowed the redemption period of one year and allowed the coupons to be transferable. In addition, the case was a "blend" of both coupons and cash, with the court noting that the attorneys' fees was based only on the cash portion. *Id.* at 1333-34.

Objectors also oppose defendants' suggestion that when the one-week giveaway program is completed, the claim forms will be sent "to the Settlement Administrator with instructions to destroy them." Def. Mem. at 35. Objectors vigorously oppose the destruction of the very evidence that the Special Master and Court will need to verify the efficacy and integrity of the giveaway program. The forms can be correlated with the number of products distributed to determine whether there was any "slippage." Indeed, if the forms are going to be used, instead of cash or coupons, Objectors request that they be numbered to further aid accountability, and should not be destroyed until a full accounting of the giveaway program has been completed and only after a specific court order has been issued.

Because of the myriad of problems associated with the proposed giveaway program, the only fair, responsible, and sensible way to handle the restitution program is to require pre-registration by a certain date on the settlement's website or by mail, just as was done in the *CD* case. Class members will affirm under penalty of perjury that they are a class member, perhaps indicate which products they purchased, and provide their address. In return, they will receive a check or a coupon that is transferable and redeemable for up to one year or some other suitable period of time. The proposed product giveaway program is simply fraught with too many administrative problems, is of questionable value, and should not be approved by the Special Master or this Court.

IV. THE REQUEST FOR ATTORNEYS' FEES OF APPROXIMATELY $23 MILLION IS UNREASONABLE AND EXCESSIVE. ANY REDUCTION TO THE FEE REQUEST SHOULD BE DISTRIBUTED TO THE CLASS

1. In this case, plaintiffs' counsel request attorneys' fees in the amount of approximately $23 million, and the award of costs of approximately $1 million, for a combined total of $24 million. This amount happens to be the figure that the defendants agreed not to oppose. Objectors submit that the $23 million fee request is excessive and unreasonable and should be greatly reduced to no more than the lodestar amount of $13.5 million, and even less. However, because the defendants are willing to pay attorneys' fees and costs up to $24 million, that means that they have allocated that amount of money to settle this class action. Accordingly, Objectors submit that any fees reduced below the requested $23 million should be allocated to the benefit of the class members.

2. Objectors submit that plaintiffs' attorneys should not be paid until class members have received their compensation or restitution, whether in the form of cash or coupon as Objectors prefer, or after the distribution of the "free" products. The amount of fees awarded should be based on the success of the distribution program. As it now stands, plaintiffs' attorneys would get paid $23 million up front, and then wash their hands of any problems that class members might likely encounter with respect to the administration of the giveaway program.

3. Plaintiffs' counsel attempts to justify their excessive fee by claiming that it constitutes 13.7% of the so-called "Product Fund" of $175 million, and that under common fund principles, that percentage-of-the-fund figure is allegedly below the 16.5% - 37% range used in Ninth Circuit class action cases, and below the national average of 21.4% of the

common fund in antitrust class action cases. Pl. Mem. at 14-15.

Because the value of the fund to class members in this case involves highly personal and differentiated products, the true net value to the class members cannot be calculated. Accordingly, a percentage-of-the-fund comparison should not be used as any kind of barometer to determine the reasonableness of the fee. The cases cited by the plaintiffs where percentages of the fund are used generally involve payments to the class of cash, cash equivalents. or a combination of the two. Where, however, no cash or its equivalent is involved, no common fund is created. *See Staton v. Boeing Co.*, 327 F.3d 998 (9th Cir. 2003). Accordingly, Objectors submit that the lodestar method of computing a reasonable fee is more appropriate in this case.[7]

Here, the lodestar is claimed to be approximately $13.5 million. Objectors suspect that even the lodestar amount is inflated since it appears that the case was overlawyered and the hourly rates are fairly high. Lodestar rates can be adjusted either up or down depending the facts of each case, and objectors believe a downward departure is warranted.

4. Objectors request that the Special Master or Court appoint an independent expert to determine whether the $23 million fee request is reasonable, particularly because of the uncertain value of the benefit to the class. Indeed, plaintiffs cite to *Lobatz v. U.S. West*

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[7] In the *CD* case, a consumer antitrust case that is similar in some respects to this case, class members received actual cash, and the value of the product designated for charities was reduced by at least 20 percent of the Manufacturers Suggested Retail Price (MSRP) for valuation purposes. Using that meager 20 percent discount in this case, the aggregate value of the products is reduced from $175 million to $140 million; applying the 10% fee used by the court in the *CD* case results in a fee here of $14 million, which is approximately the amount of the lodestar, a figure that Objectors still believe constitutes an excessive and unreasonable fee.

Cellualr of Calif. Inc., 222 F.3d 1142 (9th Cir. 2000) for the proposition that fee awards are permitted based on agreements not to oppose fees up to a certain level "as long as they are reasonable, evein in situationts where the class in question got no cash." Pl. Mem. at 24. But in *Lobatz*, there was expert testimony that the fee request was reasonable. 222 F.3d at 1149. Accordingly, an expert should be appointed in this case to make this important determination. Part of this valuation should be a determination as to what the case is worth.

5. As previously discussed, Objectors submit that the results obtained by plaintiffs' counsel for class members consist of nothing more than sample-type products that may be of little value to them. The distribution plan is almost guaranteed to result in chaos, confusion, and disappointment as predicted by plaintiffs' lead counsel. Accordingly, the lodestar fee should be reduced to reflect the low value of the results obtained.

6. Plaintiffs try to justify an enhancement of the lodestar by claiming that this case was very risky and had little chance of recovery after trial. Objectors submit that this is a misdirected argument. The real issue is what is the risk that the defendants would not have settled this case. Clearly, if a case is likely to settle, even for a small amount, plaintiffs' counsel are fairly assured of being compensated, either as percentage of the common fund created or lodestar. Consequently, the more meaningful question that should be asked is the chance of settling the case, not winning at trial.

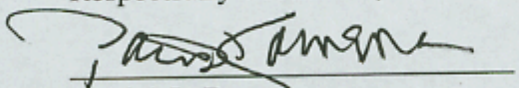
But even if the risk of winning at trial is the standard, plaintiffs' unnamed litigation-risk expert estimated that plaintiffs' counsel had only a 7 percent chance of winning at trial. Scarpulla Dec. ¶ 59. Objectors submit that as a matter of public policy, if the chance of winning at trial on liability grounds is so small because of the lack of legal merit, such

litigation should not be encouraged, and thus, no multiple to the lodestar should be made. If anything, a reduction in the lodestar is appropriate to discourage attorneys from stirring up and prosecuting essentially meritless class action litigation, hoping that the defendants will settle to avoid litigation costs. Accordingly, Objectors submit that a reasonable fee award in this case should be a reduced lodestar amount. Objectors further adopt the arguments and objections of other objectors who oppose the request for attorneys' fees as being excessive.

CONCLUSION

For the foregoing reasons, those provided in their preliminary objections, and those similar objections filed by other objectors, Objectors Tracy Lynn Anderson, *et al.*, submit that this class action settlement is in need of a serious makeover, from the notice, to the restitution for class members, the distribution plan, and the attorneys' fees. As it now stands, the settlement is not fair, adequate, or reasonable, and should not be approved. The Special Master and this Court should carefully exercise their fiduciary duties to class members and not rubber-stamp this settlement as the parties hope this Court would do. Objectors reserve their right to file further comments after the report is filed by the Special Master as provided by Fed. R. Civ. Proc. 53(g)(2).

Respectfully submitted,



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