SUPREME COURT OF NEW JERSEY

PATRICIA MYSKA and KATHERINE WAGNER, AND JOHN TODISCO and DAX MORALES, Plaintiffs/Petitioners v. NEW JERSEY MANUFACTURERS INSURANCE COMPANY AND AAA MID-ATLANTIC INSURANCE COMPANY OF NEW JERSEY, AND PALISADES INSURANCE COMPANY, Defendants/Respondents.	Docket No.: 076021 Civil Action On Petition for Certification to Review the Judgment of the Superior Court of New Jersey, Appellate Division, Docket No. A-0275-14T4 Docket No. A-4398-13T4 Sat Below: Hon. Marie E. Lihotoz, P.J.A.D. Hon. Marianne Espinosa, J.A.D. Hon. Jerome M. St. John, J.A.D.

BRIEF ON BEHALF OF PROPOSED AMICUS CURIAE THE NEW JERSEY CIVIL JUSTICE INSTITUTE

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INTERESTED AMICUS CURIAE

Proposed *amicus curiae* the New Jersey Civil Justice Institute ("NJCJI") advocates for a civil justice system that treats all parties fairly. NJCJI has a strong interest in the clear, predictable, and fair application of the law and is concerned with the broader civil justice implications that cases, such as this one, may have on the professionals, sole proprietors, and businesses within this State.

NJCJI is a bipartisan, statewide group comprised of small businesses, individuals, not-for-profit groups, and many of the State's largest business associations and professional organizations. NJCJI monitors New Jersey legislation to assess any impact on issues related to civil justice, offers comments on proposed amendments to New Jersey's Rules of Court, and participates as amicus curiae in matters of interest to its membership. In recent years, NJCJI has appeared as amicus curiae before the New Jersey Supreme Court and the Appellate Division of the New Jersey Superior Court to be heard in important consumer and tort litigation, including Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173 (2012), Allen v. V&A Bros., Inc., 208 N.J. 114 (2011), Bosland v. Warnock Dodge, Inc., 197 N.J. 543 (2009), and In re Pelvic Mesh/Gynecare Litigation, 426 N.J. Super. 167 (App. Div. 2012). NJCJI and its members believe that a fair civil justice system resolves disputes expeditiously,

without bias, and based solely upon application of the law to the facts of each case. A fair civil justice system fosters public trust and motivates professionals, sole proprietors, and businesses to provide safe and reliable products and services, while ensuring that injured individuals are compensated fairly for their losses.

NJCJI's interest in the instant case stems from its efforts to help shape law related to class action claims and to further its interest in the clear, predictable, and fair application of the law governing class action litigation. Accordingly, NJCJI seeks leave to participate in the within appeal as amicus curiae in light of the significance of this matter to its constituent members, and submits this brief both in support of that application and on the merits.

PRELIMINARY STATEMENT

This matter presents the Court with an opportunity to hold that, in an appropriate case, a defendant may move to strike class allegations from a complaint when the plaintiff cannot meet an essential element of R. 4:32 required to certify a class.

As recounted in the Appellate Division opinion below, Plaintiffs-Appellants seek a "bright-line rule" prohibiting any ruling on class action allegations prior to discovery. Myska v. New Jersey Mfr. Ins. Co., 440 N.J. Super. 458, 478 (2015). Such

a result would depart from federal precedent and encourage lawsuit abuse. There are situations where complaints do not plead viable classes, and defendants should retain the ability to move to strike or dismiss such allegations. To hold otherwise risks subjecting defendants to expensive discovery and briefing on frivolous class certification claims, when such claims may be asserted simply to extract nuisance value settlements.

The federal courts in this State and elsewhere recognize a defendant's ability to seek dismissal of class allegations at an early stage. NJCJI respectfully suggests that this Court follow that well-reasoned authority, and affirm the judgment below allowing defendants to move to strike class allegations on the pleadings.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

NJCJI incorporates by reference the Statement of Facts and Procedural History set forth in the Brief of Defendant-Respondent, New Jersey Manufacturers Insurance Company.

LEGAL ARGUMENT

I. THIS COURT SHOULD AFFIRM THE APPELLATE DIVISION'S HOLDING THAT TRIAL COURTS MAY DISMISS CLASS ACTION ALLEGATIONS ON THE PLEADINGS IN APPROPRIATE CASES.

A. Well-Reasoned Federal Precedent Allowing Motions to Strike Class Allegations

The Supreme Court of the United States has observed that when "the issues are plain enough from the pleadings," a trial

court may dispose of class allegations prior to discovery. Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160 (1982). Both the Fifth and Sixth Circuits have explicitly recognized a defendant's ability to move to strike class allegations from a complaint. Pilgrim v. Universal Health Card, LLC, 660 F.3d 943, 949 (6th Cir. 2011); John v. Nat'l Sec. Fire & Cas. Co., 501 F.3d 443, 444-45 (5th Cir. 2007). As the Sixth Circuit held:

> That the motion to strike came before the plaintiffs had filed a motion to certify the class does not by itself make the court's decision reversibly premature. Rule 23(c)(1)(A) says that the district court should decide whether to certify a class "[a]t an early practicable time" in the litigation, and nothing in the rules says that the court must await a motion by the plaintiffs. As a result, "[e]ither plaintiff or defendant may move for a determination of whether the action may be certified under Rule 23(c)(1)."

Pilgrim, 660 F.3d at 949 (quoting 7AA Charles Allen Wright, et al., Federal Practice and Procedure, Section 1785). Accordingly, "[w]here it is facially apparent from the pleadings" that no class can be certified, the federal courts will grant a defendant's motion to strike such allegations from a complaint. John, 501 F.3d at 445.

This authority has been followed and applied by many district judges in the District of New Jersey. See Rowe v. Morgan Stanley Dean Witter, 191 F.R.D. 398, 406 n. 14 (D.N.J. 1999) (citations omitted) (Lechner, J.) (dismissing class

allegations prior to certification stage); Clark v. McDonald's Corp., 213 F.R.D. 198, 205 n. 3 (D.N.J. 2003) (Kugler, J.) ("A defendant may move to strike class action allegations prior to discovery in those rare cases where the complaint itself demonstrates that the requirement for maintaining a class action cannot be met."); Himmelman v. Continental Cas. Co., No. Civ. 06-166, 2006 WL 2347873 at *1-*2 (D.N.J. Aug. 11, 2006)(AAa1-a2)[1] (Brown, J.) (striking plaintiff's class action allegation at motion to dismiss phase of case); Green v. Green Mountain Coffee Roasters, Inc., 279 F.R.D. 275, 284-5 (D.N.J. 2011) (Wigenton, J.) (dismissing plaintiff's class allegations prior to discovery and briefing on a formal motion for class certification after finding that on the face of the complaint plaintiff failed to meet the predominance requirement); Martinez v. Equifax Inc., No. 15-2100, 2016 WL 226639 at *1-*2 (D.N.J. Jan. 19, 2016) (Chesler, J.)(AAa19-a20) (granting defendant's motion to strike class allegations).

Class action allegations will be stricken where it is clear from the pleadings that the plaintiff cannot satisfy the requirement of Federal Rule 23. For example, in Green, Judge Wigenton struck class allegations regarding a defect in Keurig coffee brewers where the complaint failed to allege that

[1] The Appendix of NJCJI is cited as "AA [page number]."

putative class members commonly experienced that defect; in Clark, Judge Kugler struck allegations asserting claims against a proposed class of defendants, because the Rule 23 requirements for certifying a defendant class could not be met; and in Martinez, Judge Chesler struck class allegations from a Fair Credit Reporting Act complaint that collapsed the dispute's merits into the class definition by identifying the class as those persons impacted by the defendant's "fail[ure] to apply the proper and appropriate FCRA procedures." 2016 WL 226639, at *2. In this fashion, the federal courts quickly and efficiently dispose of meritless class action allegations.

B. This Court Should Follow Federal Precedent.

The New Jersey courts commonly look to and follow federal precedent on class certification issues. See Current New Jersey Court Rules, R. 4:32, cmt. 1 (2015; Riley v. New Rapids Carpet Ctr., 61 N.J. 218, 226 (1972)("[o]ur class-action rule, R. 4:32, is a replica of Rule 23 of the Federal Rules of Civil Procedure as amended in 1966."); Muise v. GPU, Inc., 371 N.J. Super. 13, 31 (App. Div. 2004) (New Jersey's "class-action rule, R. 4:32, is a replica of Rule 23 of the Federal Rules of Civil Procedure," and therefore the "construction of the federal rule may be considered helpful, if not persuasive, authority."); Lubitz v. DaimlerChrysler Corp., No.4883-042, 006 WL 3780789 *1, *3 (Law Div. Dec. 21 2006)(AA3a)("Indeed, it is common for New

Jersey courts to refer to congruent federal law when interpreting New Jersey's class action rules."); Delgozzo v. Kenny, 266 N.J. Super. 169, 185 (App. Div. 1993) (referring to federal law to parse commonality requirement of R.4:32-1(a)(20)). Accordingly, this Court should do so here, and acknowledge a defendant's right to move to strike class actions from a complaint in an appropriate situation.

As with Federal Rule 23, nothing in R. 4:32 precludes a motion to strike a class actions prior to discovery. The two rules are, in fact, substantially the same on this point. Specifically, R. 4:32-2(a) provides that "the court shall, at an early practicable time, determine by order whether to certify the action," thereby allowing defendants to seek resolution of the class issue at an "early" time.

Moreover, this Court's decision in Riley v. New Rapids Carpet Ctr., 61 N.J. 218 (1972), affirms that a defendant may seek pre-certification dismissal of class claims. In Riley, the Court reversed the dismissal of class allegations because the complaint advanced "a showing of a possible basis for class relief." Id. at 229. As the Appellate Division noted in its opinion below, Riley did not turn on the stage of the litigation, but rather focused on "the nature of the claims and the propriety of their presentation as a class action, in accordance with the provisions of Rule 4:32-1." Myska, 440 N.J.

Super. at 478-79. And while qualifying that it may "be rare that a decision to deny a class action should be made on the face of the complaint," this Court nevertheless held that such challenges may still be brought. 61 N.J. at 228.

Keeping this procedural mechanism available to defendants in no way impedes the protections afforded to potential class claims. The liberal reading given to class action complaints is not boundless and cannot prevent a court from dismissing a claim that clearly cannot satisfy the requirements for class certification. Such situations may exist, for example, when a complaint seeks certification of a class asserting personal injuries and causation of those injuries is inherently individual; seeks certification of a nationwide class on state law claims when it would be improper to give New Jersey law extraterritorial effect; asserts copycat claims already at issue in prior pending class actions; or the plaintiff is an improper class representative because he is a "serial filer" of class actions in our courts.[2]

[2] One particularly notorious "serial" filer of class actions, Harold Hoffman, has filed hundreds of class actions in the courts of this State, often serving as both plaintiff and class counsel for the evident purpose of coercing nuisance settlements on an individual, non-class basis. See, e.g., Hoffman v. Supplements Togo Management, LLC, 419 N.J. Super. 596,599 (App. Div. 2011) (noting that "at various times in the past, plaintiff has brought lawsuits, in his own name and on behalf of other putative class members.") Trial courts should retain the

Another amicus party, the New Jersey Association for Justice, has submitted a brief suggesting an unduly limited scope for motions to strike class actions. According to that amicus party, such a motion should only be allowed in cases "which fail to plead - and which could not be amended to plead - (1) an identifiable class of plaintiffs; and (2) questions of law and fact which are common to the class." Brief of Amicus Curiae New Jersey Association for Justice, at p. 13. To the contrary, motions to strike should be permitted where it is clear from the pleadings that the plaintiff cannot satisfy any of the essential elements of R. 4:32, including the predominance of common issues of fact or law, the typicality of the named plaintiff, or the adequacy of the named plaintiff or of plaintiff's counsel to represent the case. And the complaint should be judged on its own merits, and not what a court or a lawyer speculates the complaint might be "amended to plead."

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ability to strike such class action allegations that plainly represent an abuse of the system.

CONCLUSION

NJCJI respectfully requests that its Motion to Appear as Amicus Curiae be granted. NJCJI further urges that the Court find that class allegations in a complaint may, when appropriate, be the subject of a motion to strike, without forcing defendants to incur the cost of discovery and briefing on a formal motion for class certification.

Respectfully submitted,

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Attorneys for Amicus Curiae
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By: /s/ Gavin J. Rooney
Gavin J. Rooney

Dated: February 29, 2016

APPENDIX

2006 WL 2347873
Only the Westlaw citation is currently available.
NOT FOR PUBLICATION
United States District Court,
D. New Jersey.

W. Curtis HIMMELMAN, Individually and on Behalf of All Other Persons Similarly Situated, Plaintiffs,
v.
CONTINENTAL CASUALTY COMPANY, Defendant.

No. Civ. 06-166(GEB).

Aug. 11, 2006.

Attorneys and Law Firms

Seth R. Lesser, Locks Law Firm, LLC, Cherry Hill, NJ, for Plaintiff.

Christopher H. Lowe, Sevfarth Shaw LLP, New York, NY, for Defendant.

MEMORANDUM OPINION

BROWN, Chief Judge.

*1 This matter comes before the Court upon the motion of defendant Continental Casualty Company ("Defendant") to dismiss and/or strike class action allegations from plaintiff W. Curtis Himmelman's ("Plaintiff") Complaint. The Court, having considered the parties' submissions and having decided this matter without oral argument pursuant to Federal Rule of Civil Procedure 78, and for the reasons discussed below, grants Defendant's motion to dismiss the class action allegations.

I. BACKGROUND

Plaintiff worked for Defendant, a company that issues and sells insurance policies, as a claims analyst. Defendant classified Plaintiff as exempt from the overtime requirements of the federal Fair Labor Standards Act, 29 U.S.C. §§ 201-219 ("FLSA"), and the New Jersey State Wage and Hour Law, N.J. Stat. Ann. §§ 34:11-56a to -56a30 ("WHL"). Plaintiff allegedly worked in excess of eight hours per day and forty hours per week, yet was not paid overtime compensation in accordance with the FLSA and WHL.

On or about January 12, 2006, Plaintiff filed his Complaint on behalf of himself and other persons similarly situated for Defendant's violations, asserting a collective action under the FLSA and a Rule 23 class action for the WHL claim. On or about March 2, 2006, Defendant filed the instant motion to dismiss and/or strike the class allegations of Plaintiff's Complaint.

II. DISCUSSION

A. *Standard for a Motion to Dismiss*

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) may be granted only if, accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief. *Oran v. Stafford*, 226 F.3d 275, 279 (3d Cir.2000); *Langford v.. City of Atlantic City*, 235 F.3d 845, 850 (3d Cir.2000); *Bartholomew v. Fischl*, 782 F.2d 1148, 1152 (3d Cir.1986). The Court may not dismiss a complaint unless plaintiff can prove no set of facts that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Angelastro v. Prudential-Bache Sec., Inc.*, 764 F.2d 939, 944 (3d Cir.), *cert. denied*, 474 U.S. 935 (1985). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

Under Rule 12(b)(6), the Court must "accept the allegations in the complaint as true, and draw all reasonable factual inferences in favor of the plaintiff. [The motion can be granted] only if no relief could be granted under any set of facts that could be proved." *Turbe v. Government of the Virgin Islands*, 938 F.2d 427, 428 (3d Cir.1991)(citing *Unger v. Nat'l Residents Matching Program*, 928 F.2d 1392, 1394-95 (3d Cir.1991)); *see also Langford*, 235 F.3d at 850; *Dykes v. Southeastern Pa. Transp. Auth.*, 68 F.3d 1564, 1565 n. 1 (3d Cir.1995), *cert. denied*, 517 U.S. 1142 (1996); *Plecknick v. Commonwealth of Pennsylvania*, 36 F.3d 1250, 1255 (3d Cir.1994); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir.1994). A complaint may be dismissed for failure to state a claim where it appears beyond any doubt "that no relief could

be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (citation omitted).

*2 A complaint should not be dismissed unless it appears beyond doubt that "the facts alleged in the complaint, even if true, fail to support the ... claim...." *Ransom v. Marrazzo*, 848 F.2d 398, 401 (3d Cir.1988). Legal conclusions made in the guise of factual allegations, however, are given no presumption of truthfulness. *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (citation omitted); *see* also *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir.1997)(stating that "a court need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss.") (citations omitted)).

B. *State Law Class Action Allegations are Legally Incompatible with Federal Claim*

Collective actions under the FLSA are governed by 29 U.S.C. § 216(b), which establishes an opt-in scheme whereby "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." Conversely, in Rule 23 class actions a prospective party plaintiff must opt out of the class upon notice of the action. Therefore, these two schemes are inherently incompatible. *See Robinson v. Sizes Unlimited, Inc.*, 685 F.Supp. 442, 445 n. 7 (D.N.J.1988) (citations omitted)(noting the "fundamental, irreconcilable difference between" opt-out and opt-in schemes); *see also LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 289 (5th Cir.1975)(footnote omitted)(stating that Section 216(b) and Rule 23 are "mutually exclusive and irreconcilable").

This Court recently stated that "Congress created the opt-in procedure under the FLSA for the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers from the burden of representative actions." *Moeck v. Gray Supply Corp.*, No. 03-1950, slip op. at 13 (D.N.J. Jan. 5, 2006). Therefore, in denying class certification, the Court concluded that allowing the plaintiff "to circumvent the opt-in requirement and bring unnamed parties into federal court by calling upon state statutes similar to the FLSA would undermine Congress's intent to limit these types of claims to collective actions." *Id*. (citation omitted). The instant matter presents the same issues and the Court will therefore strike Plaintiff's class action allegations. *See Clark v. McDonald's Corp.*, 213 F.R.D. 198, 205 n. 3 (D.N.J.2003) (citations omitted)(noting that "[a] defendant may move to strike class action allegations prior to discovery in those rare cases where the complaint itself demonstrates that the requirements for maintaining a class action cannot be met."); *Rowe v. Morgan Stanley Dean Witter*, 191 F.R.D. 398, 406 n. 14 (D .N.J.1999) (citations omitted)(dismissing class allegations while noting that "[r]uling on a dispositive motion prior to addressing class certification may be appropriate, in some cases").

III. CONCLUSION

*3 For the foregoing reasons, Defendant's motion to strike the class action allegations is granted. An appropriate form of order is filed herewith.

All Citations

Not Reported in F.Supp.2d, 2006 WL 2347873

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Only the Westlaw citation is currently available.

Superior Court of New Jersey,
Law Division,
Bergen County.

Robert LUBITZ and Alberto Lemus, on behalf of themselves and all others similarly situated,
Plaintiffs,
v.
DAIMLERCHRYSLER CORP., Defendants.

Decided Dec. 21, 2006.

Attorneys and Law Firms

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Jeffrey L. Weinstein (Jeffrey L. Weinstein, P.C., attorneys) of the Texas bar admitted pro hac vice argued the cause for objector Cynthia B. Balser.

JONATHAN N. HARRIS, J.S.C.

I. INTRODUCTION

*1 This is a consumer product class action brought on behalf of owners and lessees of the 1.2 million Jeep Grand Cherokee motor vehicles manufactured from 1999 through 2004. This opinion treats plaintiffs' applications for 1) a final court determination that this matter shall proceed as a class action, 2) approval of a settlement, and 3) an award of attorneys' fees and expenses. I conclude that a settlement class shall be certified; the settlement is approved because it is fair, reasonable, and adequate; and attorneys' fees and costs are awarded.

II. BACKGROUND

This is one of several civil actions nationally that seeks to redress allegedly defective motor vehicle brake apparatuses that were placed into the stream of commerce on the Jeep Grand Cherokee distributed by DaimlerChrysler Corp. (DCC) between 1999 and 2004. At issue are the front disc brake assemblies that are alleged to contain defective rotors and calipers causing uneven disc thickness, which results in the pulsation of the brakes and vibration of the motor vehicle, as well as a shortening of the expected useful life of the rotors.

Plaintiffs, particularly the first two named plaintiffs Robert Lubitz and Alberto Lemus who purchased Jeep Grand Cherokees in 1999 and 2002 respectively, claim to represent all owners and lessees of the allegedly defective motor vehicles. Other plaintiffs in the corresponding civil actions in New York, Florida, Ohio, Kansas, Missouri, and California seek relief along the lines sought by the instant plaintiffs, for the same grievances.

The instant litigation proceeded through the usual filing of a complaint, motion to dismiss, answer, and discovery. Although the initial theories of liability in the complaint were refined and narrowed through motion practice, the parties had plenty about which to argue. Mediation efforts were thought to be useful by all sides, and Nicholas H. Politan, a retired federal district court judge, was engaged

to attempt to forge a settlement. After several mediation sessions, the parties constructed a settlement that resolves the instant matter, together with all of the parallel litigation elsewhere.

On June 1, 2006, Judge Sybil R. Moses, A.J.S.C., entered an order that provisionally certified a settlement class, determined that the proposed settlement had apparent merit, scheduled a Fairness Hearing, and provided for notice to be given to class members. On October 30, 2006, I conducted the Fairness Hearing called for in Judge Moses' June 1, 2006 order. At the same time, I considered plaintiffs' application for attorneys' fees and expenses.

Among the mixed factual and legal questions that were in dispute before the settlement was reached were whether the rotor/caliper assemblies were defective; what is the duration of any warranty on the rotor/caliper assemblies; what components, if any, are covered by what warranty; and what is the effect, if any, of DCC's decision to reengineer and change the rotor/caliper assemblies for model years after 2002? Also in controversy were the legal theories that remained for plaintiffs to attempt to exploit in order to recover remedies. Those contested legal theories included breach of express warranty, unconscionability of warranty, breach of implied warranty of merchantability, violation of the New Jersey Consumer Fraud Act (N.J.S.A. 56:8-1 to-20)(NJCFA), and breach of contract. Throughout 2004 and 2005, the parties actively deployed the full array of litigational tactics in their efforts to prosecute and defend their respective clients' positions. Extensive motion practice was conducted and detailed discovery processes were implemented here and in the related civil actions. Eventually, a framework for settlement was reached, and I am now called upon to place my imprimatur on the arrangements made.

*2 The definition of the proposed final settlement class is the following:

> All persons in the United States who bought or leased a jeep Grand Cherokee vehicle, model years 1999-2004, between May 1, 1998 and the present, excluding fleet and governmental purchasers and lessees.
>
> The class shall be divided into three subclasses: (1) the "1999-2002 Model Years Subclass" consisting of all members of the Settlement Class who bought or leased a model-year 1999-2002 Jeep Grand Cherokee vehicle; (2) the "2003-2004 Model Years Expired Warranty Subclass" consisting of all members of the Settlement Class who bought or leased a model-year 2003-2004 Jeep Grand Cherokee vehicle, and who contacted DCC about experiencing pulsation during application of the brakes of their Subject Vehicles while the Subject Vehicles were still within the Warranty Period, and whose Warranty Period for the Subject Vehicle may now be expired; and (3) the "2003-2004 Model Years Warranty Subclass" consisting of all members of the Settlement Class who bought or leased a model-year 2003-2004 Jeep Grand Cherokee vehicle, except members of the 2003-2004 Model Years Expired Warranty Subclass (collectively referred to as the "Subclasses).

Under the proposed settlement, qualified members of the 1999-2002 Model Years Subclass will be reimbursed dollar-for-dollar for the cost of prior brake repairs or replacements incurred during the warranty period up to a maximum amount of $12,000,000, but reallocated on a pro rata basis if the aggregated claims exceed said cap. In addition, the $12,000,000 available for this reimbursement will be utilized for the payment of up to $3,000,000 in attorneys' fees and expenses. Thus, the maximum amount allocable to qualified claimants in the 1999-2002 Model Years Subclass actually will be the difference between $12,000,000 and the amount of attorneys' fees and expenses that I award, up to a maximum of $3,000,000. Put more candidly, the more money the attorneys get, the less the class gets. The 2003-2004 Model Years Warranty Subclass will be provided a free brake inspection at DCC's expense during a specified period. If a disc thickness variation is detected and the vehicle is still within its warranty period, DCC will pay for repairs. The 2003-2004 Model Years Expired Warranty Subclass will also be provided a free brake inspection at DCC's expense if a member experiences pulsation. If both a disc thickness variation is detected *and* the member complained about brake pulsation during the warranty period, DCC will pay for repairs.

Notice of the proposed settlement was provided by mailings to approximately 2.8 million addressees. Less than seventy objections were lodged with the court. Only 1,984 persons excluded themselves from membership in the class. Although the majority of objections did not carefully focus upon the terms of the settlement, several objections are noteworthy. It is asserted that there are substantive and procedural deficiencies with the settlement. These include problems with the allegedly overbroad and consideration-free nature of some of the releases being given by absent class members, the meager benefit being provided to class members who complained about brake pulsation after their warranties expired, the absence of cash payments to any class members for individual damages, the lack of any notice to absent class members by publication, the allegedly onerous nature of the claims procedure (including a cumbersome claims form), and the general overall illusory nature of the

settlement with allegedly no benefit to the class, but a windfall in attorneys fees for the prosecuting attorneys.

III. DISCUSSION

A. The Law

*3 Any settlement involving a certified class in a class action requires court approval. *R.* 4:32-2(e)[1]. This rule, modeled after *Fed.R.Civ.P.* 23, has not received extensive treatment in New Jersey reported opinions. Accordingly, I will borrow from federal decisions where necessary to help me parse the operation of the applicable rule. Indeed, it is common for New Jersey courts to refer to congruent federal law when interpreting New Jersey's class action rules. *Morris Cty. Fair Hous. Council v. Boonton Tp., supra,* 197 *N.J.Super.* 359, 369 ("[I]t is appropriate to seek guidance in federal case law in determining the procedures and standards for approval of settlements of representative actions[.]"); *Goasdone v. American Cyanamid Corp.*, 354 *N.J.Super.* 519, 528 (Law Div.2003)(since New Jersey has no reported decision on certification of a medical monitoring class, federal case law lends important guidance); *Delgozzo v. Kenny*, 266 *N.J.Super.* 169, 185 (App.Div.1993)(referring to federal law to parse commonality requirement of *R.* 4:32-1(a)(2)); *In re Cadillac '8-6-4 Class Action*, 93 *N.J.* 412, 424 (recognizing New Jersey's class action rule "is modeled after *Rule* 23(a) and (b) of the Federal Rules of Civil Procedure."); *Riley v. New Rapids Carpet Ctr.*, 61 *N.J.* 218, 226 (1972) ("[o]ur class-action rule, *R.* 4:32, is a replica of *Rule* 23 of the Federal Rules of Civil Procedure as amended in 1966."); *Muise v. GPU, Inc.*, 371 *N.J.Super.* 13, 31 (App.Div.2004)("[c]onstruction of the federal rule may be considered helpful, if not persuasive, authority").

B. The Notice

In order to ensure that the dictates of due process are observed, notice to class members of a settlement must be given. *Rule* 4:32-2(e)(1)(B) provides that:

> The court shall direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

Adequate notice of a proposed settlement that will fix the rights of class members who do not opt-out and forever bar them from seeking further relief on their causes of actions is required not only by the rules of civil procedure, but also by the constitutional mandate of due process. *See Phillips Petroleum Co. v. Shutts*, 472 *U.S.* 797, 811-12, 86 *L. Ed.2d* 628, 105 *S.Ct.* 2965 (1985); *Kyriazi v. Western Elec. Co.*, 647 *F.2d* 388, 395 (3d Cir.1981). In order to satisfy due process, notice to class members 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." *Mullane v. Central Hanover Bank & Trust Co.*, 339 *U.S.* 306, 314-15, 94 *L. Ed.* 865, 70 *S.Ct.* 652 (1950). It is most appropriate to determine the adequacy of notice before an inquiry is conducted into the merits of the settlement. *See In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 *F.3d* 283, 326-28 (3d Cir.1998). Additionally, in *R.* 4:32-1(b)(3) actions, class members must receive "the best notice practicable under the circumstances, consistent with due process of law." *R.* 4:32-2(b).

*4 The settling parties sent the best notice practicable to class members. Acting upon Judge Moses' order, commencing on July 18, 2006, approximately 2.8 million notices were mailed to potential class members. Extensive efforts were made to follow-up where mailed notices were returned as undeliverable. Anyone requesting information about the settlement was provided a copy, and the settlement data also resided in the court's case files, which were available for public inspection during regular court hours. The settling parties established an internet-based website, www.DCCSettlement.com, which provided thoroughgoing information to anyone interested in the action. A toll-free voice mail system was established to accommodate telephone inquiries regarding the settlement. As of October 4, 2006, over 50,000 calls had been received and over 21,000 return calls were made to inquirers.

Furthermore, the substance of the notice was adequate. It clearly communicated its purpose; the nature of the action; the definition of the class; the class claims, issues, or defenses; the nature of the settlement; the attorneys' fees sought; and notice of the Fairness Hearing. The notice provided that any potential class members who do not wish to be included in the settlement must submit a written request to be excluded. The dates for submitting claims, exclusion requests, and opposition to the settlement were clearly indicated. Such notice meets the requirements of due process and *R.* 4:32-2(b)(2).

C. The Class

The parties seek final certification of a settlement class pursuant to *R.* 4:32-1(a) and *R.* 4:32-1(b)(3). In order to determine whether the requirements for class action maintainability have been met, inquiry beyond the pleadings must be made because "a court must understand the claims, defenses, relevant facts, and applicable

substantive law in order to make a meaningful determination of the certification issues." *Castano v. American Tobacco Co.*, 84 *F.3d* 734, 744 (5th Cir.1996); *accord, Carroll v. Cellco Partnership*, 313 *N.J.Super.* 488, 495 (App.Div.1998).

A trial court should not certify a class until it has been determined, through rigorous analysis, that all the prerequisites of the rule governing class actions have been satisfied. As a first hurdle, as noted, a class is appropriate for certification only if it meets the four prerequisites of a class action set out in R. 4:32-1(a). Under this rule, one or more members of a class may sue or be sued as representative parties on behalf of all, only if (1) the class is so numerous that joinder of all members is impracticable (numerosity), (2) there are questions of law or fact common to the class (commonality), (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality), and (4) the representative parties will fairly and adequately protect the interests of the class (adequacy).

1. Numerosity

*5 To begin, *R.* 4:32-1(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." This requirement does not demand that joinder be impossible, but rather that joinder would be extremely difficult or inconvenient. *See Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp.*, 149 *F.R.D.* 65, 73-74 (D.N.J.1993) (impracticability does not mean impossibility, but rather that the difficulty or inconvenience of joining all members calls for class certification). Whether joinder of all of the class members would be impracticable depends upon the circumstances surrounding the case and not merely on the number of class members. *See General Tel. Co. of the Northwest v. E.E.O.C.*, 446 *U.S.* 318, 329, 100 *S.Ct.* 1698, 64 *L.Ed.2d* 319 (1980) (numerosity requires examination of specific facts of each case and imposes no absolute numerical limitations). See also Liberty *Lincoln Mercury*, 149 *F.R.D.* at 73 (number is not, by itself, determinative). While no minimum number of class members is required, "generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong ... has been met." *Stewart v. Abraham*, 275 *F.3d* 220, 226-27 (3d Cir.2001). A class of 81 property owners seeking money damages was found to be sufficient to meet the numerosity requirement. *Saldana v. City of Camden*, 252 *N.J.Super.* 188, 193 (App.Div.1991). In order to satisfy the numerosity requirement "[p]recise enumeration of the members of a class is not necessary." *Zinberg v. Washington Bancorp, Inc.*, 138 *F.R.D.* 397, 405 (D.N.J.1990); *see also In re Cadillac, supra*, 93 *N.J.* at 425.

Joinder of all class members is impracticable in this case. As of the Fairness Hearing, there were over one million class members identified within the subclasses' descriptions. I conclude that plaintiffs have more than enough to satisfy the numerosity requirement of *R.* 4:32-1(a)(1).

2. Commonality

Rule 4:32-1(a)(2) requires that there be questions of law or fact common to the class, "although not all questions of law or fact raised need be in common." *Weiss v. York Hospital*, 745 *F.2d* 786, 808-809 (3d Cir.1984), cert. denied, 470 *U.S.* 1060, 105 *S.Ct.* 1777, 84 *L.Ed.2d* 836 (citing 7 C. Wright & A. Miller, *Federal Practice & Procedure* § 1763, at 603 (1972)). Where class members' factual circumstances are materially identical and the "questions of law raised by the plaintiff are applicable to each [class] member," the commonality requirement is satisfied. *Weiss v. York Hospital, supra*, 745 *F.2d* at 809 (citations omitted). Further, the commonality requirement is met "[w]hen the party opposing the class has engaged in a course of conduct that affects a group of persons and gives rise to a cause of action," resulting in all of the members sharing at least one of the elements of that cause of action. *Newberg Class Actions*, § 3.10 (3d ed.1992). Common questions arise "from a 'common nucleus of operative facts' regardless of whether the underlying facts fluctuate over the class period and vary as to individual claimants." *In re Asbestos School Litig.*, 104 *F.R.D.* 422, 429 (E.D.Pa.1984), *aff'd in part, vacated in part sub nom.: In re School Asbestos Litig.*, 789 *F.2d* 996 (3d Cir.1986), *cert. denied*, 479 *U.S.* 852, 107 *S.Ct.* 182, 93 *L.Ed.2d* 117, 35 *Ed. Law Rep.* 30 (1986). "A common nucleus of operative fact[s] is typically found [when] defendants have engaged in standardized conduct toward members of the proposed class." In *re Life USA Holdings Inc. Ins. Litig.*, 190 *F.R.D.* 359, 366 (E.D.Pa.2000); *Kugler v. Romain*, 58 *N.J.* 522 (1971). It should be kept in mind, however, that "commonality becomes obscured when the probable unique issues of liability, causation, and damages in each case are considered, requiring individualized treatment at trial." *Saldana v. City of Camden, supra*, 252 *N.J.Super.* at 197.

*6 The conduct at issue includes the defendant's actions of placing its allegedly defective motor vehicles in the stream of commerce and the manner of responding to warranty claims related to complaints about the operation of the disc brake assemblies. Plaintiffs allege that for each subclass the common questions revolve around the alleged deficiencies of the brakes and the corporate response to

complaints relating thereto. This uniform conduct militates in favor of finding a common core of operative facts and circumstances and satisfies the requirement of commonality.

3. Typicality

Rule 4:32-1(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." "When the same unlawful conduct was directed at or affected both the named plaintiff and the members of the putative class, the typicality requirement is usually met, irrespective of varying fact patterns that may underlie individual claims." *Cannon v. Cherry Hill Toyota, Inc.*, 184 *F.R.D.* 540, 544 (D.N.J.1999). In order to meet the typicality requirement, a plaintiff must show that her "injury arises from or is directly related to a wrong to a class, and that wrong includes the wrong to the plaintiff." *In re Am. Med. Sys. Inc.*, 75 *F.3d* 1069, 1082 (6th Cir.1996)(quoting 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*, § 3:76 (4th ed.2002). The court must ask whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of absent class members to assure that the absentees' interests will be fairly represented. *Baby Neal v. Casey*, 43 *F.3d* 48, 57 (3d Cir.1994). By ensuring that the class representative's claims are similar to those of the class, the typicality requirement, like commonality, promotes efficient case management and fair representation. Yet, despite this similarity, the commonality and typicality requirements serve distinct functions. The commonality requirement tests the sufficiency of the class claim. *See Hassine v. Jeffes*, 846 *F.2d* 169, 177 n. 4 (3d Cir.1988). The typicality requirement focuses on the relation between the representative party and the class as a whole. *Id.* The New Jersey Supreme Court has stated that "[t]he claims of the representatives 'must have the essential characteristics common to the claims of the class.' " *In re Cadillac, supra*, 93 *N.J.* at 425 (quoting 3B Moore's Federal Practice ¶ 23.06-2 (1982)).

A central issue in the instant case, claimed to be shared by plaintiffs and the members of the proposed class alike, is whether defendants' actions amounted to deceptive business practices under New Jersey law or violated its warranty promises. The claims asserted by plaintiffs and the defenses that would be arrayed against plaintiffs are typical of those that would be asserted for and against the members of the three subclasses. Those claims arise from the same nucleus of alleged facts: defendant's installation of defective brakes on its motor vehicles and its subsequent stonewalling when it came time for repairs within the warranty period. Typicality exists.

4. Adequacy of Representation

*7 The binding effect of all class action decrees raises significant due process questions that are directly relevant to *R.* 4:32-1(a)(4). If absent class members are to be conclusively bound by the result of an action prosecuted or defended by a party alleged to represent their interests, basic notions of fairness and justice demand that the representation they receive be adequate. The adequacy requirement mandates an inquiry into the zeal and competence of the representatives' counsel, the willingness and ability of the representatives to take an active role in and control the litigation, while protecting the interests of absentees. The adequacy inquiry also "serves to uncover conflicts of interest between the named plaintiffs and the class they seek to represent." *See Amchem Prods., Inc. v. Windsor*, 521 *U.S.* 591, 625, 117 *S.Ct.* 2231, 138 *L.Ed.2d* 689 (1997). Furthermore, because absent class members are conclusively bound by the judgment in any class action brought on their behalf, the court must be especially vigilant to ensure that the due process rights of all class members are safeguarded through adequate representation at all times. Differences between the named plaintiffs and absent class members render the named plaintiffs inadequate representatives only where those differences create conflicts between the named plaintiffs' and the absent class members' interests.

One accepting employment as counsel in a class action does not become a class representative through simple operation of the free enterprise system; rather, both the class determination and designation of counsel as class representative comes from judicial determinations, and the attorneys so benefited serve in something of a position of public trust, and they share with the court the burden of protecting the class action device against public apprehensions that it encourages strike suits and excessive attorney fees. *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc.*, 481 *F.2d* 1045 (2d Cir.1973), on remand, *certiorari denied* 94 *S.Ct.* 722, 414 *U.S.* 1092, 38 *L. Ed.2d* 549. To determine whether the proposed class satisfies *R.* 4:32-1(a)(4), I must evaluate the adequacy of class counsel. Factors such as counsel's experience with class actions, knowledge of the subject matter at issue in the case, and the resources of counsel are relevant to this determination. *Haley v. Medtronic, Inc.*, 169 *F.R.D.* 643, 650 (C.D.Cal.1996); *In re Prudential Secs.*, 163 *F.R.D.* 200, 208 (S.D.N.Y.1995). Additionally, the court is under an obligation to evaluate carefully the legitimacy of the named plaintiffs' plea that they are proper class representatives. Thus, the Supreme Court has admonished federal district courts that they are to 'stop, look, and listen' before certifying a class, *Kremens v. Bartley*, 431

U.S. 119, 135, 97 *S.Ct.* 1709, 1718, 52 *L. Ed.2d* 184 (1977). The adequacy of representation issue is of critical importance in all class actions and the court is under an obligation to pay careful attention to the *R.* 4:32-1(a)(4) prerequisite in every case. *Vervaecke v. Chiles, Heider & Co.*, 578 *F.2d* 713, 719 (8th Cir.1978). Finally, it should be noted that plaintiffs have the burden of establishing that a case is certifiable as a class action and that, as class representatives, the named plaintiffs meet all of the *R.* 4:32-1 requirements. In order properly to represent absent members of a class, counsel for named parties who seek to be class representatives must be more than merely attorneys admitted to practice before the particular court hearing the case; they must have sufficient experience and training to satisfy the trial court that they will be strenuous advocates for the class, and their conduct will be evidence of their capability adequately to represent the class. The requirement that the attorneys for class representatives be experienced is intended to mean that they be experienced in the type of litigation involved. *Carpenter v. Hall*, 311 *F.Supp.* 1099 (S.D.Tex.1970).

*8 Generally, "[a]dequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class ." *Wetzel v. Liberty Mutual Insurance Co.*, 508 *F.2d* 239, 247 (3d Cir.), *cert. denied*, 421 *U.S.* 1011, 95 *S.Ct.* 2415, 44 *L.Ed.2d* 679 (1975). The proposed class here satisfies the standards of *R.* 4:32-1(a)(4). From my review of the record presented, plaintiffs' attorneys appear to be qualified and experienced to conduct this litigation. I perceive no interests antagonistic to those of the potential class and no conflicts are apparent on the record. Moreover, the plaintiffs are adequate representatives for all members of the subclasses. The adequacy requirement is satisfied.

5. Rule 4:32-1(b)(3)

The parties seek certification under *R.* 4:32-1(b)(3), requiring that "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to any other available methods for the fair and efficient adjudication of the controversy." *R.* 4:32-1(b)(3).

a. Predominance

The issue of predominance under *R.* 4:32-1(b)(3) focuses on "whether the potential class, including absent class members, seeks to remedy a common legal grievance." *In re Cadillac, supra*, 93 *N.J.* at 431; *see also Delgozzo v. Kenny, supra*, 266 *N.J.Super.* at 189. In order to meet the predominance requirement of *R.* 4:32-1(b)(3) plaintiffs must establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, predominate over those issues that are subject only to individualized proof. In other words, just because the legal issues involved may be common between class members does not mean that the proof required to establish these same issues is sufficiently similar to warrant class representation and treatment.

Therefore, the predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Moore v. Paine Webber, Inc.*, 306 *F.3d* 1247, 1252 (2d Cir.2002). The predominance requirement is far more demanding than the commonality requirement. *See Amchem Prods., Inc. v. Windsor*, 521 *U.S.* 591, 623-24, 117 *S.Ct.* 2231, 138 *L.Ed.*2d 689 (1997). Because *R.* 4:32-1(b)(3) requires that common issues predominate, class certification may be denied where common issues of law are not present or where resolving the claims for relief would require individualized inquiries. *See, e.g., Lewis Tree Serv., Inc. v. Lucent Techs. Inc.*, 211 *F.R.D.* 228, 235 (S.D.N.Y.2002) ("At a basic level, a nationwide class action in which plaintiffs raise claims of fraud would require the application of the law of at least fifty jurisdictions and would make class certification inappropriate."); *In re Methyl Tertiary Butyl Ether* ("MTBE"), 209 *F.R.D.* 323, 350 (S.D.N.Y.2002) (finding no predominance given plaintiffs' allegation that MTBE contamination occurred "over many years across four states indirectly caused by twenty defendants in conjunction with innumerable third parties who released the contaminant into the environment"). "The critical consideration is whether there is a 'common nucleus of operative facts.' " *Carroll v. Cellco Partnership, supra*, 313 *N.J.Super.* at 499.

*9 In this case, predominance is present. Not only will the same universe of legal principles be employed, but the challenged actions of the defendant are discrete, perhaps similar, if not uniform, and confined to a distinct area of its manufacture and warranty satisfaction operations. This will involve a cohesive set of proofs that lends itself to class action treatment.

b. Superiority

Rule 4:32-1(b)(3) requires that a class action be a superior method for the adjudication of a controversy. Implicit in this requirement is an identification of the relevant factual and legal issues underlying the request for class certification. *In re Cadillac, supra*, 93 *N.J.* at 426. The

mere identification of those issues, however, is less penetrating than their subsequent evaluation on a motion for summary judgment or at trial. *Id.* Certification of a class action should not be denied because of the merits underlying the theory on which the action is predicated. *Olive v. Graceland Sales Corp.*, 61 *N.J.* 182, 189 (1974). "Nonetheless, even the identification of the issues to determine the suitability of an action for certification requires some preliminary analysis." *In re Cadillac, supra*, 93 *N.J.* at 426 (citing Miller, *An Overview of Federal Class Actions: Past, Present and Future* 51 (1977)). Thus, the court must engage in a cursory analysis of plaintiffs' claims to determine whether class certification represents a superior form of dispute resolution for the statutory and common law fraud claims.

In evaluating the superiority of a class action, the court should inquire as to the class members' interest in individually controlling the prosecution or defense of separate actions; the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; whether it is desirable to concentrate litigation of claims in this forum; and the manageability of a class action. As only a settlement class is at issue, manageability of a trial is not a consideration. *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 *F.R.D.* 166, 178, n. 14. (E.D.Pa.2000)(citing *Amchem Prods. Inc. v. Windsor*, 521 *U.S.* 591, 620 (1997)).

Consideration of the enumerated factors leads to the conclusion that the class action is superior to other forms of suit. Although approximately 2,000 persons have requested exclusion from the class, there has been little individual interest in pursuing individual claims. Even the existence of the parallel actions in other states, particularly when they will be folded into this settlement and resolved, does not militate against a certification here. Indeed, the concentration of the litigation in this forum will likely save judicial resources. An analysis of the superiority factors commends a finding that the class should be certified.

D. The Settlement

It is worthwhile to acknowledge that settlement of litigation holds a lofty position in the pantheon of public policy. *Lahue v. Pio Costa*, 263 *N.J.Super.* 575 (App.Div.), *certif. denied*, 134 *N.J.* 477 (1993); *Pascarella v. Bruck, supra*, 190 N.J.Super. at 125; *Bistricer v. Bistricer, supra*, 231 *N.J.Super.* at 147; *Department of the Pub. Advocate v. Board of Pub. Util.*, 206 *N.J.Super.* 523, 528 (App.Div.1985); *Jannarone v. W.T. Co.*, 65 *N.J.Super.* 472, 476-77 (App.Div.), *certif. denied sub. nom. Jannarone v. Calamoneri*, 35 *N.J.* 61 (1961). The settlement of lawsuits is favored not because of the salutary consequence of relieving overburdened judicial and administrative calendars but because of the notion that the parties to a dispute are in the best position to determine how to resolve a contested matter in a way that is least disadvantageous to everyone. In recognition of this principle, courts will strain to give effect to the terms of a settlement wherever possible. It follows that any action that would have the effect of vitiating the provisions of a particular settlement agreement and the concomitant effect of undermining public confidence in the settlement process in general should not be countenanced.

*10 *Rule* 4:32-2(e) imposes upon the trial judge the duty of protecting absentees, which is executed by the court's assuring the settlement represents adequate compensation for the release of the class claims. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 *F.3d* 768, 805 (3d Cir.1995). The Third Circuit has noted that in deciding the fairness of a proposed settlement, "the evaluating court must, of course, guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *Id.* at 806 (citations omitted). At the same time, it has been noted that cases such as this, where the parties simultaneously seek certification and settlement approval, require courts to be even more scrupulous than usual when they examine the fairness of the proposed settlement. *In re Prudential Ins. Co. of Am. Sales Practice, supra*, 148 *F.3d* at 317 (citing *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 *F.3d* at 805). This heightened standard is designed to ensure that class counsel has demonstrated "sustained advocacy" throughout the course of the proceedings and has protected the interests of all class members. *Id.* at 317. The Court must "ensure that the settlement is in the interest of the class, does not unfairly impinge on the rights and interests of dissenters, and does not merely mantle oppression." *Reed v. General Motors Corp.*, 703 *F.2d* 170, 172 (5th Cir.1983) (quoting *Petway v. American Cast Iron Pipe Co.*, 576 *F.2d* 1157, 1214 (5th Cir.1978)). Because the parties' interests are aligned in favor of a settlement, I must take independent steps to ensure fairness in the absence of adversarial proceedings. *Reynolds v. Beneficial Nat'l Bank*, 288 *F.3d* 277, 279-80 (7th Cir.2002) (noting that the class action context requires judges to exercise the highest degree of vigilance in scrutinizing proposed settlements). The Court's duty of vigilance does not, however, authorize it to try the case in the settlement hearings.

The hallmark of any settlement to be approved by the court must provide assurances that the settlement "is fair and reasonable to the members of the class." *Chattin v. Cape May Greene, Inc.*, 216 N.J.Super. at 627. In order to give

more than lip service to the fairness standard, it is imperative that the court also assure itself that the settlement is "fair, adequate, and reasonable, and not the product of collusion." *Joel A. v. Giuliani*, 218 *F.3d* 132, 138 (2d Cir.2000). To do this requires a framework, one that is readily found in several federal sources. For example, the *Manual for Complex Litigation, Fourth* lists the following non-exclusive factors for judges to consider when reviewing an application to approve a class action settlement:

1. the advantages of the proposed settlement versus the probable outcome of a trial on the merits of liability and damages as to the claims, issues, or defenses of the class and individual class members;

*11 2. the probable time, duration, and cost of trial;

3. the probability that the class claims, issues, or defenses could be maintained through trial on a class basis;

4. the maturity of the underlying substantive issues, as measured by the information and experience gained through adjudicating individual actions, the development of scientific knowledge, and other factors that bear on the probable outcome of a trial on the merits;

5. the extent of participation in the settlement negotiations by class members or class representatives, and by a judge, a magistrate judge, or a special master;

6. the number and force of objections by class members;

7. the probable resources and ability of the parties to pay, collect, or enforce the settlement compared with enforcement of the probable judgment predicted under above paragraph 1 or 4;

8. the effect of the settlement on other pending actions;

9. similar claims by other classes and subclasses and their probable outcome;

10. the comparison of the results achieved for individual class or subclass members by the settlement or compromise and the results achieved or likely to be achieved for other claimants pressing similar claims;

11. whether class or subclass members have the right to request exclusion from the settlement, and, if so, the number exercising that right;

12. the reasonableness of any provisions for attorney fees, including agreements on the division of fees among attorneys and the terms of any agreements affecting the fees to be charged for representing individual claimants or objectors;

13. the fairness and reasonableness of the procedure for processing individual claims under the settlement;

14. whether another court has rejected a substantially similar settlement for a similar class; and

15. the apparent intrinsic fairness of the settlement terms.

In determining the weight accorded these and other factors, courts have examined whether

• other courts have rejected similar settlements for competing or overlapping classes;

• the named plaintiffs are the only class members to receive monetary relief or are to receive relief that is disproportionately large (differentials are not necessarily improper, but may call for judicial scrutiny);

• the settlement amount is much less than the estimated damages incurred by members of the class as indicated by preliminary discovery or other objective measures, including settlements or verdicts in individual cases;

• the settlement was completed at an early stage of the litigation without substantial discovery and with significant uncertainties remaining;

• nonmonetary relief, such as coupons or discounts, is unlikely to have much, if any, market or other value to the class;

• significant components of the settlement provide illusory benefits because of strict eligibility conditions;

• some defendants have incentives to restrict payment of claims because they may reclaim residual funds;

*12 • major claims or types of relief sought in the complaint have been omitted from the settlement;

• particular segments of the class are treated significantly differently from others;

• claimants who are not members of the class (e.g., opt outs) or objectors receive better settlements than the class to resolve similar claims against the same defendants;

• attorney fees are so high in relation to the actual or probable class recovery that they suggest a strong

possibility of collusion;

• defendants appear to have selected, without court involvement, a negotiator from among a number of plaintiffs' counsel; and

• a significant number of class members raise apparently cogent objections to the settlement. (The court should interpret the number of objectors in light of the individual monetary stakes involved in the litigation. When the recovery for each class member is small, the paucity of objections may reflect apathy rather than satisfaction. When the recovery for each class member is high enough to support individual litigation, the percentage of class members who object may be an accurate measure of the class' sentiments toward the settlement. However, an apparently high number of objections may reflect an organized campaign, rather than the sentiments of the class at large. A similar phenomenon is the organized opt-out campaign.)

§ 21.662 *Manual for Complex Litigation, Fourth* 316-318 (footnotes omitted).

These factors are similar to factors regularly utilized in the Second and Third Circuits for over thirty years, *see City of Detroit v. Grinnell Corp.*, 495 *F.2d* 448, 463 (2d Cir.1974); *In re Elan Securities Litigation*, 385 *F.Supp.*2d 363, 368 (S.D.N.Y.2005); *Girsh v. Jepson*, 521 *F.2d* 153, 156 (3d Cir.1975); *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 *F.R.D.* 207, 235 (D.N.J.2005), and commend themselves for use in this jurisdiction and in this case in particular.

1. Advantages of Settlement over Probable Outcome at Trial

In evaluating the risks of establishing liability and damages, it is appropriate to survey the possible risks of litigation in order to balance the likelihood of success and the potential damage award if the case were take to trial against the benefits of immediate settlement. *In re Prudential Ins. Co. of Am. Sales Practices Litig., supra*, 148 *F.3d* at 319. However, the court should avoid conducting a "mini-trial and must, to a certain extent, give credence to the estimation of the probability of success proffered by class counsel[.]" *In re Ikon Office Solutions, Inc. Sec. Litig., supra*, 194 *F.R.D.* at 181 (citation omitted).

This case is a complex amalgam of products liability claims, consumer fraud, and breach of warranty theories. To succeed on its primary claims, the class must establish that the defendant engaged in unfair business practices. Regardless of the strength of the case class counsel might present at trial, victory in litigation is never guaranteed and here a successful outcome on all proffered theories is dubious at best. A jury could place considerable weight upon the credibility and testimony of defendant's agents and other witnesses, some of whom are well-respected in their industry, who would undoubtedly deny all aspects of knowledge of consumer fraud. Such risks as to liability strongly weigh in favor of the settlement.

*13 In addition, the class would have to overcome significant damage defenses that defendant would assert relating to individual driving idiosyncrasies as the source of class members' brake problems. As is often the case, the parties would likely engage in a battle of experts on the question of ascertainable damages, the outcome of which would be unpredictable. Settlement is favored because it eliminates these inherent, unavoidable litigation risks.

2. Probable Time, Duration, and Cost of Trial

This factor is intended to capture the probable costs, in both time and money, of continued litigation through trial. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., supra*, 55 *F.3d* at 812. Although the parties have already expended enormous sums to enable them to reach this settlement, much more would be necessary to conclude this dispute under the auspices of a jury.

After this costly and lengthy discovery, it is likely that the parties would have engaged in extensive motion practice, consisting of, at a minimum, motions for summary judgment and evidentiary in limine applications. The costs associated with prosecuting and defending these motions would have diminished the recovery of the class, perhaps depleted the resources of defendant, and presented the court with thorny legal, evidential, and factual issues to resolve. What would happen in the actions pending in other states would only serve to more fully drain the resources of all parties.

Finally, trial of the liability issues would involve substantial attorney and expert time, the introduction of voluminous documentary and deposition evidence, vigorously contested motions, and the considerable expenditure of judicial resources. The damages calculation at trial, would involve time-consuming and complex economic analyses, straining the patience of even the most engaged jurors. All of these expenses would impose a significant burden on any recovery obtained for the subclasses if plaintiffs were even ultimately successful. A result that avoids an unnecessary and unwarranted expenditure of time and resources benefits everyone. *Computron Software, Inc., Sec. Litig.*, 6 *F.Supp.2d* 313,

317 (D.N.J.1998).

3. Probability of Maintaining the Class Action Through Trial

"The value of a class action depends largely on the certification of the class because, not only does the aggregation of the claims enlarge the value of the suit, but often the combination of the individual cases also pools litigation resources and may facilitate proof on the merits. Thus, the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the action." *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., supra,* 55 *F.3d* at 817. While decertification is always a possibility in any class action, the parties do not identify any particular issue or circumstance in this case that might lead to a particular risk of decertification.

4. Maturity of the Underlying Substantive Issues

*14 This factor evaluates, among other things, the novelty of the class theories of liability and assesses the probable outcome of those theories at trial. In this action, where plaintiffs assert traditional statutory consumer fraud and products liability theories, there is but a small likelihood that legal issues will be paramount at trial. Instead, the hotly contested factual disputes, especially those that revolve around the allegations of defective products and sharp business practices regarding the warranty, will be the engine that drives the litigation. Thus, this factor neither favors nor militates against the fairness of the settlement.

5. Nature of Settlement Negotiations

The settling parties have trumpeted the arms-length manner in which the settlement was reached. Starting out as wary adversaries, they voluntarily entered a mediation process and spent months working under the stewardship of a retired member of the federal judiciary. The long involvement of the neutral mediator during the settlement negotiations lends support to the parties' claim that they bargained as adversaries and at arms length. This backs the settlement. I have no sense that there was collusion among the parties that results in unfairness to the subclasses.

6. Number and Force of Objections by Class Members

This factor is a very significant element in assessing the fairness of the settlement. Since court approval is a substitute for the usual right of litigants to determine their own best interests, the reaction of class members who object can not be lightly ignored or rejected out of hand. In like vein, courts will not ignore the absence of objection to a settlement. Courts construe class members' failure to object to proposed settlement terms as evidence that the settlement is fair and reasonable. *See Fickinger v. C.I. Planning Corp.,* 646 *F.Supp.* 622, 631 (E.D.Pa.1986) ("Unanimous approval of the proposed settlement by the class members is entitled to nearly dispositive weight."). However, courts must be cautious about "inferring support from a small number of objectors to a sophisticated settlement." *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., supra,* 55 *F.3d* at 812. This is particularly true in large consumer fraud class action cases, as many consumers may have such small amounts at stake that it is imprudent to invest the time and resources to contest a settlement. To date, there have been less than 70 objections lodged. This is an inconsequential number and does not militate toward derailing the settlement. *Bell Atl. Corp. v. Bolger,* 2 *F.3d* 1304, 1313 n. 15 (3d Cir.1993)(finding that 30 objectors in a class of 1.1 million is an "infinitesimal number").

For the most part, the objections focus almost exclusively on discrete components of the settlement. Most complain about the seemingly inadequate amount of cash paid, in light of class members' aggravation engendered by the motor vehicles' performance and DCC's wary responses to warranty claims. I am satisfied that although many of the objections are heart-felt and articulate, they do not present a convincing case to reject the settlement. The thunderous silence from the vast majority of class members is an overwhelming indication that the settlement is fair and adequate. A settlement need not be perfect in order to be approved; it need not equally satisfy every member of the class.

*15 Although there is a rational argument to be made that a differently configured settlement might make sense, and would be within the reach of the parties, there is nothing fundamentally unfair about the way the instant settlement treats all class members, even with the differential treatment that is proposed among the subclasses. The most that might be said for the arguments of the objectors is that they are entitled to respectful consideration. There is nothing in their arguments that commands the exercise of judicial discretion towards scuttling an eminently just compromise. Even the great hew and cry concerning the sheer number of complaints lodged with federal agencies is unavailing when compared to the deafening silence of the vast majority of the class. There is always a "better" settlement just around the corner, but without a principled way to reject the instant compromise other than to nitpick it to death, there is no just reason to disturb the efforts of

those who toiled so long and hard to reach a reasonable accommodation of all parties' interests.

I reject as unfounded the notion that a more generous notice procedure should have been employed to notify more potential class members of the settlement, including the deployment of magazine and newspaper advertisements. There is no showing that any significant numbers of probable class members are wandering in the wilderness without knowledge or information about this matter. The notice appears the best practicable under the circumstances.

I further decline to disturb the settlement on the ground that the release on behalf of class members is too expansive and, for some, is not supported by consideration. This point of view reflects a rather myopic position of the objector who claims an entitlement to tangible benefits for each and every class member. Some of the benefits of the settlement are tangible, some are intangible. All of the give and take in the settlement reflects a measured balancing of the strengths and weaknesses in each subclass, and an appropriate accommodation of each is embodied in the settlement terms.

7. Ability of the Parties to Pay, Collect, or Enforce the Settlement

This factor weighs neither in favor nor against the settlement. There is nothing to suggest that there is a significant risk of nonpayment of the settlement by the defendant, and even a larger settlement would likely be capable of performance by DCC.

8. Effect of Settlement on Pending Actions

It appears that several other putative class actions have been commenced by class members that seek similar relief to that sought in this action. The instant settlement will obviate those other class actions by class members, thereby conserving the resources of those parties and judicial resources in those jurisdictions. This favors settlement here.

9. Similar Claims by Other Classes

This factor plays no role in determining whether the instant settlement is fair, reasonable, and adequate.

10. Comparison of Results Achieved by Individual Class Members

*16 This factor neither favors nor disfavors settlement because the parties have not brought the results of such individual claims to my attention.

11. Exclusion Requests

In a class of over one million, less than 2,000 class members exercised their right to opt-out of the settlement. This is less than 0.2%, a miniscule and insignificant number. This factor favors the settlement.

12. Reasonableness of Attorneys' Fees

The attorneys in this case seek approval of up to $3,000,000 in attorneys' fees ($2,916,746) and costs ($83,254), all of which will be paid from the $12 million cash fund that is set aside for the 1999-2002 Model Years Subclass. If, as plaintiffs contend, the value of the settlement is $14.5 million, reflecting the cash fund together with the putative value of the free brake inspections offered to class members, the attorneys' fees represent approximately 20% of this common fund. The attorneys' fees sought are in excess of the actual time value of the work done. In other words, the simple expedient of multiplying the actual hours of work expended times the hourly rate of the attorney or paralegal yields a lodestar fee in the amount of $1,417,919. The requested attorneys' fees reflect a multiplier of 2.06 times the lodestar.

For reasons that will be outlined in detail later in this opinion, I conclude that the requested attorneys' fees are excessive. Instead, I will award the amount of $2,175,000 as attorneys' fees, representing a multiplier of only slightly more than 1.5 times the lodestar and 15% of the common fund. Since the award effectively will be paid by or charged to class members, this generous amount of attorneys' fees does not militate for the settlement. However, because the attorneys' fees were negotiated *after* the terms of the settlement that strictly applied to the subclasses were completed, there is little evidence of collusion or conflict of interest on the part of the class attorneys. In short, the settlement is not subject to rejection just because the requested attorneys' fees are so high.

13. Other Actions

This factor explores whether other courts have already rejected substantially similar settlements for similar classes. There is no evidence that any court has rejected a settlement akin to this one, given the scope and breadth of this case. This slightly favors settlement here.

14. Intrinsic Fairness of the Settlement

By almost any standard, plaintiffs engaged in a difficult quest to obtain remedies for consumers against an domineering foe. Plaintiffs faced formidable obstacles in arriving at a satisfactory resolution of their grievances. If the plaintiffs were able to obtain class certification in a contested environment, resist the inevitable dispositive motions of defendants, survive the crucible of the trial, and obtain the best possible result from a jury, the result would likely resemble this settlement, or less. Indeed, the grave difficulties of convincing a trier of fact that brake wear is the primary responsibility of the car manufacturer and not otherwise attributable to the peculiarities of individual driving styles and road conditions would likely lead to a ruinous result for plaintiffs. Thus, I see nothing that commends a rejection of the settlement in favor of casting class members' fates to the wind by going to trial. The elements of the instant settlement present a powerful array of relief that cannot be meaningfully challenged. It is easy to nitpick and second-guess discrete elements of the settlement, and to take cheap shots at the attorneys' fees, but in the end, the settlement stands tall on its own two feet. This factor favors settlement.

15. Miscellaneous Factors

*17 The most substantial component of the miscellaneous group of factors that are relevant to this case is an analysis of the stage of the litigation when the action settled. A settlement should not be approved if the parties do not have an adequate appreciation of the merits of the case. Consequently, the type and amount of discovery, formal or informal, that has occurred since the inception of the action are relevant to the propriety of the settlement. However, the fact that this case settled before class certification was decided and before the completion of all formal discovery should not mask the fact that plaintiffs' attorneys had obtained substantial discovery data through litigational processes and the mediation mechanism. I am satisfied that the parties reached this settlement only after plaintiffs' counsel engaged in careful and extensive research, investigation, and analysis of the facts and circumstances surrounding the conduct of defendants' business practices. I conclude that class counsel have a sufficient basis upon which to assess the strengths and weaknesses of the claims and the terms of the settlement. For all of the reasons heretofore expressed, I am thoroughly convinced that the factors favoring settlement substantially outweigh those few factors that counsel against the settlement. Accordingly, I approve the settlement as fair, reasonable, and adequate.

E. The Attorneys' Fees

Plaintiffs' attorneys seek the court's approval of the terms of the settlement that would enable them to reap $2.9 million in attorneys' fees. The defendant does not object to the payment of these attorneys fees as required by the settlement agreement, for the obvious reason that its liability for all cash contributions is capped at $12 million. Accordingly, this "clear sailing" agreement requires even greater scrutiny by the court. *See In re Fine Paper Antitrust Litig.*, 751 *F.2d* 562, 583 (3d Cir.1984); *Weinberger v. Great N. Nekoosa Corp.*, 925 *F.2d* 518, 519 (1st Cir.1991) (In the case of a "clear sailing" agreement (i.e., where the party paying the fees agrees not to contest the court-awarded amount as long as it does not exceed a negotiated ceiling), "rather than merely rubber-stamping the request, the court should scrutinize it to ensure that the fees awarded are fair and reasonable.").

In ruling on a motion for award of attorneys' fees, I have two goals. The court seeks to protect the interests of class members by acting as a fiduciary for the class. *In re Cendant Corp. Litig.*, 264 *F.3d* 201, 231 (3d Cir.2001). The court's fiduciary role arises from a recognition that there is a potential economic conflict of interest between class members, who seek to maximize recovery from a settlement, and lawyers, who seek to maximize fees. The United States Court of Appeals for the Third Circuit has explained that the "divergence in [class members' and class counsel's] financial incentives ... creates the 'danger ... that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment for fees.' " *In re Cendant Corp. Prides Litig.*, 243 *F.3d* 722, 730 (3d Cir.2001) (quoting *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 *F.3d* 768, 820 (3d Cir.1995)). Consequently, "the danger inherent in the relationship among the class, class counsel, and defendants 'generates an especially acute need for close judicial scrutiny of fee arrangements' in class action settlements.' " *Id.* (quoting *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., supra*, 55 *F.3d* at 820).

*18 In examining an application for an award of attorneys' fees from a common fund, the Court also seeks to protect the public interest and, with it, the integrity of the judicial system:

> For the sake of their own integrity, the integrity of the legal profession, and the integrity of Rule 23, it is important that the courts should avoid awarding "windfall fees" and that they should likewise avoid every appearance of having done so. To this end courts

must always heed the admonition of the Supreme Court in *Trustees v. Greenough*, [105 *U.S.* 527, 26 *L. Ed.* 1157 (1881)], when it advised that fee awards under the equitable fund doctrine were proper only "if made with moderation and a jealous regard to the rights of those who are interested in the fund."

> *City of Detroit v. Grinnell Corp.*, 495 *F.2d* 448, 469 (2d Cir.1974) (quoting *Trustees v. Greenough*, 105 *U.S.* 527, 536, 26 *L. Ed.* 1157 (1881)), abrogated on different grounds by *Goldberger v. Integrated Resources, Inc.*, 209 *F.3d* 43 (2d Cir.2000)).

Keeping these two goals in mind, I am bound to review thoroughly and with the eye of a skeptical client the attorneys' fee application for fairness.

1. The Incollingo Case

There appears to be only one reported decision in New Jersey that directly deals with the method of setting attorneys fees in connection with a common fund class action settlement. *Incollingo v. Canuso*, 297 *N.J.Super.* 57 (App.Div.1997). The opinion is noteworthy because it does not examine the extensive body of federal law that has emerged nationally relating to attorneys' fees in common fund cases. Indeed, it ignores federal precedent and treats the matter as if it were solely a fee application pursuant to a fee-shifting statute[2] subject to *Rendine v. Pantzer*, 141 *N.J.* 292 (1995). *See Incollingo v. Canuso, supra*, 297 *N.J.Super.* at 63.

In *Incollingo*, the total attorneys' fees of $925,000.00 plus costs of approximately $150,000.00 were to be deducted from the settlement common fund created by the total cash recovery of $2,975,000.00 (plus coupons with a face value of $231,000). The method espoused by the court requires that the trial judge first determine the lodestar amount. Next, I am obligated to reduce the lodestar if it includes unreasonable charges or because the level of success is limited compared to the relief sought. *Id.* at 63. Then I must ascertain whether the hourly rates for the attorneys performing the work are reasonable. Finally, I must determine whether to increase the lodestar to "consider whether to increase that fee to reflect the risk of nonpayment in all cases in which the attorney's compensation entirely or substantially is contingent upon a successful outcome." *Id.* (citing *Rendine v. Pantzer*, *supra*, 141 *N.J.* at 337).

This methodology is at odds with the majority view of how to award attorneys' fees in common fund class actions, and is not advocated by plaintiffs' attorneys. Courts typically use the percentage of recovery method in common fund class actions, as that method is "generally favored in common fund cases because it allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.' " *In re Rite Aid corp. Sec. Litig.*, 396 *F.3d* 294, 300 (quoting *In re Prudential Ins. Co. of Am. Sales Practice, supra*, 148 *F.3d* at 333.) When a court uses the percentage of recovery method, it "first calculates the percentage of the total recovery that the proposal would allocate to attorneys fees by dividing the amount of the requested fee by the total amount paid out by the defendant; it then inquires whether that percentage is appropriate based on the circumstances of the case." *In re Cendant Corp. Litig.*, 264 *F.3d* 201, 256 (3d Cir.2001). This is mirrored in the *Manual for Complex Litigation, Fourth*, which states:

> *19 Historically, attorney fees were awarded from a common fund based on a percentage of that fund. After a period of experimentation with the lodestar method (based on the number of hours reasonably expended multiplied by the applicable market rate for the lawyer's services), the vast majority of courts of appeals now permit or direct district courts to use the percentage-fee method in common-fund cases. The only court of appeals that has not explicitly adopted the percentage method seems to allow considerable flexibility in approving combined percentage and lodestar approaches.
>
> § 14.121 *Manual for Complex Litigation, Fourth* 187 (footnotes omitted).

Thus, even though *Incollingo* may not be in the mainstream of modern class action jurisprudence, I may neither ignore, nor disobey its mandate. Thus, as instructed by *Incollingo*, I will view plaintiffs' requested attorneys' fees under the lens of *Rendine*.

A. Determine the Lodestar

As of October 10, 2006, the summary records of plaintiffs' attorneys showed that they had logged 3,777.25 hours in this case. The requested lodestar is $1,417,919 reflecting a blended hourly rate of slightly more than $375 per hour. Although summary in nature, the attorneys' fees information that I have reviewed do not appear to contain any unreasonable charges, churning, or any other reason to adjust the lodestar downward. The average hourly rate-the blended rate-is within a reasonable range that matches the skill and resolve exhibited by plaintiffs' attorneys during this litigation. Moreover, there is no principled reason to adjust the lodestar downward because of a purported lack of success as compared to the original relief sought. Since qualifying class members will obtain tangible and

intangible benefits provided by the defendant, it would be wholly inaccurate to characterize the settlement as either incomplete or unsatisfactory. To the contrary, plaintiffs' counsel obtained some valuable benefits in a litigational environment that defendant made decidedly unfriendly.

B. Lodestar Adjustment

This process calls for the most difficult analysis because here I am asked to increase the lodestar by a factor of 207% to reflect the $2.9 million request for legal fees under the settlement agreement. I decline, under the *Rendine* iteration, to adjust the lodestar by such a sizeable factor, especially where no exceptional circumstances exist.

The element that will move the lodestar is primarily the risk of nonpayment where the compensation is entirely or substantially contingent on a successful outcome. In *Rendine*, the New Jersey Supreme Court noted that in the usual fee-shifting case, the contingency enhancement should be between five and fifty-percent of the lodestar. In fact, exercising its original jurisdiction in *Rendine*, the New Jersey Supreme Court increased the lodestar by 33%. *Id.* at 345. I am exceeding that percentage and allowing a high end lodestar enhancement of 50%. This reflects a blended hourly rate of approximately $563 per hour, a fulsome compensation by any standard. Moreover, it adequately compensates plaintiffs' counsel for the risks inherent in pursuing this action. Thus, I award plaintiffs' attorneys a fee of $2,126,878, plus their reasonable expenses of $83,254, for a total award that will come from the cash fund of $2,210,132.

*20 In light of this result, and recognizing that *Incollingo* may not be the sole controlling precedent, I will crosscheck the result using principles derived from federal jurisprudence in common fund class action settlement cases. Ironically, this is exactly backwards to the federal scheme, which first computes a percentage of recovery as the basis for the attorneys' fees, and then crosschecks the result with the lodestar method.

The methodology that I will employ is that of the United States Court of Appeals for the Third Circuit, not just because New Jersey is part of the Third Circuit, but because the most mature and well-developed analyses of attorneys' fees has emerged from that court. It is said that the 1985 recommendation of a Third Circuit task force, *Court Awarded Attorney Fees: Report of the Third Circuit Task Force*, reprinted in 108 *F.R.D.* 237 (1985), was one of the driving forces that spurred the percentage method to gain favor. § II(B)(2)(a), *Awarding Attorneys' Fees and Managing Fee Litigation, Second*, Alan Hirsch and Diane Sheehey (Federal Judicial Center 2005) at 72. The D.C. and Eleventh Circuits require the percentage method. The First, Second, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have stated that the district court may use either the percentage method or the lodestar method. The Seventh Circuit has indicated that the percentage method is preferred. The Ninth Circuit has suggested that the percentage method is particularly appropriate when there are multiple claims and it would be difficult to determine what hours were expended on the claims that produced the fund. The Ninth Circuit also suggested that the lodestar is preferable when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors. The Fifth Circuit has not explicitly adopted the percentage method, but seems to allow a combined percentage and lodestar approach. *Id.* at 72-73.

In this action, the plaintiffs' attorneys have urged that I follow the Third Circuit's methodology as outlined in *Gunter v. Ridgewood Energy Corp.*, 223 *F.3d* 190 (3d Cir.2000). I accept their invitation because *Gunter* represents an appropriate methodology that may be readily deployed in the instant case.

2. The Gunter Case

Gunter sets forth the analysis for determining the reasonableness of a percentage fee award. The court stated in common fund cases, a trial court should first consider several factors in setting a fee award. Those factors include:

> (1) the size of the fund created and the number of person benefited; (2) the presence or absence of substantial objections by members of the class to the ... fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.
>
> *21 *Gunter v. Ridgewood Energy Corp.*, *supra*, 223 *F.3d* at 195 ((citing *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, *supra*, 148 *F.3d* at 336-340; and *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, *supra*, 55 *F.3d* at 819-22).

The court also instructed that a court should "cross-check the percentage award at which [it] arrive[s] against the 'lodestar' award method, which is normally employed in statutory fee-award cases." *Id.* These factors "need not be applied in a formulaic way. Each case is different, and in certain cases, one factor may outweigh the rest." *Gunter v. Ridgewood Energy Corp.*, *supra*, 223 *F.3d* at 195 n. 1.

A. Size of Fund and Number of Persons Benefited
Generally speaking, as the size of the settlement fund increases, the percentage award decreases. *In re Prudential Ins. Co. of Am. Sales Practices Litig., supra,* 148 *F.3d* at 339; *Cullen v. Whitman Med. Corp.,* 197 *F.R.D.* 136, 148 (E.D.Pa.2000). The basis for the inverse relationship is the belief that at some point the size of the recovery is attributable to the size of the class and has no direct relationship with the efforts of counsel. *In re Prudential Ins. Co. of Am. Sales Practices Litig., supra,* 148 *F.3d* at 339.

Plaintiffs' contend that the value of the settlement is more than $14.5 million, based upon the sum of the cash fund, the cost of brake inspections, and the administrative costs that are being borne by defendant. Although it is unclear exactly how much of the $12 million fund will actually be used up through the claims process, the objectors speculation that only a small fraction of claims will be honored is belied by the unusually robust response of class members for the free brake inspections. If this response is emblematic of those who will take advantage of the fund, I believe that most, if not all of it will be devoted to compensate individual class members. As for the estimated value of the brake inspections, the assignment of $50 for each inspection appears soundly based in the record, and when combined with the 50,000 requests for inspection, results in the $2.5 million additur to the $12 million cash fund. Lastly, the administrative costs that will be shouldered by defendant surely have value to plaintiffs, even if a mathematically precise amount may not be calculable at this time.

Since the requested fees ($2.9 million) reflects only 20% of the value of the settlement, it is neither outrageous nor shocking. Thus, this first *Gunter* factor disfavors reduction of the requested attorneys' fees.

B. Presence or Absence of Substantial Objections
The second *Gunter* factor assays the quality and quantity of objections by class members to the settlement terms and to the fees requested by their counsel. The majority of objections directed against the attorneys' fees addressed the unrealistic comparison of the benefit to individual class members with the aggregate of the fee request. The objectors point out the difficulty in assessing the true value of the settlement at this time, and continually argue that a better settlement should have been demanded by plaintiffs' attorneys. The objectors' position echoes a familiar refrain seen in class action settlements and the concomitant application for attorneys' fees. They have not persuasively argued that plaintiffs' attorneys' fees request is anything more than a product of lawyer's avarice. This emotional argument does not hold sway. This factor neither favors nor disfavors the award of the requested attorneys' fees.

C. Skill and Efficiency of Attorneys Involved
*22 A goal of the percentage fee-award is to ensure that competent counsel continue to undertake risky, novel, and complex litigation that serves the public interest. The experience and expertise of plaintiffs' attorneys supports the requested award. All counsel conducted themselves thus far in a professional and expert manner throughout this case.

D. Complexity and Duration of the Litigation
Although this case involves complex legal and factual issues, it contains none of a sort that would engender novel or first impression considerations. Indeed, although defendant put plaintiffs' counsel through extensive and time consuming motion practice and discovery procedures, and dispositive motions would certainly follow, the heat created by the friction of the adversary process in this case does not appear too great. In other words, this litigation is not unduly demanding, nor overly taxing to the attorneys for plaintiffs.

E. Risk of Nonpayment
This case, like most consumer product class actions, presents the potential for an uncertain outcome and a significant risk of not recovering anything. On the other hand, there was a favorable outlook for recovery sufficient for seasoned counsel to undertake the case on behalf of plaintiffs and the class on a contingency fee basis. This factor does not favor the requested fee to any great extent.

F. Amount of Time Devoted by Counsel
Plaintiffs' attorneys had expended 3,777 of hours on this action as of October 2006. This amount of attorney time is disproportionate to the request for $2.9 million in fees, especially where the tangible cash benefits to the class are less than $12 million. I find that the amount of time devoted to this case weighs against the percentage of recovery requested as a fee in this case.

G. Awards in Similar Cases

This factor requires the court to compare the percentage of recovery requested as a fee in this case against the percentage of recovery in other common fund cases in which the percentage of recovery method, rather than the lodestar method, was used. *In re Cendant Corp. Prides Litig., supra,* 243 *F.3d* at 737. In *Vizcaino v. Microsoft Corp.,* 290 *F.3d* 1043 (9th Cir.2002), the court surveyed percentage based attorneys' fee awards in thirty-four common fund cases. The awards included in the survey ranged from 2.8% to 40% of the common fund. *Id.* at 1052-54. Eighteen of the thirty-four cases analyzed by the Ninth Circuit involved settlements of $100 million or more. Attorneys' fees of 30% of the common fund were awarded in only three of those cases. Percentage based fees of 25% or more were awarded in nine of the eighteen megafund cases surveyed. *Id.* The *Vizcaino* court affirmed a fee award of 28% of a common fund of approximately $97 million. *Id.* at 1052. The Third Circuit examined the percentage based fee awards in eighteen megafund cases in *In re Cendant Corp. Prides Litig., supra,* 243 *F.3d* at 737-38. The "attorneys' fee awards ranged from 2.8% to 36% of the common fund in those cases." *Id.* at 738. Percentage based fees of 30% or more were awarded in only three of the cases reviewed by the Third Circuit. *Id.* The fee award was more than 25% of the common fund in five of the eighteen cases. *Id.* Attorneys' fees of 25% of the common fund of $ 126.6 million were awarded to plaintiffs' counsel in *In re Rite Aid. In re Rite Aid Sec. Litig.,* 362 *F.Supp.*2d 587 (E.D.Pa.2005). See also *In re Combustion, Inc.,* 968 *F.Supp.* 1116, 1136 (W.D.La.1997) (setting a maximum cap reserve for attorneys fees of 36% of common fund of $ 127 million); *In re Ikon Office Solutions, Inc. Sec. Litig., supra,* 194 *F.R.D.* at 192-196 (awarding attorneys' fees of 30% of common fund (less costs) of $108 million with an excess of 45,000 attorney hours).

*23 Having exhaustively reviewed the *Gunter* factors, I conclude that they do not support plaintiffs' request for an award of $2.9 million, representing 20% of the tangible settlement fund. Instead, a fee based upon the percentage method of 15% ($2,175,000) would be more appropriate, and yields an attorneys' fee slightly more than using the *Incollingo* method. This confirms that the attorneys' fee shall be $2,126,878.

IV. CONCLUSION

For the reasons set forth above, I grant class action status to this matter and appoint plaintiffs' attorneys as class counsel. I grant the motion to approve the settlement. I approve attorneys' fees and expenses for plaintiffs' attorneys in the total amount of $2,210,132. I request that plaintiffs' attorneys prepare the final judgment memorializing this decision, circulate it among all counsel and any objectors who appeared at the Fairness Hearing, and submit it to me for signature as soon as practicable pursuant to *R.* 4:42-1(c).

All Citations

Not Reported in A.2d, 2006 WL 3780789

Footnotes

1 This action and Judge Moses' provisional determinations that the action may proceed as a class action and that the settlement had apparent merit were pending before the New Jersey Rules of Court affecting class actions changed on September 1, 2006. I will apply the Rules in effect as of the date of this decision.

2 Statutory awards are generally calculated using the lodestar method (number of hours reasonably spent on the litigation multiplied by the hourly rate, enhanced in some circumstances by a multiplier), subject to any applicable statutory ceiling on the hourly rate. § 21.71 *Manual for Complex Litigation, Fourth* 334-335. Common fund awards are generally based upon a percentage of the common fund the class action has produced.

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Only the Westlaw citation is currently available.
NOT FOR PUBLICATION
United States District Court,
D. New Jersey.

Anthony Francis Martinez, on behalf of himself and all others similarly situated, Plaintiff,
v.
Equifax Inc. et al., Defendants.

Civil Action No. 15-2100 (SRC)
|
Signed 01/19/2016

Attorneys and Law Firms

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OPINION & ORDER

Chesler, U.S.D.J.

This matter comes before the Court on the motion to dismiss the Complaint and to strike the class action allegations, pursuant to Federal Rule of Civil Procedure 12(b)(6), by Defendants Equifax Inc. and Equifax Information Services LLC (collectively, "Equifax"). For the reasons stated below, the motion to dismiss will be granted in part and denied in part.

This case arises from a dispute between a consumer, Plaintiff Anthony Francis Martinez, and a credit reporting agency, Equifax, under the Fair Credit Reporting Act ("FCRA"). In brief, the Complaint alleges that Equifax issued a credit report with incorrect and damaging information about Plaintiff, and refused to correct it. The Complaint asserts four claims for FCRA violations: 1) failure to implement reasonable procedures; 2) failure to conduct a reasonable investigation; 3) failure to provide notice of dispute; and 4) failure to consider all relevant information. The Complaint asserts these claims for Plaintiff, as well as on behalf of a putative class.

The class allegations in the Complaint begin by defining the class: the class action "is brought of behalf of all persons who disputed an Equifax credit report and where Equifax failed to apply the proper and appropriate FCRA procedures." (Compl. ¶ 35.) The Complaint also states that questions of law or fact common to the class predominate over any questions affecting only individual members, and then cites seven issues concerning violations of the FCRA.

Defendants first move to dismiss the Complaint against Defendant Equifax Inc., arguing that Equifax Inc. is not a consumer reporting agency, as defined by the FCRA. Plaintiff, in response, does not oppose this. The motion to dismiss the Complaint against Defendant Equifax Inc. will be granted, and, as to Defendant Equifax Inc. only, the Complaint will be dismissed with prejudice.

Defendants next move to dismiss Counts III and IV, contending that the Complaint does not plead sufficient facts to make these claims plausible under the pleading standards of Iqbal and Twombly. As to Count III, violation of the FCRA through failure to provide notice of the dispute, Defendants correctly assert that the Complaint pleads insufficient facts in support: the Complaint has no information about even what entity provided the allegedly incorrect information to Equifax, much less anything about what transpired between Equifax and that unidentified entity. As to Count III, the motion to dismiss will be granted, and the claim will be dismissed without prejudice.

As to Count IV, for violation of the FCRA through failure to consider all relevant information provided by the consumer, the Complaint pleads sufficient facts to make plausible a claim that Defendant violated the FCRA by failing to consider all relevant information provided by the consumer. Taking the factual allegations as true, such a violation appears plausible.[1] As to Count IV, the motion to dismiss will be denied.

*2 Defendants next move to strike the class allegations from the Complaint, arguing that the putative class, as defined, cannot be certified as a matter of law. Defendants argue that where, as here, it is clear from the face of the Complaint that the requirements for maintaining a class action cannot be met, it is appropriate to strike the class allegations at this early point in the litigation.

Defendants contend that the proposed class, as currently defined, does not and cannot meet the requirements of

Federal Rule of Civil Procedure 23. The Third Circuit has held:

> The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. To invoke this exception, every putative class action must satisfy the four requirements of Rule 23(a) and the requirements of either Rule 23(b)(1), (2), or (3). To satisfy Rule 23(a), (1) the class must be 'so numerous that joinder of all members is impracticable' (numerosity); (2) there must be 'questions of law or fact common to the class' (commonality); (3) 'the claims or defenses of the representative parties' must be 'typical of the claims or defenses of the class' (typicality); and (4) the named plaintiffs must 'fairly and adequately protect the interests of the class' (adequacy of representation, or simply adequacy). Rule 23(b)(3), the basis for certification here, 'requires that (i) common questions of law or fact predominate (predominance), and (ii) the class action is the superior method for adjudication (superiority).'

Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 590-591 (3d Cir. 2012) (citations omitted).

The Complaint paraphrases the language of Rule 23(b)(3), asserting that "[t]here are questions of law or fact common to the Class that predominate over any questions affecting only individual members." (Compl. ¶ 38(B).) To be certified, the proposed class must therefore meet the requirements for classes pursuant to Rule 23(a) and Rule 23(b)(3).

> In addition, the Third Circuit requires that a Rule 23(b)(3) class be ascertainable: Many courts and commentators have recognized that an essential prerequisite of a class action, at least with respect to actions under Rule 23(b)(3), is that the class must be currently and readily ascertainable based on objective criteria. If class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate. Some courts have held that where nothing in company databases shows or could show whether individuals should be included in the proposed class, the class definition fails.

Marcus, 687 F.3d at 592-593 (citations omitted).

Recently, the Third Circuit provided additional guidance on the ascertainability requirement:

> The ascertainability inquiry is two-fold, requiring a plaintiff to show that: (1) the class is 'defined with reference to objective criteria'; and (2) there is 'a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.' The ascertainability requirement consists of nothing more than these two inquiries. And it does not mean that a plaintiff must be able to identify all class members at class certification—instead, a plaintiff need only show that 'class members *can* be identified.'

Byrd v. Aaron's Inc., 784 F.3d 154, 163 (3d Cir. 2015).

Defendants argue, and this Court agrees, that the class definition in the Complaint fails to meet the ascertainability requirement. First and foremost, the putative class is not defined with reference to objective criteria. The Complaint states that the class action "is brought of behalf of all persons who disputed an Equifax credit report and where Equifax failed to apply the proper and appropriate FCRA procedures." (Compl. ¶ 35.) This definition has two components: 1) the set of all persons who disputed an Equifax credit report; and 2) "where Equifax failed to apply the proper and appropriate FCRA procedures." The first component of the class definition is easily ascertained by reference to objective criteria, such as a list of all people who disputed an Equifax credit report, which clearly and crisply identifies all potential class members.

*3 The second component of the definition, however, is not sufficiently ascertainable. It meets neither part of the Byrd ascertainability requirements. First, it lacks any reference to objective criteria. It leaves unanswered a host of crucial questions: what specific procedures are proper and appropriate? How is the determination of the proper and appropriate procedure made? Procedures for doing what? This Court does not see how this subset of report-disputing consumers – the ones subjected to procedural failures by Equifax –can be determined by reference to any objective criteria.

Second, there appears to be no reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition. This is both because the class definition is unworkably vague, and also because it necessitates individualized fishing expeditions to search for unspecified violations of FCRA. This sounds very much like what the Third Circuit had in mind when it stated: "If class members are impossible to identify without

extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate." Marcus, 687 F.3d at 593. This Court does not see how it would be possible to ascertain the members of this subset without resort to individualized, open-ended fishing for FCRA violations.

In opposition, Plaintiff cites cases in which, he contends, other courts have certified similarly-defined classes. These cases are worth discussing, because they highlight the defects in Plaintiff's class definition. Plaintiff first cites Soutter v. Equifax Info. Servs., LLC, 307 F.R.D. 183, 194-195 (E.D. Va. 2015), an Equifax FCRA case in which the Court certified a class defined as follows:

> All natural persons who meet every one of the following definitional requirements:
>
> 1. the computer database of the Executive Secretary of the Supreme Court of Virginia shows that the person was the defendant in a Virginia General District Court civil action or judgment;
>
> 2. the computer database of the Executive Secretary of the Supreme Court of Virginia shows that as of the date 20 days after the Court's certification of this class, the civil action or judgment was dismissed, satisfied, appealed, or vacated on or before April 1, 2009 ("the disposition date");
>
> 3. Equifax's records note receipt of a communication or dispute from that person about the accuracy of Equifax's reporting of that civil action or judgment status; and
>
> 4. Equifax's records note that a credit report regarding the person was furnished to a third party who requested the credit report, other than for an employment purpose: (1.) no earlier than February 17, 2008, (2.) no later than February 21, 2013, (3.) after the date that Equifax's records note its receipt of the consumer dispute regarding the judgment status, and (4.) at least thirty (30) days after the disposition date but before the judgment notation was corrected by Equifax to report that it was satisfied, appealed or vacated.

This definition identifies the proposed class clearly and crisply, defining it by reference to clear objective criteria, and the administrative process for determining whether putative class members fall within the class definition is easy to envision. Unlike the class definition in the instant case, the Soutter class definition did not necessitate mini-trials.

Plaintiff next cites Summerfield v. Equifax Info. Servs. LLC, 264 F.R.D. 133, 144 (D.N.J. 2009), an Equifax FCRA case in which the Court certified a class defined as follows:

> All consumers in the State of New Jersey to whom, beginning two years prior to the filing of this Complaint and continuing through resolution of this action, in response to a dispute about the accuracy of a public record that Defendant reported (including, but not limited to bankruptcies, liens, or judgments), Defendant sent a letter substantially similar to the Letter attached to the Complaint as Exhibit A.

*4 As with the definition in Soutter, and unlike that in the instant case, this defines the class by reference to clear objective criteria, the administrative process for determining whether putative class members fall within the class definition is easy to envision, and that process does not necessitate mini-trials.

Plaintiff next cites Clark v. Experian Info. Sols., Inc., 2002 WL 2005709 (D.S.C. June 26, 2002), a case in which the cited decision does not quote the class definition. It does, however, give a good sense of it, offering this summary:

> In their initial complaints, named Plaintiffs Franklin E. Clark and Latanjala Denise Miller allege that Defendants Experian Information Solutions, Inc., Equifax, Inc., Equifax Credit Information Services, Inc., Trans Union Corp., and Trans Union L.L.C. willfully failed to set up or maintain reasonable procedures to assure the maximum possible accuracy of information contained in their consumer credit reports. Plaintiffs further alleged that, for at least the past two years, Defendants have produced consumer credit reports regarding Plaintiffs, and the putative class, which indicate that Plaintiffs have been involved in bankruptcy proceedings. Plaintiffs contended, however, that neither they nor those similarly situated ever have filed bankruptcy, or at least have not filed within the ten

> year period immediately preceding the inclusion of the alleged inaccurate information in the credit reports.

Id. at *1. This suggests that the amended complaint proposed the easily ascertainable class of persons whose credit report incorrectly said that they had filed for bankruptcy. As with the definitions in Clark and Soutter, and unlike that in the instant case, this defines the class by reference to clear objective criteria, the administrative process for determining whether putative class members fall within the class definition is easy to envision, and that process does not necessitate mini-trials.

Plaintiff correctly contends that these three cases are on point, but they do not support Plaintiff's position. Instead, they highlight the defects in Plaintiff's proposed class definition. Plaintiff's proposed class definition fails to meet the ascertainability requirement. It is clear at this early stage of the litigation, as a matter of law, that this Court would never grant a motion for class certification involving this class definition. The class action allegations in the Complaint will be struck. Should Plaintiff wish to amend the Complaint to redefine the class, he must seek this Court's leave to do so.

The motion to dismiss the Complaint and to strike the class allegations will be granted in part and denied in part. As to Defendant Equifax Inc. only, the motion to dismiss will be granted, and the Complaint will be dismissed with prejudice. As to Count III, the motion to dismiss will be granted, and the claim will be dismissed without prejudice. As to Count IV, the motion to dismiss will be denied. The motion to strike the class allegations in the Complaint will be granted.

For these reasons,

IT IS on this 19th day of January, 2016,

ORDERED that Defendants' motion to dismiss the Complaint and to strike the class action allegations (Docket Entry No. 9), pursuant to Federal Rule of Civil Procedure 12(b)(6), is **GRANTED** in part and **DENIED** in part; and it is further

***5 ORDERED** that, as to Defendant Equifax Inc. only, the motion to dismiss is **GRANTED**, and the Complaint is hereby **DISMISSED** with prejudice; and it is further

ORDERED that, as to Count III, the motion to dismiss is **GRANTED**, and Count III is hereby **DISMISSED** without prejudice; and it is further

ORDERED that, as to Count IV, the motion to dismiss is **DENIED**; and it is further

ORDERED that the motion to strike the class allegations is **GRANTED**, and the class allegations in the Complaint are hereby **STRUCK**.

All Citations

Slip Copy, 2016 WL 226639

Footnotes

1 Defendants argue that there "are any number of reasons why an investigation that included a review of Mr. Martinez's submissions" could have resulted in rejecting his dispute. That is absolutely true. Iqbal, however, does not require that a complaint's factual allegations must make a claim more likely true than not, but only that the complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v.Iqbal, 556 U.S. 662, 678 (2009). The facts alleged make it plausible that Equifax failed to consider all relevant information provided by Plaintiff.

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