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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOHN TRUE, individually)
and on behalf of all)
others similarly)
situated,)
Plaintiff,)
v.)
AMERICAN HONDA MOTOR)
CO., INC.,)
Defendants.)

Case No. EDCV 07-287-VAP
(OPx)
**[Motion filed on March 2,
2009]**
**ORDER DENYING PRELIMINARY
APPROVAL WITH LEAVE TO
SUBMIT ADDITIONAL MATERIALS
NO LATER THAN APRIL 24, 2009**

Plaintiffs John True ("True") and Gonzalo Delgado's ("Delgado") (collectively "Plaintiffs") Motion for Preliminary Approval of Settlement ("Motion") came before the Court for hearing on March 23, 2009. After reviewing and considering all papers filed in support of, and in opposition to, the Motion the Court DENIES the Motion WITHOUT PREJUDICE and grants the parties leave to submit additional materials no later than April 24, 2009.

1 Plaintiffs allege they were exposed to advertising
2 regarding the fuel efficiency of Honda Civic Hybrid
3 ("HCH") automobiles and bought HCHs based on these
4 representations during the class period, between 2003 and
5 2008. (First Amended Complaint ("FAC") ¶¶ 1-10; Class
6 Action Settlement Agreement and Release ("Settlement
7 Agreement") at 1, 9.)

8
9 **I. BACKGROUND**

10 True named American Honda Motor Company ("Defendant")
11 as Defendant in a Complaint filed on March 9, 2007, in
12 which Delgado joined. Plaintiffs seek relief on the
13 following claims: (1) California Business and Professions
14 Code section 17200; (2) California Business and
15 Professions Code section 17500; (3) California Civil Code
16 section 1750; (4) common law unjust enrichment. (Motion
17 for Preliminary Approval of Settlement ("Mot.") 1.)

18
19 Defendant brought a Motion to Dismiss, which the
20 Court denied on June 25, 2007. The parties engaged in
21 approximately 11 months of discovery and motion practice
22 before proceeding to mediation. (Mot. 2.) By December
23 2008, the parties reached a settlement in principle.
24 (Mot. 2.)

25
26 They now seek preliminary approval of the Settlement
27 Agreement and move the Court to enter an order directing:
28

1 (1) Certification of a single class, solely for the
2 purpose of settlement, under Rule 23 of the Federal Rules
3 of Civil Procedure, consisting of "[a]ll persons who
4 purchased or leased a new Honda Civic Hybrid automobile
5 model years 2003 through 2008 in the United States of
6 America including the District of Columbia" excluding
7 Defendant and its subsidiaries and affiliates and their
8 employees, officers, their family members, class counsel,
9 and all persons who timely opt out of the proposed
10 settlement (Settlement Agreement Ex. E ¶ 1);

11 (2) Preliminary approval of the Settlement Agreement;

12 (3) Approval of the proposed Class Notice, notice
13 via the website, and Consumer Claim Form (Settlement
14 Agreement Exs. B-D);

15 (4) Appointment of True and Delgado as class
16 representatives (Settlement Agreement Ex. C ¶ 9);

17 (5) Appointment of Nicholas Chimicles ("Chimicles")
18 and Jonathan Cuneo ("Cuneo") as class counsel;

19 (6) Appointment of Defendant as claims
20 administrator; and

21 (7) Establishment of a date for a final fairness
22 hearing on the settlement agreement. (See Settlement
23 Agreement Ex. C.)

24

25 Plaintiffs also move for a finding that Defendant
26 provided notice of proposed settlement to the Attorney

27

28

1 General of the United States and the attorneys general of
2 the States as required by 28 U.S.C. § 1715(b).

3

4 **B. Facts**

5 Pursuant to the Settlement Agreement, Defendant will
6 review its fuel economy advertising for the HCH and will
7 modify its disclaimer language for at least 24 months,
8 including at least changing the language from "actual
9 mileage may vary" to "actual mileage will vary." (Mot.
10 4; Settlement Agreement 14.) In addition, all class
11 members will receive a DVD demonstrating methods for
12 operating and maintaining HCHs to maximize fuel economy.
13 (Mot. 3.) Class members will also receive one of four
14 kinds of payments or discounts, described below. The
15 parties do not explain the size of the total fund
16 available for these monies, nor whether it is
17 reversionary. (See Mot. 2-4.)

18

19 **1. Option A**

20 Option A is available to members of the proposed
21 class who: (1) own (rather than lease) an HCH; (2) sell
22 or trade in their HCH; and (3) buy an Eligible Vehicle
23 from Defendant, defined as "a new model year 2009 or 2010
24 Honda or Acura, excluding the Honda Fit, Honda Insight,
25 HCH or any Honda Certified Used Car or Acura Certified
26 Pre-Owned Vehicle." Those claiming relief under Option A
27 must buy an Eligible Vehicle (4) before June 30, 2011.

28

1 They will receive \$1,000. This benefit is non-
2 transferrable. (Mot. 3; Settlement Agreement 11-12.)

3

4 **2. Option B**

5 Option B is available to those class members who
6 retain ownership or a leasehold on their HCH and (1)
7 purchase an Eligible Vehicle from Defendant (2) before
8 June 30, 2011. They will receive a \$500 payment,
9 transferrable to certain listed family members: spouses,
10 parents, siblings, children, grandparents, or
11 grandchildren. (See Settlement Agreement 12-13.)
12 Registered domestic partners, in states that recognize
13 those unions, are not included, however.

14

15 **3. Option C**

16 Option C is available to those class members who made
17 a documented Complaint regarding the fuel economy of
18 their HCH to Defendant, an authorized Honda or Acura
19 dealership who reported the Complaint to Defendant, or to
20 Plaintiffs' counsel. They will receive a cash payment of
21 \$100. The moving papers do not contain an estimate of
22 the number of persons who made qualifying complaints.
23 (Settlement Agreement 13-14.)

24

25 **4. No additional relief**

26 Class members who do not want to, or are not able to,
27 buy an Eligible Vehicle, and who did not make a

28

1 qualifying complaint, will be ineligible to receive any
2 payments or discounts.

3

4 In exchange for receiving these benefits, class
5 members will release Defendant of all claims that were or
6 could have been made arising from Defendants' marketing
7 regarding the fuel economy of the HCH. (Mot. 4;
8 Settlement Agreement 6-7.)

9

10 The entire Settlement Agreement is subject to
11 cancellation by Defendant "[i]f one hundred (100) or more
12 Settlement Class Members properly and timely submit
13 requests for exclusion from the Settlement Class."
14 (Settlement Agreement 31.) Plaintiffs' counsel estimates
15 the class consists of approximately 120,000 people.
16 (Mot. 5-6.) The moving papers do not address the
17 likelihood that more than 100 persons will opt out.

18

19 Plaintiffs request attorneys' fees, expenses, and
20 named plaintiffs' incentive awards of no more than
21 \$2,950,000. (Mot. 4; Settlement Agreement 20-21.)
22 Plaintiffs seek \$12,500 for True and \$10,000 for Delgado
23 as incentive payments. (Mot. 4.)

24

25

II. LEGAL STANDARD

26

27

Parties seeking class certification for settlement
purposes must satisfy the requirements of Rule 23.

28

1 Amchem Prods, Inc. v. Windsor, 521 U.S. 591, 620 (1997).
2 A court considering such a request should give the Rule
3 23 certification factors "undiluted, even heightened,
4 attention in the settlement context." Id.

5
6 Under Rule 23(a), in order to bring a class action, a
7 plaintiff must demonstrate: the class is so numerous that
8 joinder of all members is impracticable ["numerosity"],
9 (2) there are questions of law or fact common to the
10 class ["commonality"], (3) the claims or defenses of the
11 representative parties are typical of the claims or
12 defenses of the class ["typicality"], and (4) the
13 representative parties will fairly and adequately protect
14 the interests of the class ["adequacy of
15 representation"].

16
17 In addition to these prerequisites, a plaintiff must
18 satisfy one of the prongs of Rule 23(b) in order to
19 maintain a class action. Where, as here, a plaintiff
20 moves for class certification under Rule 23(b)(3), the
21 plaintiff must prove that:

22 the questions of law or fact common to
23 the members of the class predominate over
24 any questions affecting only individual
25 members, and that a class action is
superior to other available methods for
the fair and efficient adjudication of
the controversy.

26
27 The matters pertinent to the findings include: (A) the
28 interest of members of the class in individually

1 controlling the prosecution or defense of separate actions;
2 (B) the extent and nature of any litigation concerning the
3 controversy already commenced by or against members of the
4 class; (C) the desirability or undesirability of
5 concentrating the litigation of the claims in the
6 particular forum.¹

7
8 Rule 23(e) requires the Court to approve any
9 settlement, voluntary dismissal, or compromise of the
10 claims, issues, or defenses of a certified class. Fed. R.
11 Civ. P. 23(e). The court must hold a hearing and find that
12 "the settlement . . . is fair, reasonable, and adequate."
13 Fed. R. Civ. P. 23(e)(2). Review of a proposed settlement
14 generally proceeds in two stages, a hearing on preliminary
15 approval followed by a final fairness hearing. See Federal
16 Judicial Center, Manual for Complex Litigation, § 21.632
17 (4th ed. 2004).

18
19 At the preliminary approval stage, a court determines
20 whether a proposed settlement is "within the range of
21 possible approval" and that notice should be sent to class
22 members. In re Corrugated Container Antitrust Litig., 643
23 F.2d 195, 205 (5th Cir. 1981); see also Gautreaux v.
24 Pierce, 690 F.2d 616, 621 n.3 (stating that the purpose of
25 a preliminary approval hearing is "to ascertain whether

26 ¹A fourth factor, "the difficulties likely to be
27 encountered in the management of a class action," need
28 not be considered when class certification is only for
settlement purposes. Fed. R. Civ. P. 23(b)(3)(D); Amchem
Prods., 521 U.S. at 620.

1 there is any reason to notify the class members of the
2 proposed settlement and to proceed with a fairness
3 hearing"); Manual for Complex Litigation § 21.632.

4 5 **III. DISCUSSION**

6 For the reasons explained below, the Court lacks
7 sufficient information to determine whether the proposed
8 class satisfies the requirements of Rule 23 and whether
9 the proposed settlement is fair, adequate, and
10 reasonable.

11 12 **A. Certification of the Class**

13 Plaintiffs seek certification under Rule 23 of a
14 single class of buyers of HCHS, based on Defendant's
15 advertising which allegedly violates: (1) California
16 Business and Professions Code section 17200; (2)
17 California Business and Professions Code section 17500;
18 (3) California Civil Code section 1750; and resulted in
19 (4) common law unjust enrichment. (Mot. 1; FAC ¶ 6.)

20 21 **1. Numerosity**

22 To establish, under Rule 23(a)(1), that joinder of
23 all members is "impracticable," the plaintiff need not
24 show that it would be "impossible" to join every class
25 member. Haley v. Medtronic, Inc., 169 F.R.D. 643, 647
26 (C.D. Cal. 1996). There is no specific number
27 requirement, as the court may examine the specific facts
28

1 of each case. Ballard v. Equifax Check Servs., Inc., 186
2 F.R.D. 589, 594 (E.D. Cal. 1999).

3

4 Here, Plaintiffs' counsel estimates the proposed
5 class consists of over 120,000 persons. (Mot. 5-6.)
6 This satisfies the numerosity requirement of Rule 23(a).

7

8 **2. Commonality**

9 Courts have construed Rule 23(a)(2)'s commonality
10 requirement permissively. Hanlon v. Chrysler Corp., 150
11 F.3d 1011, 1019 (9th Cir. 1998). As the Ninth Circuit
12 explained:

13 All questions of fact and law need not be
14 common to satisfy the rule. The
15 existence of shared legal issues with
16 divergent factual predicates is
sufficient, as is a common core of
salient facts coupled with disparate
legal remedies within the class.

17

18 Id.

19

20 Additionally, this Court, Pfaelzer, J., has stated
21 that "the commonality requirement is interpreted to
22 require very little," In re Paxil Litigation, 212 F.R.D.
23 539, 549 (C.D. Cal. 2003), and that "for the commonality
24 requirement to be met, there must only be one single
25 issue common to the proposed class." Haley, 169 F.R.D.
26 at 648.

27

28 Here, Plaintiffs' FAC alleges several common

1 questions of fact and law: (1) whether Defendant's
2 advertising was false and misleading; (2) whether
3 Defendant knew or should have known it was misleading;
4 (3) whether Defendant's claims about fuel economy were
5 material to the class; (4) whether the class suffered
6 damages; (5) whether Defendant knew or should have known
7 the class members would experience significantly less
8 fuel economy than advertised; (6) whether Defendant
9 concealed or failed to tell the class about material
10 facts regarding fuel economy. (Mot. 6; FAC ¶¶ 26-32.)
11 Accordingly, Plaintiffs satisfy the commonality
12 requirement.

13

14 **3. Typicality**

15 To gauge typicality, a "court does not need to find
16 that the claims of the purported class representative[s]
17 are identical to the claims of the other class members."
18 Haley, 169 F.R.D. at 649. The Ninth Circuit in Hanlon
19 further wrote that "[u]nder the rule's permissive
20 standards, representative claims are 'typical' if they
21 are reasonably co-extensive with those of absent class
22 members; they need not be substantially identical." 150
23 F.3d at 1020. Additionally, the class representatives
24 "must be able to pursue [their] claims under the same
25 legal or remedial theories as the unrepresented class
26 members." Paxil, 21 F.R.D. at 549.

27

28

1 Here, Plaintiffs assert their claims are typical
2 because they bought HCHs seeking fuel efficiency but were
3 never able to achieve the advertised mileage per gallon.
4 (Mot. 7-8.) **They rely on excerpts from deposition**
5 **transcripts but fail to attach these to the Motion.** Even
6 assuming for the sake of this Motion the excerpts are
7 accurately cited, however, the Court cannot assess
8 whether Plaintiffs' claims are typical because, although
9 the FAC asserts Plaintiffs were exposed to advertising
10 and relied on it, **Plaintiffs do not so state in their**
11 **Motion.** (See FAC ¶¶ 4-5 (all class members exposed to
12 advertising and all relied on it), 29 (named Plaintiffs'
13 claims typical).) **Plaintiffs are directed to amend their**
14 **pleading with pertinent excerpts from the deposition**
15 **transcripts, bracketed according to Local Rules 32-1 and**
16 **16-2.7.**

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4. Adequacy of Representation

Traditionally, courts have engaged in a two-part analysis to determine if the plaintiff has met the requirements of Rule 23(a)(4): (1) the class representative must not have interests antagonistic to the unnamed class members, and (2) the representative must be able to prosecute the action "vigorously through qualified counsel." Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507, 512 (9th Cir. 1978).

1 Adequate representation "'depends on the
2 qualifications of counsel for the representatives, an
3 absence of antagonism, a sharing of interests between
4 representatives and absentees, and the unlikelihood that
5 the suit is collusive.'" Paxil, 212 F.R.D. at 550.
6 Courts now determine the adequacy of counsel under Rule
7 23(g). See, e.g., Hill v. Merrill Gardens, L.L.C., 2005
8 WL 2465250, *3 (N.D. Ind. 2005); F.R.C.P. 23 Advisory
9 Committee Notes.

10
11 **a. Named Plaintiffs**

12 The Court cannot assess whether named Plaintiffs are
13 adequate representatives because Plaintiffs' counsel
14 failed to submit declarations from named Plaintiffs
15 regarding any possible conflicts of interest between them
16 and the proposed class. **The Court will permit Plaintiffs**
17 **leave to supplement their Motion to support the absence**
18 **of antagonism between named Plaintiffs and the class.**
19 **Such materials should address whether named Plaintiffs**
20 **owned or leased their HCHs and the type of relief they**
21 **intend to claim under the Settlement Agreement.**

22
23 **b. Counsel**

24 Plaintiffs' counsel submitted substantial evidence of
25 their experience with class action, complex, and other
26 large-scale litigation, including substantial trial
27 experience. (Joint Declaration of Co-Lead Counsel
28

1 Jonathan W. Cuneo and Nicholas E. Chimicles ("Cuneo &
2 Chimicles Decl.") ¶¶ 2, 3, Exs. 1-2.) Plaintiffs'
3 counsel have made an adequate showing of their
4 qualifications. See Fed. R. Civ. P. 23(g).

5
6 **5. Predominance of Common Questions of Law or Fact**
7 **and Superiority of a Class Action**

8 Plaintiffs satisfy the requirements of Rule 23(b).
9 Common questions of fact predominate, common questions of
10 law may predominate, and a class action is clearly the
11 superior way to resolve this controversy.

12
13 First, this action concerns claims based on
14 nationwide advertising created and distributed on behalf
15 of a single company regarding a single product; all class
16 members allegedly wrongly paid a hybrid premium, or
17 additional cost to obtain a hybrid rather than
18 conventional vehicle.² The Court has already determined
19 it can infer reliance on the advertising because the
20 alleged misrepresentations were material. (Mot. 11; June
21 22, 2007 Order Denying Defendant's Motion to Dismiss 12-

22
23 ²The record is ambiguous about the amount of the
24 hybrid premium. Plaintiffs plead a hybrid premium of
25 "nearly \$7000" in their FAC and original Complaint, based
26 on comparing the prices of hybrid and non-hybrid Honda
27 Civic models. (FAC ¶ 15; Compl. ¶ 15.) Although
28 Plaintiffs' counsel states they consulted with experts
about how to "calculate the difference in value between a
similarly equipped Honda Civic and Honda Civic Hybrids"
they do not explain why they now estimate the hybrid
premium at \$2500, less than half the original estimate.
(See Cuneo & Chimicles Decl. ¶ 44.)

1 13.) Although individual damages, including restitution
2 for unanticipated fuel expenses, would vary, common
3 issues of fact predominate over individualized inquiries.
4 (See Mot. 11.)

5
6 Second, Plaintiffs assert common legal issues
7 predominate because California law applies to all members
8 of the nationwide class because all of the following are
9 located in California: (1) Defendant's headquarters,
10 where it "coordinated" Defendant's "national and regional
11 advertising" and "regulated or reviewed dealer
12 advertising"; (2) Defendant's primary advertising agency,
13 where it "created and placed all or substantially all of
14 the advertising and promotional materials at issue;" and
15 (3) the offices of Defendant's legal and regulatory
16 departments, which reviewed Defendant's advertising.
17 (Mot. 9-10 citing Clothesrigger, Inc. v. GTE Corp., 191
18 Cal. App. 3d 605, 613 (1987).)

19
20 Third, Plaintiffs also show a class action is the
21 superior method of resolving this controversy as each
22 class member has a relatively small and uniform injury.
23 (Mot. 12.)

24
25 For the reasons above, Plaintiffs have carried their
26 burden and satisfied the requirements of Rule 23(b)(3).

1 **B. Fairness and Adequacy of Settlement Agreement**

2 We now turn to the factors of Rule 23(e) to determine
3 whether the settlement is adequate and reasonable,
4 balancing several factors, including:

5 the strength of plaintiffs' case; the
6 risk, expense, complexity, and likely
7 duration of further litigation; the risk
8 of maintaining class action status
9 throughout the trial; the amount offered
10 in settlement; the extent of discovery
11 completed, and the stage of the
12 proceedings; the experience and views of
13 counsel; the presence of a governmental
14 participant; and the reaction of the
15 class members to the proposed settlement.

11 Class Plaintiffs v. City of Seattle, 955 F.2d 1268 (9th
12 Cir. 1992).

14 Here, the Settlement Agreement calls for a total
15 settlement amount which is undisclosed, \$2.95 million in
16 attorneys' fees, expenses and costs, including a total of
17 \$22,500 in class representative incentive payments for
18 the two named Plaintiffs. (Mot. 4.) The declarations of
19 Plaintiffs' counsel and the third-party mediator, as well
20 as other materials on the record, demonstrate the parties
21 engaged in substantial and arms-length negotiations over
22 several sessions, in person and through various
23 electronic media. (Mot. 12-13; Cuneo & Chimicles Decl.
24 ¶¶ 48-66.) **Although the Court is satisfied the
25 settlement was reached through arms-length negotiation,
26 it lacks sufficient information to grant or deny
27 preliminary approval to the settlement. The Court**
28

1 directs the parties to submit the information requested
2 below.

3
4 **1. The strength of Plaintiffs' case**

5 **The Court lacks sufficient information to assess the**
6 **strength of Plaintiffs' case and the risk and duration of**
7 **further litigation.** Plaintiffs assert the application of
8 California law to all members of the proposed class is a
9 contested legal issue. (See Mot. 19-20.) The parties
10 believe two cases pending before the California Supreme
11 Court, In re Tobacco II Cases, No. S147345 and Pfizer v.
12 Superior Court, No. 2145775 "may affect core legal issues
13 in this Lawsuit." The parties fail to explain how or why
14 these cases will affect this suit. (See Mot. 18 n.24.)
15 **The parties are invited to address the Court on this**
16 **issue at the hearing.**

17
18 Plaintiffs also assert preparation for trial will
19 require additional discovery, work with experts, and
20 preparation of a motion for summary judgment. (Mot. 18-
21 19.) While discovery, pretrial motion practice, and
22 trial preparation in a complex case normally entail
23 significant expense, their anticipated occurrence does
24 not alone inform the Court about which disputed legal or
25 factual issues Plaintiffs' counsel unearthed when
26 "review[ing] thousands of pages of relevant documents
27 produced by [Defendant] and third parties and tak[ing]

1 four depositions of [Defendant's] executives"
2 (Mot. 14.) Nor does the Motion explain what Plaintiffs
3 learned from their experts which led them to reduce the
4 estimate of the hybrid premium from \$7000 to \$2500.
5 (Compare FAC ¶ 15 with Mot. 11.) **The Court directs the**
6 **parties to submit further information on these issues.**

7
8 **2. The amount offered in settlement**

9 Plaintiffs assert the settlement is within the range
10 of possible approval because it "provides a meaningful
11 benefit to all Settlement Class Members," is "tailored to
12 remedy . . . the specific issues raised by Plaintiffs'
13 allegations," and is "user-friendly and accessible."
14 (Mot. 15.) In particular, Defendants assert the in-kind
15 benefits, the Option A and B discounts on certain of
16 Defendant's vehicles, are reasonable because they are of
17 real economic value to members of the proposed class.
18 (Mot. 15.)

19
20 Based on the record here, the Court cannot determine
21 the extent to which the proposed relief, including DVDs,
22 changes to advertising, the different types of payments
23 to those qualifying for Options A, B, and C, and the lack
24 of monetary payment for some class members is adequate
25 and reasonable for the proposed class of over 120,000
26 persons. (See Mot. 2-4, 12.)

27
28

1 First, Plaintiffs assert the DVD is of real value to
2 the class, drawing parallels to cases such as Shaw v.
3 Toshiba America Information Systems, Inc., 91 F. Supp. 2d
4 942, 946 (E.D. Texas 2000), in which settlement
5 consideration included a specially-designed software
6 patch. (Mot. 17.) **There is insufficient information in**
7 **the record here about the proposed content of the DVD,**
8 **which remains to be developed, to assess the extent to**
9 **which it may be valuable consideration. (See Settlement**
10 **Agreement 14-15.)** For example, the record does not
11 reveal the extent of the fuel efficiency gains estimated
12 to be garnered if members of the proposed class follow
13 its instructions.

14
15 Second, as to the value of in-kind payments,
16 Plaintiffs rely on Shaw, 91 F. Supp. 2d at 960, although
17 it undermines Plaintiffs' position in several important
18 respects. On the one hand, Shaw approves of settlements
19 including in-kind payments so long as they are of "real,
20 economic value to class members." Shaw, 91 F. Supp. 2d
21 at 960. Payment of \$1,000, \$500, or \$100 is no doubt of
22 some economic value. On the other hand, Shaw supported
23 its conclusion that the benefits at issue in the case
24 before it, "Toshiba Bucks," were of real value because
25 they were "designed to be as much like cash as possible -
26 specifically, they're assignable, aggregational, and
27 transferrable." Shaw, 91 F. Supp. at 961.

28

1 By contrast, the payments proposed here do not bear
2 these attributes. They are either not assignable at all,
3 or only to a limited degree, and for a limited time. For
4 these reasons, the proposed payments here are
5 distinguishable from "Toshiba Bucks": they are not
6 "designed to be as much like cash as possible." See
7 Shaw, 91 F. Supp. at 961.³

8
9 Third, the Court lacks two vital pieces of
10 information about the adequacy of the settlement: the
11 size of the total fund and the likely claims on the fund.
12 Useful information on this subject might include:

- 13 • **an estimated total number of persons in the proposed**
14 **class who intend to purchase an Eligible Vehicle**
15 **within the proposed time period, qualifying for**
16 **Options A or B;**⁴
- 17
18 • **an estimated total number of relatives or other**
19 **persons eligible for transfer of the \$500 Option B**
20 **payments intend to purchase an Eligible Vehicle**
21 **within the proposed time period;**

22
23 ³Plaintiffs also rely on Manners v. American General
24 Life Insurance Company, 1999 WL 33581944 (M.D. Tenn.
1999) but the Court's review of this case does not reveal
discussion of in-kind benefits.

25 ⁴Plaintiffs assert that "the historically high brand
26 loyalty exhibited by Honda owners" increase "the
27 likelihood that many Settlement Class Members would be
28 purchasing Honda vehicles in the near future." (Mot.
16.) Plaintiffs' only support is the deposition
transcript of Delgado, which was not provided with this
Motion.

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- an estimated total number of persons within the proposed class who made complaints to Defendant or to authorized dealers regarding HCH fuel efficiency, allowing them to recover under Option C; whether Defendant or Plaintiffs' counsel solicited such complaints; and whether there is reason to believe members of the proposed class made complaints that were never relayed to Defendant, barring them from relief under Option C; and
- an estimated total number of persons who are likely to recover no compensation save the DVDs from the proposed settlement.

The Court also directs the parties to brief the following issue: the reasons the parties, in seeking certification of Rule 23(b)(3) opt-out class, require those seeking relief under Option C to have "opted-in" some time ago by filing a written Complaint with Defendant or a Honda or Acura dealer.

3. The extent of discovery completed, and the stage of the proceedings

Plaintiffs filed this action on March 9, 2007. Over a two-year time span, Defendant produced approximately 17,000 pages of documents of an undisclosed nature,

1 tailored to discovery of Defendant's "development,
2 manufacturing, research, testing, advertising and
3 handling of complaints" regarding the HCH as well as
4 Defendant's corporate structure. (Mot. 14; see Cuneo &
5 Chimicles Decl. ¶¶ 28, 30.) Plaintiffs deposed
6 representatives of Defendant regarding: advertising by
7 independent Honda dealerships and Defendant's agreements
8 with them regarding advertising; advertising of HCH
9 through various media; "[t]he origins, background,
10 questions asked, preparation and factual support for the
11 Early Buyer Study⁵ produced by" Defendant and any other
12 relevant buyer studies. (Cuneo & Chimicles Decl. ¶¶ 33-
13 35.) The Court concludes discovery has been sufficient
14 to permit the parties to enter into a well-informed
15 settlement.

16

17 **4. The experience and views of counsel**

18 As explained above, Plaintiffs' counsel demonstrates
19 experience with class action and complex litigation and
20 provides a helpful description of the steps counsel
21 undertook in the litigation of this action. (See Mot.
22 14; Cuneo & Chimicles Decl. ¶¶ 48-68.) The Court does
23 not doubt the experience of Plaintiffs' counsel but
24 requires their views on the fairness, reasonableness, and
25 adequacy of the settlement. **Plaintiffs' counsel should**
26 **submit a statement regarding their views of the**
27 **settlement.**

28 ⁵Plaintiffs do not explain what this study is.

1 **5. The reaction of the class members to the**
2 **proposed settlement**

3 Plaintiffs provide no evidence regarding class
4 members' reaction to the proposed settlement. Plaintiffs
5 counsel fail to provide any declarations, including those
6 of the named Plaintiffs, regarding their reactions to the
7 proposed settlement. Indeed, the Motion does not mention
8 this factor at all. **The Plaintiffs shall submit the**
9 **declarations of True and Delgado regarding their view of**
10 **the proposed settlement.**

11
12 For the above reasons, Plaintiffs have not borne
13 their burden under Rule 23(e). Accordingly, the Court
14 cannot conclude the settlement is fair, reasonable, or
15 adequate.

16
17 **C. Notice**

18 Plaintiffs must provide notice to potential opt-in
19 class members that is "timely, accurate, and
20 informative." See Hoffmann-La Roche Inc. v. Sperling,
21 493 U.S. 165, 172 (1989) (emphasis added). The claims
22 administration process and the claims forms are deficient
23 in several respects.

24
25 **1. Claims administration process**

26 Defendant will act as the Claims Administrator.
27 (Settlement Agreement 15-19; Notice Plan). It will send
28

1 the notice and claims forms to class members, attempt to
2 locate class members no longer at their original
3 addresses, provide notice via a website, and assist class
4 members with the claims process through a telephone
5 Helpline. (Notice Plan 1-6.) This process is adequate.

6
7 **2. Consumer Claim Form**

8 Claim forms must be informative and accurate.
9 Hoffman-LaRouche, 493 U.S. at 172.

10
11 The Consumer Claim Form is generally acceptable,
12 although the Court notes some areas of concern:

- 13
- 14 • **Registered domestic partners**, and members of civil
15 unions, are **not among the list of transferees for**
16 **Option B.**

 - 17
18 • **The Consumer Claim Form lacks a clear statement that**
19 **if the potential class member does not qualify for**
20 **payment under Options A, B, or C he will receive no**
21 **money.** The Consumer Claim Form should include a
22 clear statement to this effect: "IF YOU DO NOT SIGN
23 AND RETURN THIS FORM, OR IF YOU DO NOT QUALIFY FOR
24 OPTION A, B, OR C, YOU WILL RECEIVE NO MONEY FROM THE
25 SETTLEMENT."
- 26
27
28

1 • **The Consumer Claim Form lacks a convenient way for**
2 **class members to opt out.** The Court notes that the
3 Settlement Agreement creates serious consequences if
4 more than 100 persons opt out of the class: Defendant
5 has the option of voiding the Settlement Agreement,
6 exposing both sides to continuing litigation and
7 depriving Plaintiffs' counsel of their attorneys'
8 fees. (See Settlement Agreement 31.) Nevertheless,
9 the Court must safeguard the interests of all class
10 members. Opting out should be as convenient as
11 remaining a part of the class.

12 13 **3. Class Notice**

14 The Class Notice, like the Consumer Claim form, must
15 be accurate. Like the Consumer Claim Form, the Class
16 Notice should include registered domestic partners and
17 civil unions among the transferees for Option B relief on
18 page 5. (Settlement Agreement Ex. D at 5.)

19
20 Like the Consumer Claim Form, the Class Notice should
21 include a clear statement regarding the consequences of
22 failure to file a Consumer Claim Form or to qualify for
23 relief under Options A, B, or C. This is very important
24 information and should appear on the chart of questions
25 and answers located on page 2. (Settlement Agreement Ex.
26 D at 2.)

27
28

1 In addition, the Class Notice, at page 6, should
2 provide reference to a form through which class members
3 may exclude themselves, rather than detailed instructions
4 about how to compose their request for exclusion.
5 (Settlement Agreement Ex. D at 6.)

6
7 The parties should also clarify the statement at page
8 6 of the Class Notice which states: "If you do not
9 object to the proposed settlement and/or wish to
10 participate in the settlement, you need not do anything.
11 If the Court approves the settlement, you will
12 automatically become eligible to receive all the benefits
13 to which you are entitled." This may lead class members
14 to believe they need not file Consumer Claim Form to
15 later claim benefits. (Settlement Agreement Ex. D at 6.)

16
17 **D. Attorneys' Fees and Incentive Payment for Named**
18 **Plaintiff**

19 The Motion indicates Plaintiffs will seek allocation
20 of settlement funds for attorneys' fees and for incentive
21 payments for the named Plaintiffs.

22
23
24
25 **1. Attorneys' fees**

26 Plaintiffs assert claims under California law, and
27 California law governs the award of attorneys' fees.

1 Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1047 (9th
2 Cir. 2002). California recognizes the common fund
3 doctrine for the award of attorneys' fees to prevailing
4 plaintiffs whose efforts result in creation of a fund
5 benefitting others. Serrano v. Priest, 20 Cal. 3d 25, 35
6 (1977). Under both California and Ninth Circuit
7 precedent, a court may exercise its discretion to award
8 attorneys' fees from a common fund by applying either the
9 lodestar method or the percentage-of-the-fund method.
10 Wershba v. Apple Computer, Inc., 91 Cal. App. 4th 224,
11 253 (2001); Fischel v. Equitable Life Assur. Soc'y of
12 U.S., 307 F.3d 997, 1006 (9th Cir. 2002) (citing
13 Vizcaino, 290 F.3d at 1047).

14

15 Plaintiff's counsel, Cuneo and Chimicles, will seek
16 up to 2.95 million in attorneys' fees, costs, expenses,
17 and incentive payments for Plaintiffs. (Stipulation
18 20:24-28; 21:1-2.)

19

20 Plaintiffs' counsel reviewed documents, deposed
21 several experts, and engaged in extensive negotiations.
22 (Cuneo & Chimicles Decl. ¶¶ 48-66.) They do not state
23 the hours they have spent on this case although they
24 state their fees incurred thus far, calculated pursuant
25 to the lodestar method, would be approximately the same
26 amount as the fees they seek; by the time the settlement
27 reaches final approval, their fees calculated through the

28

1 lodestar method will exceed the fee they seek. (Cuneo &
2 Chimicles Decl. ¶ 68; Mot. 24.) As noted above,
3 **Plaintiffs' counsel provide insufficient information**
4 **about the value of the benefits that will be provided to**
5 **the proposed class and the estimated liability of**
6 **Defendant.** On the basis of the information submitted in
7 support of the Motion, the Court cannot assess the
8 results Plaintiffs' counsel have provided for the class.
9 **Plaintiffs' counsel have not met their burden regarding**
10 **an award of attorneys' fees.**

11

12 2. Incentive payments for Plaintiffs

13 The Motion indicates named Plaintiffs will seek a
14 total of \$22,500 in incentive awards: \$12,500 for True
15 and \$10,000 for Delgado. (Settlement Agreement 21.) The
16 criteria courts may consider in determining whether to
17 make an incentive award include:

18 1) the risk to the class representative
19 in commencing suit, both financial and
20 otherwise; 2) the notoriety and personal
21 difficulties encountered by the class
22 representative; 3) the amount of time and
23 effort spent by the class representative;
24 4) the duration of the litigation and; 5)
25 the personal benefit (or lack thereof)
26 enjoyed by the class representative as a
27 result of the litigation.

28 Van Vranken v. Atlantic Richfield Co., 901 F. Supp. 294,
299 (N.D. Cal. 1995).

1 The declaration of Chimicles and Cuneo gives some
2 general information about the tasks Plaintiffs performed
3 - including communicating with their counsel regarding
4 interrogatories, requests to admit, and document
5 requests, and preparing for and testifying at
6 depositions. (See Mot. 25 citing Cuneo & Chimicles Decl.
7 ¶¶ 42, 43, 55, 66.) In addition, True attended a hearing
8 and a status conference. (Cuneo & Chimicles Decl. ¶¶ 21,
9 66.) Nevertheless, Plaintiffs' counsel provides little
10 detail relevant to the factors listed in the preceding
11 paragraph, including the risks shouldered, notoriety
12 experienced, time required, and personal benefits derived
13 by Plaintiffs from the litigation. (See Mot. 25 citing
14 Cuneo & Chimicles Decl. ¶¶ 42, 43, 55, 66.) Accordingly,
15 the Court cannot assess whether these awards are fair or
16 reasonable. **Plaintiffs have not carried their burden as**
17 **to incentive awards. The Court directs Plaintiffs'**
18 **counsel to submit additional information, including**
19 **declarations from the Plaintiffs themselves.**

20

21 **E. Notice Pursuant to 28 U.S.C. section 1715**

22 Plaintiffs move the Court to find that Defendant
23 provided proper notice of proposed settlement pursuant to
24 the Class Action Fairness Act ("CAFA"), in particular 28
25 U.S.C. § 1715(b). Plaintiffs attach a form letter
26 providing notice as Exhibit A to the Settlement
27 Agreement. Section 1715(b) requires Defendant to serve

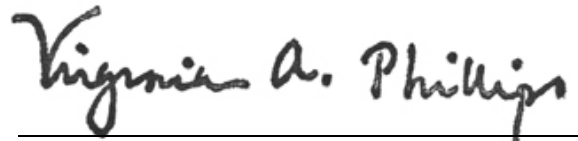
28

1 the notice on certain officials ten days after filing the
2 proposed settlement. This made it difficult to file,
3 concurrently with the Motion, proof the letters had been
4 sent. **Nevertheless, the Court requires proof the letters**
5 **were timely sent before it can make the finding requested**
6 **by Plaintiffs.**

7
8 **IV. CONCLUSION**

9 As explained above, Plaintiffs have failed to
10 establish that their proposed class is entitled to
11 certification under Federal Rule of Civil Procedure
12 23(a). Moreover, they have failed to establish that the
13 proposed settlement is fair, reasonable, and adequate as
14 required by Rule 23(e). Accordingly, the Court DENIES
15 the Motion. **The Court will permit Plaintiffs to submit**
16 **additional information in support of the Motion.**
17 **Plaintiffs shall file any such materials no later than**
18 **April 24, 2009.**

19
20
21 Dated: March 25, 2009



VIRGINIA A. PHILLIPS
United States District Judge