LOCKS LAW FIRM, LLC
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Attorneys for Plaintiff

TRACEY DICKENS on behalf of herself and all others similarly situated, Plaintiff, v. SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., and JOHN DOES (1-300), Defendants.	SUPERIOR COURT OF NEW JERSEY MIDDLESEX COUNTY LAW DIVISION Docket No.: MID-L-05305-16 CIVIL ACTION **NOTICE OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

PLEASE TAKE NOTICE that on Friday, June 21, 2019 at 9 o'clock a.m., or as soon thereafter as counsel may be heard, or as the Court may otherwise direct, the undersigned attorneys for Plaintiffs will move before the Superior Court of New Jersey, Law Division, in Middlesex County, New Jersey, will move before the Court pursuant to R. 4:32 for an Order granting preliminary approval of the class action settlement in the above referenced matter. A proposed form of Order is attached.

PLEASE TAKE FURTHER NOTICE that in support of this Motion, Plaintiffs will rely upon the certification of counsel, brief and exhibits attached hereto.

PLEASE TAKE FURTHER NOTICE that pursuant to R. 1:6-2(a), a copy of the proposed form of Order is attached hereto. This Motion shall be deemed uncontested unless response papers are timely filed and served, stating with particularity the basis of the opposition

to the relief sought. **Plaintiffs respectfully request oral argument on this Motion should timely opposition be served**.

Respectfully submitted,
LOCKS LAW FIRM, LLC

By: /s/James A. Barry
JAMES A. BARRY
Attorney for Plaintiff

Dated: May 23, 2019

LOCKS LAW FIRM, LLC
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TRACEY DICKENS on behalf of herself and all others similarly situated, Plaintiff, v. SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., and JOHN DOES (1-300), Defendants.	SUPERIOR COURT OF NEW JERSEY MIDDLESEX COUNTY LAW DIVISION Docket No.: MID-L-05305-16 CIVIL ACTION **ORDER GRANTING PRELIMINARY APPROVAL OF A CLASS ACTION SETTLEMENT**

THIS MATTER having been brought before the Court on Motion for Preliminary Approval of a Class Action Settlement, filed by Plaintiff's Counsel; and the Court having considered the terms and conditions of the Settlement Agreement; and for good cause appearing that the terms and conditions set forth in the Settlement Agreement were the result of good faith, arm's length settlement negotiations between competent and experienced counsel for both Plaintiff and Defendants:]

IT IS ON THIS ____ DAY OF _____, 2019 ORDERED THAT:

1. This Court has jurisdiction over the Parties and the subject matter herein;

2. The terms of the Parties Settlement Agreement are hereby conditionally approved, subject to further consideration thereof at the Final Approval Hearing (or "Fairness Hearing") provided for below. The Court finds that said settlement is sufficiently within the range of

reasonableness and the notice of the proposed settlement should be given as provided in the Settlement Agreement;

3. The Court preliminarily certifies the following class for purposes of settlement only:

> All New Jersey workers' compensation recipients who, since September 12, 2010, (i) have had a worker's compensation claim that was administered by Defendant and adjudicated by the New Jersey Division of Workers' Compensation, (ii) who either directly or through counsel received notice from Defendant purporting to require the payment of liens pursuant to *N.J.S.A.* 34:15-40 that incorporated employer-allocated fees or expenses, *and* (iii) who paid any amount of money in satisfaction of that lien.

4. The Court finds, only for purposes of preliminarily approving the settlement, that the requirements of *R.* 4:32-1, *et seq.* of the New Jersey court Rules are satisfied, and that a class action is an appropriate means of resolving this litigation. All the prerequisites for class certification under *R.* 4:32-1(b)(1)(A) are present. The Settlement Class Members are identifiable and too numerous to be joined. Common questions of law and fact as to all Settlement Class Members predominate over individual issues, and should be resolved in one proceeding with respect to all Settlement Class members. The Class Representative's claims are typical of those of the Class. The class action mechanism is superior to alternative means for adjudicating and resolving this action;

5. For purposes of settlement only and pending final approval by this Court of the Settlement Agreement, the Court finds that Plaintiff, Tracey Dickens, is an adequate class representative for the Settlement Class;

6. For purposes of settlement only and pending final approval by this Court of the Settlement Agreement, the Court finds that the following attorneys are designated as Class Counsel:

Alfred M. Anthony, Esquire
James A. Barry, Esquire
LOCKS LAW FIRM, LLC
801 N. Kings Highway
Cherry Hill, NJ 08034

7. The Court approves the Proposed Form of Notice attached to the Certification of James A. Barry. The notice to be provided is hereby found to be the best practicable means of providing notice under the circumstances and, when completed, shall constitute due and sufficient notice of the proposed settlement and the Fairness Hearing to all persons and entities effected by and/or entitled to participate in the settlement, in full compliance with the notice requirements of *R.*4:32-2(b) of the New Jersey Court Rules, due process, the Constitution of the United States, the laws of New Jersey and all other applicable laws. The Notice is accurate, objective, informative, and provides the Settlement Class with all of the information necessary to make an informed decision regarding their participation in the Settlement and its fairness. The Court also approves the manner and timing of the notice to the Settlement Class as set forth in Sections VI and VII of the Settlement Agreement, and hereby orders that the notice to the Settlement Class shall be affected in accordance with Section VII of the Settlement Agreement. The Notice Date shall be _____, 2019;

8. If the Settlement Agreement is terminated or not consummated for any reason whatsoever, this conditional certification of the Settlement Class shall be void. The Defendants have reserved all their rights to oppose any and all future class certification motions on any grounds. Similarly, Plaintiff reserves all of his rights, including the right to move for any and all future class certification and/or to continue with the litigation;

9. Class Counsel is authorized to retain Settlement Administrator, Angeion Group1801 Market St #660, Philadelphia, PA 19103, as the Settlement Administrator in

accordance with the terms of the Settlement Agreement and this Order. All costs incurred in notifying the Settlement Class, as well as administering the Settlement Agreement, shall be paid as set forth in the Settlement Agreement;

10. Any Settlement Class Member may, but need not, submit objections as to why the Settlement Agreement should not be approved as fair, reasonable, and adequate and why Final Judgment should not be entered thereon. All timely objections to the proposed settlement shall be heard, and any papers submitted in support of said objections shall be considered by the Court at the Fairness Hearing, but only if such objector (1) files a document with the Court saying they object to the terms of the Settlement in Dickens v. Sedgwick Claims Management Services, Inc., Docket: MID-L-5305-16; (2) provides a statement of each specific objection asserted; (3) provides a detailed description of the facts and/or legal authorities, if any, underlying each objection; (4) includes their name, address, telephone number, and signature on the documents; (5) provides any other information required by the New Jersey Court Rules; (6) provides a list of all class action proceedings in which they previously objected and in which their attorneys previously appeared on behalf of objectors; and (7) state whether they intend to appear and/or argue at the Fairness Hearing and how much time they would need. If objectors intend to have any witnesses testify or to introduce any evidence at the Fairness Hearing, they must list the witnesses and provide copies of the evidence in the written objections.

11. Any objections to the Settlement must be sent to both Class Counsel and Defense Counsel and be filed with the Clerk of the Superior Court of New Jersey, Middlesex County, 56 Paterson Street New Brunswick, NJ 08903 at least twenty-one (21) days prior to the Fairness Hearing. Any Settlement Class Member who does not submit a timely, written objection or who

does not comply with the procedures set forth in this Order will be deemed to have waived all such objections and will, therefore, be bound by all proceedings, order and judgments in the action, which will be preclusive in all pending or future lawsuits or other proceedings.

12. Any objector obtaining access to materials and/or information designated and/or deemed confidential must obtain leave of court and must agree to be bound by a confidentiality agreement and by all protective orders entered in this action;

13. Defendant's counsel and Class Counsel are authorized to use and disclose such information as is contemplated and necessary to effectuate the terms and conditions of the Settlement Agreement and to protect the confidentiality of the names and addresses of the members of the Settlement Class and other confidential information pursuant to the terms of this Order.

14. On _____, 2019 at _____ a.m/p.m., a Final Approval Hearing will be held before the Honorable Lisa M. Vignuolo, J.S.C. in Courtroom _____ of the Superior Court of New Jersey, 56 Paterson Street, New Brunswick, New Jersey The date and time of the Final Approval Hearing may, from time to time and without further notice to the Settlement Class (except those Settlement Class Members who file timely and valid objections), be continued or adjourned by order of the Court; and

15. The Motion for Preliminary Approval of the proposed settlement is hereby **GRANTED**.

_____

,J.S.C.

[ ] Unopposed
[ ] Opposed

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Attorneys for Plaintiff

TRACEY DICKENS on behalf of herself and all others similarly situated, Plaintiff, v. SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., and JOHN DOES (1-300), Defendants.	SUPERIOR COURT OF NEW JERSEY MIDDLESEX COUNTY LAW DIVISION Docket No.: MID-L-05305-16 CIVIL ACTION **Certification in Support of Motion for Preliminary Approval of Class Settlement**

I, James A. Barry, Esquire, do hereby certify that:

1. I am an associate with the Locks Law Firm, LLC, attorneys for the plaintiffs in the above captioned class action.
2. A copy of the signed Settlement Agreement between the parties involved in this Class Action is attached hereto as **Exhibit A.**
3. A copy of the proposed Notice to be sent to settlement class members is attached hereto as **Exhibit B.**
4. A copy of the transcript from the Court's Oral Opinion on May 10, 2017 is attached hereto as **Exhibit C.**
5. A copy of the unpublished opinion *Lubitz v. DaimlerChrysler Corp*, 2006 WL 3780789 Law Div. 2006) is attached hereto as **Exhibit D**.

6. A copy of the individual biographies of the proposed class counsel is attached hereto as **Exhibit E.**

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Respectfully Submitted,
LOCKS LAW FIRM, LLC

/s/ James A. Barry
James A. Barry

Dated: May 23, 2019

LOCKS LAW FIRM, LLC
By: Alfred M. Anthony, Esq. (Atty. ID: 028571992)
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Attorneys for Plaintiff

TRACEY DICKENS on behalf of herself and all others similarly situated, Plaintiff, v. SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., and JOHN DOES (1-300), Defendants	SUPERIOR COURT OF NEW JERSEY MIDDLESEX COUNTY LAW DIVISION Docket No.: MID-L-05305-16 CIVIL ACTION

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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INTRODUCTION

Plaintiff Tracey Dickens, on behalf of herself and all others similarly situated ("Plaintiff") respectfully submits this memorandum of law in support of the motion seeking an order preliminarily approving the parties' proposed settlement of the above referenced matter on a class-wide basis. (A copy of the fully executed settlement agreement is annexed to the Certification of James A. Barry, hereinafter "Barry Cert", filed herewith as **Exhibit A**). The settlement agreement was reached by the parties after private mediation, conducted on September 21, 2018 with Judge Marina Corodemus, J.S.C. (ret.) of Corodemus & Corodemus. The settlement agreement provides fair, reasonable and adequate relief to members of the settlement class.

The Settlement Class consists of All New Jersey workers' compensation recipients who, since September 12, 2010, (i) have had a worker's compensation claim that was administered by Defendant and adjudicated by the New Jersey Division of Workers' Compensation, (ii) who either directly or through counsel received notice from Defendant purporting to require the payment of liens pursuant to *N.J.S.A.* 34:15-40 that incorporated employer-allocated fees or expenses, *and* (iii) who paid any amount of money in satisfaction of that lien. During discovery in this matter, Defendant produced spreadsheets containing data on individuals against whom it asserted liens in New Jersey and the amoutns those individuals paid to satisfy liens, allowing both parties to identify members of the Settlement Class as well as the approximate amounts of the individual overcharges asserted against Class Members. The Settlement Class contains 245 members.

The proposed settlement provides for a lump sum payment by Sedgwick Claims Management Services, Inc. in the amount of one hundred forty thousand dollars ($140,000.00), representing the gross settlement amount. The settlement will be distributed between three groups of class members, which will be divided based on Defendant's record of the percentage of the liens

asserted which Class Members paid. Under the settlement agreement those individuals who according to Defendant's records[1] paid over 50% of the lien asserted against them will receive a refund of 100% of the "individual overcharge" asserted against them. Those who paid greater than 40% but less than 50% of the lien asserted against them will receive a payment of 65% of the "individual overcharge" asserted against them. Finally, those who paid less than 40% of the liens asserted against them will be entitled to a pro rata share of the amounts remaining after the payments are made to the first two groups of class members, calculated to be not less than $40[2] each. Furthermore, as a result of the present litigation Defendant has taken affirmative steps to prevent any future improper inflation fo Section 40 liens by offering enhanced instructions to its personnel. (See Barry Cert, **Exhibit A** at 11 § IV(1)) Finally, notice will be directly mailed to Class Members' last known address to advise them of the estimated amount they will receive under the settlement if approved, providing the best possible notice to the class. (A copy of the proposed form of Notice is attached to Barry Cert as **Exhibit B**).

This settlement repreents an efficient and salutary result for the Class on claims that were vigorously litigated by both parties, and which involved novel areas of New Jersey law, leading to potential difficulties in the trial of this matter as well as potential appeal. The parties engaged in arms-length negotiation with an independent mediator, and were thereby able to reach a Settlement which represents a thoughtful compromise, which takes into consideration the parties' respective concerns.

[1] The percentages in Defendant's records were calculated before the statutory reduction of the lien for $750 in costs plus attorneys' fees pursuant to *N.J.S.A.* 34:15-40.

[2] Assuming that This calculation is based on counsel's current expenses and anticipated administrative expenses and assuming that all Class A and B members accept the current calculated payment of their benefit.

In short, counsel respectfully submits that this settlement is fair, adequate, and reasonable for the Settlement Class and that the requirements for final approval will be satisfied. In considering preliminary approval, this is all that the moving party needs to demonstrate in order for Settlement Class Members to be notified of the Settlement and for a fairness hearing to be scheduled. As set forth in the Settlement Agreement, Plaintiff also requests herein that this Court appoint Locks Law Firm, LLC as Class Counsel, and the Angeion Group as the Settlement administrator.

Finally, Plaintiff requests that, along with granting preliminarily approval of the Settlement, the Court approve the form and substance of the proposed notice, and adopt the schedule set forth below, for the parties to effectuate the various steps in the settlement approval process under the Settlement Agreement:

	Event	***Timing***
1	"Class Data List" Transmitted to the Claims Administrator by Defendant	Within thirty (30) business days after preliminary approval of the settlement
2	Notice to Class by Claims Administrator	Within ten (10) days after receipt of the "Class Data List"
3	Objections or written requests for exclusion by class members	Not less than twenty-two (22) days prior to the Fairness Hearing set by the Court.
4	Fairness Hearing	To be set by the Court

Accordingly, at this preliminary stage of the settlement process, Plaintiff respectfully requests that the Court: (i) grant preliminary approval of the proposed settlement; (ii) certify a Settlement Class pursuant to the provisions of R. 4:32-2(e) and R. 4:32-1(b)(1)(A); designate moving Plaintiff as Class Representative and Locks Law Firm as Class Counsel; (iii) schedule a fairness hearing to consider final approval, pursuant to the schedule set forth above; (iv) direct that notice of the proposed settlement and hearing be provided to absent class members in a manner

consistent with the Settlement Agreement, as set forth in the above-mentioned schedule; and (v) enter the proposed Order for Preliminary Approval.

PROCEDURAL BACKGROUND OF THE CASE

Plaintiff, Tracey Dickens filed the complaint in this matter on September 12, 2016 alleging *inter alia* that Defendant asserted worker's compensation liens which overstated the amounts actually collectable pursuant to New Jersey's Worker's Compensation Statute, *N.J.S.A.* 34:15-40 and that she therefore overpaid the amount actually due to Defendants. Plaintiff asserted claims for (1) unjust enrichment; (2) breach of the duty of good faith and fair dealing; (3) violation of the New Jersey Consumer Fraud Act; and (4) violation of the New Jersey Truth in Consumer Contract, Notice and Warranty Act ("TCCWNA"). Defendant moved to dismiss the complaint under *R.* 4:6-2(e) for failure to state a claim. The Court heard argument on February 17, 2017 and issued an oral opinion on May 10, 2017. (A copy of the transcript from the oral opinion is attached as Barry Cert as **Exhibit C)** In his opinion Judge Natali denied Defendant's motion to dismiss with regard to Plaintiff's unjust enrichment claim and dismissed the other counts without prejudice, permitting Plaintiff time to amend the allegations in the complaint for those counts. Plaintiff amended her complaint to re-plead the count for the breach of the duty of good faith and fair dealing. The Court then held a case management conference and entered a stay of discovery as Defendant indicated it would again move to dismiss the complaint. Defendant subsequently moved to dismiss the complaint again and for the first time produced a redacted Claims Service Agreement between it and Plaintiff's employer, Pfizer ("CSA"). After agreeing to a confidentiality order, and receiving a less-redacted version of the CSA, Plaintiff voluntarily dismissed her claim for the breach of the duty of good faith and fair dealing. On March 29, 2018 the Court denied Defendant's second motion to dismiss and lifted the stay on discovery.

The parties then engaged in extensive discovery, including both written discovery and the deposition of one of Defendant's corporate representatives. Discovery revealed that the overcharges were a result of certain attorneys fees and expenses related to contested worker's compensation cases being allocated entirely to individuals as part of the lien, while in the normal course of worker's compensation, those fees and costs are normally allocated between the parties, with 60% being allocated to individuals and 40% to worker's compensation carriers or employers.

Discovery resulted in a number of discovery motions being filed before the court. The parties then agreed to mediate the case before Judge Mirena Corodemus, J.S.C. (ret.) who held a full day mediation session with the parties on September 21, 2018. While mediation did not resolve the case on September 21, the parties continued negotiations and eventually reached the settlement before the Court today. Finally, the parties drafted the Settlement Agreement and accompanying documents, after exchanges of edits, proposals, counter-proposals and negotiations the framework and provisions of the Settlement Agreement itself were finalized. It is safe to say that the issues included in this settlement were the product of extensive, and at times, forceful negotiations between the parties.

THE PROPOSED SETTLEMENT

The Settlement Agreement provides as follows:

1. Defendant shall pay One Hundred Forty Thousand Dollars ($140,000) (the "Gross Settlement Amount") to fund the settlement of this action.
2. Subject to the Court's approval, Plaintiff's counsel shall apply for a reimbursement of expenses, including litigation and administration expenses, and an award of attorney's fees not to exceed one third (1/3rd) of the Gross Fund Value after expenses are deducted.

3. Subject to the Court's approval, Plaintiff, Tracey Dickens, shall receive an enhancement award of up to Seven Thousand Five Hundred Dollars ($7,500.00).
4. The costs of the claims administrator, shall be paid from the Gross Settlement Amount.
5. Class members shall receive notice of the action together with instruction on how they may exclude themselves or "opt out" if they do not want to participate in the settlement by direct mail. If Class Members do not properly exclude themselves shall receive a share of the Settlement.
6. The Net Fund Value will be distributed among qualified Class Members according to the percentage of the liens asserted against them which was paid by the class member, specifically:

> For all Class Members with a Lien Satisfaction Percentage of fifty percent (50%) or more, each class member shall receive a payment equaling the "individual overcharge." This group consists of twenty-one class members who will receive between $400 and $9,159 under the settlement, depending on the size of the overcharge asserted against them.
>
> For all Class Members with a Lien Satisfaction Percentage of greater than forty percent (40%) and less than fifty percent (50%), each Class Members shall receive a payment equaling 65% of the "individual overcharge." This group consists of fourteen class members who will receive between $231 and $5,984 under the settelement, depending on the size of the overcharge asserted against them.
>
> For all Class Member with a Lien Satisfaction Percentage of less than forty percent (40%) each class member shall be entitled to a pro rata share of the amounts remaining after the payments of Class A and Class B. This group consists of two hundred and ten class members, who should receive no less than $40 each under the settlement agreement.[3]

[3] Assuming that This calculation is based on counsel's current expenses and anticipated administrative expenses and assuming that all Class A and B members accept the current calculated payment of their benefit.

A. Class Notice

The Notices to be provided to the Settlement Class members is sufficient and designed to reach the maximum number of Settlement Class members at a reasonable cost. Since all Class Members were individuals for whom Defendant administere liens, Defendant shall provide the Claims Administrator with each class member's name and last known address. The Claims Administrator will perform National Change of Address database search to update addresses to the extent reasonably practicable before the first mailing. Notices will then be mailed, by first calss mail, to each Class Member. The proposed Notice too class members will include a statement of the payment each class member is currently calculated to receive under the settlement (assuming the requests for attorney's fees, costs and incentive payments are awarded in full). A copy of the proposed notice is attached as **Exhibit B**.

B. Attorney's Fees

Att he time the request for final approval is made, Class Counsel will petition the Court for reasonable attorney's fees and expenses payable out of the Gross Settlement Fund. The Settlement agreement currently provides that Class Counsel will reimbursement of expenses and attorneys' fees not to exceed one third (1/3rd) of the settlement fund after expenses are deducted.

C. Class Representative Enhancement

Together with the request for final approval, Class Counsel will petition the Court for an enhancement to be awarded to the Plaintiff, Tracey Dickens, in an amount of $7,500.00 for Mrs. Dickens' efforts in prosecuting this claim, wherein she provided background information, supporting documents, and parrticipated extensively in the entire process of this litigation including approval of the Settlement Agreement itself.

LEGAL ARGUMENT

A. The Settlement Agreement Should Be Preliminarily Approved By the Court

In this motion, Plaintiff seeks preliminary approval of the Settlement Agreement between Plaintiff and Defendant. There are relatively few published opinions in New Jersey on the standards to be applied in determining whether to approve a proposed class action settlement in New Jersey state court under R. 4:32-2(e). *See Morris County Fair Housing Council v. Boonton Tp.*, 197 N.J. Super. 359, 369 (Law Div. 1984), cited with approval in *Builders League of South Jersey, Inc. v. Gloucester County Utilities Auth.*, 386 N.J. Super. 462 (App. Div. 2006):

> There is only limited discussion in New Jersey case law of the procedures to be followed in presenting proposed settlements of class actions for judicial approval and of the standards to be applied in determining whether approval should be given. However, R. 4:32-4 [now R. 4:32-2(e)] was taken from and is identical to Fed. R. Civ. P. 23(e). Therefore, it is appropriate to seek guidance in federal case law in determining the procedures and standards for approval of settlements of representative actions.

386 N.J. Super. at 471 (citations omitted). Accordingly, much of the case law set forth herein is federal law and/or based upon Fed. R. Civ. P. 23.

Indeed, New Jersey law makes clear that, while a proposed class action settlement cannot be finalized without a finding by the court that the settlement is "fair and reasonable," the court should strive to give effect to the proposed settlement wherever possible. *See Lubitz v. DaimlerChrysler Corp.*, 2006 WL 3780789, at *9 (Law Div. 2006)(a copy of this opinion is attached to Barry Cert as **Exhibit D**), stating on a motion to approve a proposed class action settlement under R.4:32-2(c):

> It is worthwhile to acknowledge that settlement of litigation holds a lofty position in the pantheon of public policy. 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.

2006 WL 3780789, at *9 (citations omitted). As discussed more fully below, at this stage of preliminary approval, there is clear evidence that the Settlement Agreement is well within the range of possible approval and thus should be preliminarily approved.

1. The Standards and Procedures for Preliminary Approval

Rule 23(e) of the Federal Rules of Civil Procedure provides the mechanism for settling a class action, including, as here, through a class certified for settlement purposes:

> The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:
>
> (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
>
> (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
>
> (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
>
> (4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
>
> (5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

Fed. R. Civ. P. 23(e); *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997); *In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283, 316 (3d Cir. 1998)("*Prudential II*").

In determining whether preliminary approval is warranted, the sole issue before the Court is whether the proposed settlement is within the range of what might be found fair, reasonable and adequate, so that notice of the proposed settlement should be given to class members, and a hearing scheduled to consider final approval. The Court reviews the proposal preliminarily to determine whether it is sufficient to warrant public notice and a hearing. If so, the final decision on approval is made after at a fairness hearing. *Manual for Complex Litigation (Fourth)* § 13.14, at 219-221 (Fed. Jud. Ctr. 2007) ("*Manual Fourth*"). The Court is not required at this point to make a final determination:

> The judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing.

Id. at § 21.632, at 449-50. Preliminary approval is the first step in a two-step process required before a class action may be finally settled. *Id.* at 449. Courts first make a preliminary evaluation of the fairness of the settlement, prior to notice. *Id.* at 449-50. In some cases this initial assessment can be made on the basis of information already known to the court and then supplemented by briefs, motions and an informal presentation from the settling parties. *Id.* at 449. There is an initial strong presumption that a proposed class action settlement is fair and reasonable when it is the result of arm's length negotiations.

In deciding whether a settlement should be approved under Rule 23, Courts look to whether there is a basis to believe that the more rigorous, final approval standard will be satisfied. "Once the judge is satisfied as to the certifiability of the class and the results of the initial inquiry into the fairness, reasonableness, and adequacy of the settlement, notice of a formal Rule 23(e) fairness hearing is given to the class members." *Manual Fourth* § 21.633, at 450. Preliminary approval permits notice to be given to the class members of the hearing on final settlement approval, at

which time class members and the settling parties may be heard with respect to final approval. *Id.* at 450. The standard for final approval of a settlement consists of showing that the settlement is fair, reasonable, and adequate. *In re Cendant Corp. Litig.*, 264 F.3d 201, 231 (3d Cir. 2001); *see, e.g., Prudential II*, 148 F.3d at 316; *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Action* ("*GM Trucks*"), 55 F.3d 768 at 785 (3d Cir. 1995); *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115 (3d Cir. 1990); *Walsh v. Great Atlantic & Pacific Tea Co.*, 726 F.2d 956 (3d Cir. 1983); *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975).

2. The Settlement is Fair, Reasonable and Adequate

The Third Circuit has adopted the following four-factor test to determine the preliminary fairness of a class action settlement:

(1) the negotiations occurred at arm's length;

(2) there was sufficient discovery;

(3) the proponents of the settlement are experienced in similar litigation; and

(4) only a small fraction of the class objected.

GM Trucks, 55 F.3d at 785.[4]

The Settlement Agreement meets all these tests. First, it is undeniable that it was the result of arm's-length negotiations conducted by experienced counsel for all parties. The Settlement was negotiated after a full day mediation with Judge Marina Corodemus, J.S.C. (ret.) who is an

[4] For final approval, the Court reviews the settlement in light of the factors established by *Girsh*, 521 F.2d at 157: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *See also In re Rite Aid Corp. Sec. Litig*., 396 F.3d 294, 301 (3d Cir. 2005).

experienced mediator with a national reputation in the realm of class action settlement, and with extensive experience handling class actions from both the bench and as a mediator in New Jersey.

As described above, the settlement was negotiated on behalf of Plaintiff and the Class by attorneys who have been vigorously prosecuting this case and were well versed both in consumer litigation and and class action jurisprudence and how to prosecute and settle such class claims. This consideration is often shaped by the experience and reputation of counsel. *GM Trucks,* 55 F.3d at 787-88; *Cotton v. Hinton,* 559 F.2d 1326 (5th Cir. 1977); *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions,* 410 F. Supp. 659 (D. Minn. 1974) ("The recommendation of experienced antitrust counsel is entitled to great weight."); *Fisher Brothers v. Phelps Dodge Industries, Inc.,* 604 F. Supp. 446 (E.D. Pa. 1985)("The professional judgment of counsel involved in the litigation is entitled to significant weight.").This settlement was specifically negotiated by experienced counsel to meet all the requirements for class certification, and to provide administrative procedures to assure all class members' equal and sufficient due process rights. Accordingly, the settlement was not the product of collusive dealings, but rather, was informed by the vigorous prosecution of the case by the experienced and qualified counsel. Further, continued litigation would be long, complex and expensive, and a burden to Court dockets. *Lake v. First Nat'l Bank,* 900 F. Supp. 726 (E.D. Pa. 1995)(expense and duration of litigation are factors to be considered in evaluating the reasonableness of a settlement); *Weiss v. Mercedes-Benz of N. Am. Inc.*, 899 F. Supp. 1297 (D.N.J. 1995) (burden on crowded court dockets to be considered).

Finally, there is no reason to doubt the fairness of the proposed Settlement Agreement. There was no collusion between the negotiating parties. Accordingly, the standards for preliminary

approval are met in this case, and the Court should grant Plaintiff's motion in its entirety. *Id; see also In re NASDAQ MarketMakers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1999).

The present matter involves an area of New Jersey law which is not extensively developed. Specifically, the question of whether Class Members who paid significantly less than the full amount of the liens asserted against them were entitled to recover under an unjust enrichment theory of liability. In light of that uncertainty, Class Members are receiving a substantial benefit, with all individuals within the class receiving checks, without a claims procedure, with an amount determined based on the percentages of the liens asserted against them which they paid.

Accordingly, the proposed settlement is fair, reasonable and adequate.

B. Certification of the Proposed Settlement Class is Appropriate

Courts of this State generally certify a class unless there is a clear showing that certification is inappropriate. *Delgozzo v. Kenny*, 266 N.J. Super. 169, 179 (App. Div. 1993) (highlighting New Jersey cases that have "consistently held that the class action rule should be liberally construed"). Certain hurdles that have prevented the certification of various federal class actions have been lowered by many New Jersey courts in order to conform to the liberal interpretation of the class action rules. *Gallano v. Running*, 139 N.J. Super. 239, 245 (Law Div. 1976); *Carroll v. Cellco P'ship*, 313 N.J. Super. 488, 498 (App. div. 1998).) Thus, courts should be slow to hold that an action cannot proceed as a class action. *Riley v. New Raid Carpet Ctr.*, 61 N.J. 218, 227-28 (1972).

Looking through the lens of Rule 4:32 and the existing precedents, the Settlement Class readily meets the necessary criteria of numerosity, commonality, typicality, and adequacy. Given the fact that the Settlement Class consists of hundreds of individuals, there is no question that the element of numerosity has been met. The commonality and typicality requirements are also easily

satisfied, as the claim of the class representative and all Settlement Class Members are identical – an alleged inflated lien sent to every Settlement Class Members, which resulted in a payment from those class members to Defendant. Further, adequacy of representation is assured as the Class is represented by counsel who have a wealth of experience in complex class action litigation and consumer cases.

Certification of a class under Rule 4:32 for settlement of the damages claims also is appropriate because all such relief is premised on the common statutory violation, *i.e.*, the overstatement of liens due under Section 40 of the Worker's Compensation Statute, *N.J.S.A.* 34:15-40. There is no danger that individual variations, type or magnitude of damage suffered by individual class members will affect predominance, as the named plaintiff has suffered the same type of damages – and seeks the same type of relief – as members of the proposed Settlement Class. Moreover, resolution of this litigation by class settlement is superior to the individual adjudication of class members' claims for compensatory relief. In particular, the Settlement provides Plaintiff and the Class with an ability to obtain prompt and certain compensatory relief for the alleged violations, and contains well-defined administrative procedures to assure due process in the application of the settlement of each individual claimant, including the right to "opt-out." By contrast, individualized litigation carries with it great uncertainty, risk and costs, and provides no guarantee that the injured will obtain any relief at the conclusion of the litigation process. Settlement also would relieve judicial burdens that would be caused by repeated adjudication of the same issues in hundreds of individualized trials against defendants had each class member been compelled to litigate on an individual basis.

C. All the Prerequisites of Rule 4:32-1 Are Met In This Case

Here, all four elements of Rule 4:32-1(a) easily are satisfied.

1. Numerosity Under Rule 4:32-1(a).

It cannot be disputed that the Settlement Class satisfies the numerosity requirement under Rule 4:32-1(a). As stated above, there are 245 individuals in the settlement class. Accordingly, numerosity is demonstrated here. *See, e.g., Saldana v. City of Camden*, 252 N.J. Super. 188, 193 (App. Div. 1991)(certifying a potential class of only 81 members); *Cypress v. Newport News General and Nonsectarian Hospital Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967) (class of eighteen satisfied numerosity); *In re Kirschner Med. Corp. Sec. Litig.*, 139 F.R.D. 74, 78 (D.Md.1991) (noting that "a class of as few as 25 to 30 members raises the presumption that joinder would be impracticable.").

2. Commonality Under Rule 4:32-1(a)(2).

Rule 4:32-1(a)(2) does not require that all issues in the litigation be common, but only that common questions exist. Rule 4:32-1(a)(2) requires questions of law or fact common to the class, but "not all questions of law or fact raised need be in common." *Weiss v. York Hosp.*, 745 F.2d 786, 808-809 (3d Cir. 1984) (A single common question is sufficient, even if questions exist as to a representation made to an individual Plaintiff or proof of damages.); *see also Delgozzo v. Kenny*, 266 N.J. Super. 169, 185-86 (App. Div. 1993) (quoting *In re Asbestos School Litig*., 104 F.R.D. 422, 429 (E.D. Pa. 1984).

There is a common question of law and fact which not only exists, but predominates through the Class, is whether Defendant violated New Jersey law by overstating the amounts of liens to which it was entitled under the New Jersey Worker's Compensation Statute *N.J.S.A.* 34:15-40, resulting in a payment by the settlement class member. Since this question of law and fact is common to all the Class Members, the commonality requirement is met.

3. Typicality Under Rule 4:32-1(a)(3).

To satisfy the typicality requirement, the claims of the class representatives must have "the essential characteristics common to the claims of the class." *In re Cadillac V8-6-4 Class Action*, 93 N.J. 412, 425 (1983) . A plaintiff's claim is typical of the class' claims if it arises from the same event or course of conduct that has given rise to the claims of other class members. *Id.* (The claims of a class representative "are generally found to be typical if they arise from the same course of conduct that gives rise to the claims of the other class members and if the claims are based on the same legal theory."); *see also Cannon v. Cherry Hill Toyota*, 184 F.R.D. 540, 544 (D.N.J. 1999) (When "the same unlawful conduct was directed at or affected both the Named Plaintiffs and the members of the putative class, the typicality requirement is usually met, irrespective of varying fact patterns that may underlie individual claims."); *In re Data Access Sys. Sec. Litig.*, 103 F.R.D. 130, 139 (D.N.J. 1984) (citing Newberg, Class Actions ¶ 8816 (1977)) (The majority of class action decisions have held that typicality is satisfied when it is alleged that the same unlawful conduct was directed at or affected both the Named Plaintiff and the class sought to be represented.). Moreover, "[s]ince the claims only need to share the same essential characteristics, and need not be identical, the typicality requirement is not highly demanding." *Laufer v. U.S. Life. Ins. Co. in the City of New York*, 385 N.J. Super. 172, 180 (App. Div. 2006) (quoting 5 Moore's Federal Practice § 23.24[4] (3d ed. 1997)).

Plaintiff's claims clearly arise from the same course of conduct that has given rise to the claims of the class. It is alleged that Defendant mailed form letters to settlement class members which overstated the amounts due under *N.J.S.A.* 34:15-40, resulting in a payment by the class members to Defendant. The calculation of the lien and sending of the form letters are issues of common conduct over which individual class members had no control or input. Thus, the factual

basis of Plaintiff's claims and his interests in pursuing those claims are common to those of the Settlement Class and therefore, Mrs. Dickens' claims are typical of the class claims.

4. Adequacy Under Rule 4:32-1(a)(4).

Plaintiff and Class Counsel have already fairly and adequately represented the putative Class here under Rule 4:32-1(a)(4). The determination of whether representation is adequate is closely related to typicality. *See In re Cadillac*, 93 N.J. at 425. To satisfy this requirement, the "plaintiff must not have interests antagonistic to those of the class." *Delgozzo*, 266 N.J. Super at 188. Here, the interests of the Plaintiff are completely in line with those of the putative Class.

In addition, Class Counsel has substantial experience in complex litigation and class actions, and therefore their competence will not be an issue. Indeed, competency of counsel is presumed at the outset of the litigation in the absence of specific proof to the contrary. *See Lamphere v. Brown*, 71 F.R.D. 641 (D.R.I. 1976), *dism'd on other grounds*, 553 F.2d 714 (1st Cir. 1977); *Powers for Stuart James Co.*, 707 F. Supp. 499 (M.D. Fla. 1989); *Lefrak v. Arabian Oil*, 527 F.2d 1136 (2d Cir. 1975); *Werfel v. Kramarksy*, 61 F.R.D. 674 (S.D.N.Y. 1974). In the present case, the presumption of adequate representation cannot be rebutted. (a copy of counsel's CVs are attached to Barry Cert as **Exhibit E**).

The undersigned is currently the co-chair of the New Jersey State Bar Consumer Law Committee, and has handled cases before the New Jersey Supreme Court or Appellate Division involving class actions or consumer litigation including: *Kernahan v. Home Warranty Administrator of Florida, Inc.*, 236 N.J. 301 (2019) (argued); *Moore v. Atlantic County*, 2018 WL 4354304 (App. Div. 2018) (argued); *Spade v. Select Comfort*, 232 N.J. 504 (2018) (argued); *Dugan v. TGI Fridays, Inc.*, 231 N.J. 24 (2017)(on the brief); *Roach v. BM Motoring LLC*, 228 N.J. 163 (2017)(on the brief); and *Morgan v. Sanford Brown Institute*, 225 N.J. 289 (2016)(argued); the

undersigned has also served on the Plaintiff's Executive Committee in national class actions including *In re Experian Data Breach Litigation*, 8:15-cv-01592-AG-DFM (C.D. Cal.) and *In re Yapstone Data Breach Litigation*, 4:15-cv-04429-JSW (N.D. Cal).

Alfred M. Anthony, also serving as counsel for the Plaintiff on this case has an extensive history in class action litigation, including certifying the first ever toxic exposure and medical monitoring class action in New Jersey in *Russo v. Allied Signal*, which resulted in a thirty year medical monitoring program for thousands of people who played on a chromium contaminated baseball field in Jersey City. Additionally Mr. Anthony has successfully served as class counsel in cases including *In re Maywood Litigation* (on behalf of 580 individuals from Maywood, Lodi, and Rochelle Park); *Armona v. DuPont*, (on behalf of 427 Pompton Lakes residents); and *Arent v. Ciba-Geigy Corp.* (representing hundreds of residnets in Toms River); and *Catanzarite v. Crane Co.* (on behalf of West Caldwell residents).

Having demonstrated that each of the mandatory requirements of Rule 4:32-1(a) are satisfied here, Plaintiff now turns to consideration of the factors which, independently, justify class treatment of this action under Rule 4:32-1(b)(3) of the rule.

D. The Requirements of Rule 4:32-1(b)(3) Are Met in the Present Action

Plaintiff's putative class meets the requirements of Rule 4:32-1(b)(3). In order to meet the requirements for certification under R. 4:32-1(b)(3), two requirements must be satisfied. First, common questions of law or fact must predominate over individual issues. *In re Cadillac*, 93 N.J. at 426; *Delgozzo*, 266 N.J. Super. at 189. Second, the court must find that a class action is the superior method to decide the issues before it. *See In re Cadillac*, 93 N.J. at 426; *Delgozzo*, 266 N.J. Super. at 189.

1. Predominance is Met.

Although Rule 4:32-1(b)(3) requires that common issues of law and fact predominate, it does not require that there be an absence of any individual issues. *See, e.g., Lee v. Carter-Reed Co., L.L.C.*, 203 N.J. 496, 520 (2010) ("plaintiff does not have to show that there is an 'absence of individual issues or that the common issues dispose of the entire dispute'"); *Strawn v. Canuso*, 140 N.J. 43, 67 (1995) (certifying a class action under (b)(3) even where the court has found that "substantial individual issues" existed). Instead, the New Jersey Supreme Court has found "predominance" to be met where the core of the case concerns common issues. *In re Cadillac*, 93 N.J. at 431 ("If a 'common nucleus of operative facts' is present, predominance may be found.").

Here, the issue of Sedgwick overstating the amounts of liens due from individuals under *N.J.S.A.* 34:15-40 is the core issue and accordingly, class certification should be granted. This is similar to a wage class action where despite varying amounts of damages, the core question of whether a defendant engaged in illegal conduct is sufficient to establish certification. *See Iliadis v. Wal-Mart Stores, Inc.*, 191 N.J. 88 (2007) (noting that plaintiff's allegations that an employer "engaged in systematic and widespread practice of disregarding its contractual, statutory, and regulatory obligations to hourly employees in this State by refusing to provide earned rest and meal breaks and by encouraging off-the-clock-work" was sufficient to warrant class certification).

2. Superiority Is Met

The other prerequisite for certification under Rule 4:32-1(b)(3) is that a class action be "superior to other available methods for the fair and efficient adjudication of the controversy." Given the nature of this action and the fact that each claim is based upon the identical practices, a class action is also the superior method by which to adjudicate claims of individual class members. The class action device is designed for the situation where an individual seeks to vindicate the

rights of a group of people: "The whole point of a class action is to provide a diffuse group of persons, whose claims are too small to litigate individually, the opportunity to engage in collective action and to balance the scales of power between the putative class members and a corporate entity." *Lee*, 203 N.J. at 528-29. The advisory committee for Rule 23 "had dominantly in mind vindication of the 'rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'" *Amchem Prods v. Windsor*, 521 U.S. 591, 617 (1997). "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Mack v. Suffolk County*, 191 F.R.D. 16, 25 (D.Mass. 2000) (internal citations omitted); *Yang v. Odum*, 392 F.3d 97, 106 (3d Cir. 2004).

Considerations of judicial economy particularly underscore the superiority of the class action mechanism in this case. The prosecution of this case as a class action is superior to possibly hundreds of individual cases being filed in the court, each of which would be repetitious and possibly yield inconsistent adjudications, with damages below the limit for filing in Superior Court. *See Califano v. Yamaski*, 42 U.S. 682, 700-701 (1979); *Dodge v. County of Orange*, 226 F.R.D. 177, 183 (S.D.N.Y. 2005) ("Where a single issue (such as the existence of a uniform policy) is guaranteed to come up time and time again, issues of judicial economy strongly militate in favor of resolving that issue via a techniques that will bind as many persons as possible.").

In sum, the requirements of Rule 4:32-1(b)(3) are satisfied, and the Settlement Class should be certified.

E. The Court Should Direct Notice to the Class

Before the Court can hold a Fairness Hearing, finally approve the Settlement, and bind the Settlement Class Members to the terms thereof, Notice must be given to the Class Members. The Notice must state the nature of the proceedings, the general terms of the settlement, the availability of more complete information in the Court's files, and the right to be heard at the fairness hearing. *See In re Prudential Ins. Co.*, 962 F.2d 450, 527 (D.N.J. 1997), *aff'd* 148 F.3d at 327. Reasonable efforts must be made to disseminate the notice to the class members. *Id.* However, neither Rule 23 or due process considerations requires actual notice to every class member in every case, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985), but simply calls for "notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all." *Id.* Nevertheless, the notice plan has been developed with the thought of providing actual notice to "reach" all class members.

The proposed Notice easily satisfies these requirements and indeed provides more than the required level of detail. A copy of the proposed Notice is attached as **Exhibit B.** The Notice advises members of the Settlement Class of substantially all of the settlement's terms, and will be delivered by direct mail to the last known address of each Settlement Class Member, and updated through a search of the National Change of Address database. *See In re School Asbestos Litig.*, 921 F.2d 1330, 1331-32 (3d Cir. 1990)(approving notice sent via first class mail). This methodology is likely to result in actual notice to the vast majority of Settlement Class Members. Furthermore, a website will be established with important case documents made available to class members.

Finally, this Notice will include all necessary legal requirements and provide a comprehensive explanation of the Settlement in simple, non-legalistic terms.

F. A Final Fairness Hearing Should be Scheduled

The Court should schedule a final fairness hearing to determine that class certification is proper and to approve the settlement. *See Manual Fourth* § 21.634. The fairness hearing will provide a forum to explain, describe or challenge the terms and conditions of the class certification and settlement, including the fairness, adequacy and reasonableness of the settlement. *Id.* Accordingly, Plaintiff requests that the Court schedule the time, date, and place of the final fairness hearing.

Conclusion

For the foregoing reasons, Plaintiff respectfully requests that this Court enter an Order: (1) conditionally certifying a class action with respect to the claims against Defendants pursuant to Rule 4:32-1(b)(1)(A) for the purpose of effectuating a class action settlement of the claims against Defendants; (2) preliminarily approving a class settlement with Defendants as set forth in the Settlement Agreement; (3) designating Plaintiff Dickens as the representative of the class and designating the attorneys set forth herein from Locks Law Firm, LLC as Class Counsel; (4) directing notice to class members regarding settlement of certain claims against Defendants on a final and complete basis; and (5) scheduling a final fairness hearing.

Respectfully Submitted,
LOCKS LAW FIRM, LLC

/s/ James A Barry
Alfred M. Anthony, Esquire
James A. Barry, Esquire

Dated: May 23, 2019

LOCKS LAW FIRM, LLC
By: Alfred M. Anthony, Esq. (Atty. ID: 028571992)
James A. Barry, Esq. (Atty. ID 027512008)
801 N. Kings Highway
Cherry Hill, NJ 08034
(856) 663-8200

Attorneys for Plaintiff

TRACEY DICKENS on behalf of herself and all others similarly situated, Plaintiff, v. SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., and JOHN DOES (1-300), Defendants.	SUPERIOR COURT OF NEW JERSEY MIDDLESEX COUNTY LAW DIVISION Docket No.: MID-L-05305-16 CIVIL ACTION **CERTIFICATE OF SERVICE**

I, James A. Barry, of full age do hereby certify that:

1. I am an associate with the Locks Law Firm, attorneys for Plaintiffs.

2. On May 23, 2019, I electronically filed the foregoing Motion for Preliminary Approval of a Class Action Settlement.

3. On May 23, 2019, I sent a courtesy copy of Plaintiff's Motion for Preliminary Approval of a Class Action Settlement with supporting documents to Honorable Lisa M. Vignuolo, J.S.C., Middlesex County Courthouse 56 Paterson Street New Brunswick, NJ 08903 via regular mail.

4. On May 23, 2019, I served upon copies of Plaintiff's Motion for Preliminary Approval of a Class Action Settlement with supporting documents upon all counsel via electronic mail upon the following:

Garry T. Stevens, Jr., Esquire
Winget Spadafora Schwartzberg
2500 Plaza 5
Harborside Financial Center
Jersey City, NJ 07311
Phone: 201-633-3630
Stevens.g@wssllp.com
Attorney for Defendant

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: May 23, 2019

/s/James A. Barry
James A. Barry

TRACY DICKENS on behalf of herself and all others similarly situated, Plaintiff, -against- SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.; and JOHN DOES 1-300, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MIDDLESEX COUNTY DOCKET NO.: MID-L-5305-16 Civil Action

SETTLEMENT AGREEMENT

Plaintiff Tracy Dickens, by and through her counsel, and Defendant Sedgwick Claims Management Services, Inc. ("Sedgwick"), by and through its counsel, hereby enter into this Settlement Agreement providing, subject to the approval of the Court, for the settlement of Plaintiff's and the Settlement Class's claims herein described against Defendant.

I. RECITALS

WHEREAS, Plaintiff filed the above-captioned class action complaint against Defendant alleging that Defendant uniformly inflated the value of liens held by its clients pursuant to *N.J.S.A.* 34:15-40 ("Section 40") by improperly including certain ineligible legal fees and other expenses in the total amount included in a lien to enforcer the employer's and/or worker's compensation insurer's subrogation rights as against amounts recovered by the injured employee from third parties.

WHEREAS, Plaintiff has alleged that Defendant's actions resulted in its unjust enrichment at the expense of Plaintiff and other similarly situated individuals;

WHEREAS, Defendant denies Plaintiff's and the class claims, and any wrongdoing or liability, and further denies the existence of any uniform policy or practice of artificially inflating

Section 40 Liens. Defendant maintains that any claims for unjust enrichment are limited to those monies that were i) recovered for certain legal fees and other expenses over and above the undisputed and much larger amounts collected for medical expenses and disability payments; and ii) actually remitted to Sedgwick as compensation for its services. Defendants further contend that the said amounts represent only a miniscule fraction of the total subrogation recoveries obtained by Sedgwick for its clients.

WHEREAS, Defendant has concluded that settlement is desirable in order to avoid the time, expense, and inherent uncertainties of defending protracted litigation and to resolve finally and completely all pending and potential claims of the Plaintiffs and all members of the Settlement Class relating to claims which were or could have been asserted by Plaintiff and the Class Members in this Litigation, relating to the practices at issues;

WHERAS, Plaintiff recognizes the costs and risks of prosecution of this Litigation, and believes that her interests, and the interests of all Class Members, to resolve this Litigation, and any and all claims against Defendant, are best served by and through the terms contained within this Settlement Agreement;

WHEREAS, significant arms-length settlement negotiations have taken place between the Parties, including a full-day mediation before Judge Marina Corodemus (Ret) on September 21, 2018 and, as a result of those negotiations, both before, during and after that mediation, this Settlement Agreement has been reached, subject to the Court approval process set forth herein;

WHEREAS, the Parties desire to settle fully and finally all differences between them and any and all claims that were or could have been brought against Sedgwick in the complaint, and to dismiss the Action with prejudice;

WHEREAS, the Plaintiff and Class Counsel believe that this Settlement Agreement offers

significant benefits to Class Members and is fair, reasonable, adequate and in the best interest of Class Members; and

WHEREAS, this Settlement Agreement is made and entered into by and amount Plaintiff, individually and on behalf of the Settlement Class, and Defendant.

NOW, THEREFORE, in consideration of the mutual covenants and promises herein contained and other good and valuable consideration, and the avoid the risk, inconvenience, and expense of litigation and without any admission of fault or liability on the part of any party hereto or the absence or merit in any claim being asserted by the Named Plaintiff;

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned Parties as follows:

II. DEFINITIONS

1. In addition to the terms defined elsewhere in this Agreement, the following terms, as used in all parts on this Agreement, shall have the meanings specified below:

1.1. **"Action"** shall mean this above-captioned class action pending before the Superior Court of New Jersey, Law Division, Middlesex County.

1.2. **"Asserted Claim(s)"** means all claims asserted in any Complaint and their associated allegations and prayer for relief, including, without limitation, class asserted on a class basis.

1.3. **"Bar Date to Object"** shall be the date set by the Court as the deadline for Class Members to object to this Agreement. The Bar Date shall be 21 days prior to the Final Approval Hearing scheduled by the Court.

1.4. **"Bar Date to Opt Out"** shall be the date set by the Court as the deadline for Class Members to opt out of this Agreement. The Bar Date shall be twenty-one (21) days prior to the Final Approval Hearing scheduled by the Court.

1.5. **"Class Assignment"** shall refer to the classification of each Class Member as provided for in Section V, Subsection 3 of this Settlement Agreement.

1.6. **"Class Counsel"** shall mean Locks Law Firm, LLC.

1.7. **"Class Members"** shall mean the members of the Settlement Class.

1.8. **"Class Notice"** shall mean the Court-approved form of notice to Class Members informing them of the (i) preliminary approval of the Settlement; and (ii) scheduling of the Final Approval Hearing. The form of this Notice as agreed upon by the Parties is attached as Exhibit A and shall be approved by the Court prior to its dissemination.

1.9. **"Court"** shall mean the Superior Court of New Jersey, Law Division, Middlesex County.

1.10. **"Defendant"** shall mean Sedgwick Claims Management Services, Inc., as well as its affiliates, predecessors, successors, assigns, directors, offices, agents, attorneys, representatives and employees.

1.11. **"Defendant's Counsel"** shall be Winget, Spadafora and Schwartzberg, LLP.

1.12. **"Effective Date"** shall be thirty (30) days after the entry of the Final Approval Order provided no objections are made to this agreement. If there are objections to the Agreement, then the Effective Date shall be the later of: (1) Sixty (60) days after the entry of the Final Approval Order, if no appeals are taken from the Final Approval Order; or (2) if appeals are taken from the Final Approval Order, then thirty (30) days after the date on which all appeals, including motions for rehearing or reargument, motions for review, motions for certification, or any other form of review have been finally disposed

of in a manner resulting in affirmance or upholding all of the material provisions of the Final Approval Order.

1.13. **"Employee-Allocated Expenses"** shall mean those fees and expenses assessed to the employee or workers' compensation claimant by the New Jersey Division of Workers' Compensation, pursuant to the corresponding Order Approving Settlement. Employee-Allocated Expenses are to be coded into Sedgwick's computer system as an indemnifiable expense utilizing the code "176" that is ultimately incorporated into the value of any stated Section 40 lien.

1.14. **"Employer-Allocated Expenses"** shall mean those fees and expenses assessed to the employer or workers' compensation insurance carrier by the New Jersey division of Workers' Compensation, pursuant to the corresponding Order Approving Settlement. Employer-Allocated Expenses are to be coded into Sedgwick's computer system as a non-indemnifiable expense that is to be excluded from the value of any stated Section 40 lien.

1.15. **"Exclusion Letter"** shall mean a letter by or on behalf of a Class Member who elects to opt out of this Agreement.

1.16. **"Fees and Expense Award"** means the attorneys' fees and costs as awarded by the Court to Class Counsel as further described below in Section V, Subparagraph 3.1.

1.17. **"Final"** With respect to the Judgment, this Settlement, or to any award of any claims, or any award of attorneys' fees and expenses (the Fee and Expense Award), "Final" means that the time for appeal or writ review has expired or, if an appeal or petition for review is taken and dismissed or the Settlement is affirmed, the time period during

which further petition for hearing, appeal, or write of certiorari can be taken has expired. If the Judgment is set aside, materially modified or overturned by the Court or on appeal, and is not fully reinstated on further appeal, the Judgment shall not become final. Any proceeding or order or any appeal or petition for review or write of certiorari pertaining solely to Fee and Expense Award or any Incentive Award to Plaintiff will not in any way delay or preclude the Judgment from becoming final.

1.18. **"Final Approval Hearing"** shall mean the hearing at which the Court will consider and finally decide whether to enter the Final Approval Order.

1.19. **"Final Approval Order"** shall mean the Court order that approves this Settlement Agreement, approves payment of attorneys' fees and expenses, and makes such other final rulings as are contemplated by this Settlement Agreement.

1.20. **"Gross Settlement Amount"** shall mean the amount that Sedgwick shall deposit into the Settlement Fund. The Gross Settlement Amount shall be One Hundred Forty Thousand Dollars and Zero Cents ($140,000.00).

1.21. **"Incentive Award"** shall mean the amount approved by the Court to be paid to the Named Plaintiff, in addition to her respective payments under the Settlement Formula (as defined below), if any, in recognition of her efforts in coming forward as the Named Plaintiff and insuring the continued prosecution of the Litigation.

1.22. **"Individual Overcharge"** shall mean the amount that Sedgwick concedes, for the purposes of this Settlement only, each Class Member was purportedly overcharged, in Sedgwick's calculation of corresponding Section 40 lien. The Individual overcharge will be calculated as 40% of the amounts entered under the code "176" in Defendant's records.

1.23. **"Individual Damages"** shall mean the amount that each Class Member is entitled to recover pursuant to this Settlement Agreement, as calculated pursuant to the Settlement Formula.

1.24. **"Lien Satisfaction Percentage"** shall mean that percentage of the total Section 40 Lien that each Class Member has satisfied, according to Sedgwick's records.

1.25. **"Litigation"** shall mean this above-captioned putative class action proceeding pending before the Superior Court of New Jersey, Law Division, Middlesex County.

1.26. **"Named Plaintiff"** shall mean Tracy Dickens.

1.27. **"Net Settlement Fund Amount"** shall mean the net amount of the Settlement Fund after payment of court approved attorneys' fees and costs, any court approved incentive award and the costs of Notice and any fees paid to the Claims Administrator.

1.28. **"Order Approving Settlement"** shall refer to the Order issued by the New Jersey Division of Workers' Compensation, allocating Employee- and Employer-Allocated Expenses for each Class Member.

1.29. **"Parties"** shall mean the Named Plaintiff and the Defendant.

1.30. **"Preliminary Approval Order"** shall mean the order of the Court preliminarily approving this Settlement Agreement, the form of which the parties shall agree upon and designate as Exhibit B or a form that is substantially the same form as that approved by the Court.

1.31. **"Qualifying Exclusion Request"** means an Exclusion Request that is fully completed, properly executed, and timely returned to the Claims Administrator.

1.32. **"Released Parties"** shall mean Defendant, its successors, assigns, employees, officers, directors, attorneys, legal representatives, direct and indirect affiliates, parent companies, insurers, reinsurers, accountants or auditors, banks, investment banks, underwriters, consultants, agents, and/or the employers and/or insurance carriers for which Defendant provided third-party administrative services and that held the liens administered by Defendant as identified in the definition of the Settlement Class. Consistent with the preceding sentence, "Released Parties" shall also specifically include Linda Smith, who was identified in the complaint as authoring the purportedly inflated lien, but who was never named as a defendant.

1.33. **"Released Claims"** shall mean any and all claims, rights, demands, obligations, controversies, debts, damages, losses, actions, causes of action, and liabilities of any kind or nature whatsoever, whether in law or equity, whether based on federal, state, local, constitutional, statutory, or common law (including, but not limited to, claims sounding in tort, fraud or fraud in the inducement or contract or any claims for attorneys' fees or costs) or any other law, whether accrued or unaccrued, fixed or contingent, known or unknown or based on facts known or unknown, that have been or could have been asserted by the Named Plaintiff or the Settlement Class Members against Defendant arising out of the allegations, transactions, facts, events, matters, occurrences, acts, representations, or omissions involved in, set forth in, or referred to in Plaintiff's First Amended Complaint. Consistent with the preceding sentence, "Released Claims" shall also specifically include Plaintiff's claims under the New Jersey Consumer Fraud Act, *N.J.S.A.* 56:8-1 *et seq.*, and the New Jersey Truth-in-Consumer Contract Warranty and Notice Act, *N.J.S.A.*, 56:12-14 *et seq.*, which were dismissed pursuant to the Court's May 12, 2017

Order.

1.34. **"Section 40"** shall mean *N.J.S.A.* 34:15-40.

1.35. **"Section 40 Lien"** shall mean the statutory lien provided for pursuant to Section 40, which is calculated by factoring in the costs of all medical and indemnity payments, including Employee-Allocated Expenses, made by Defendant, on behalf of Defendant's clients, for the benefit of the Class Members.

1.36. **"Settlement"** shall mean the agreement by the Parties to resolve this Litigation, the terms of which have been memorialized and provided for in this Settlement Agreement.

1.37. **"Settlement Agreement"** shall mean this Settlement Agreement and all the exhibits attached hereto.

1.38. **"Settlement Class"** shall mean:

> All New Jersey workers' compensation recipients who, since September 12, 2010, (i) have had a worker's compensation claim that was administered by Defendant and adjudicated by the New Jersey Division of Workers' Compensation, (ii) who either directly or through counsel received notice from Defendant purporting to require the payment of liens pursuant to *N.J.S.A.* 34:15-40 that incorporated employer-allocated fees or expenses, *and* (iii) who paid any amount of money in satisfaction of that lien.

1.39. **"Settlement Formula"** shall mean the formula as set forth in Section V, Subparagraph 3.8, below.

1.40. **"Settlement Fund"** shall mean the one hundred forty thousand dollars ($140,000) to be paid by Defendant under the terms of this Agreement.

III. REQUIRED EVENTS

1. Promptly after execution of this Settlement Agreement by all Parties:

1.1. Class Counsel and Defendant's counsel shall take all reasonable and

necessary steps, subject to the Court's availability, to obtain entry of the Preliminary Approval Order and to move for the entry of the Final Approval Order.

1.2. The Plaintiff shall move for entry of a Preliminary Approval Order in same or substantially identical form as that attached hereto as Exhibit B.

1.3. The Parties will use their best reasonable efforts, consistent with the terms of this Settlement Agreement, to promptly obtain a Final Approval Order.

1.4. In the event that the Court refuses to issue a Preliminary Approval Order or Final Approval Order in all material aspects as those proposed to the Court, this Settlement Agreement are voidable by the party or parties adversely affected by the Court's reason for its failure to provide approval, except that any failure to approve the Fee Award or Incentive Award in the amount requested shall not give Plaintiff the right to void the Settlement Agreement.

1.5. The Parties acknowledge that prompt approval, consummation, and implementation of the Settlement set forth in this Settlement Agreement are essential. The Parties shall cooperate with each other in good faith to carry out the purposes of and effectuate this Settlement Agreement, shall promptly perform their respective obligations hereunder, and shall promptly take any and all actions and execute and deliver any and all additional documents and all other materials and/or information reasonably necessary or appropriate to carry out the terms of this Settlement Agreement and the transactions contemplated hereby.

1.6. Upon the Effective Date, Judgment in this action shall be rendered, subject

to the continuing jurisdiction of this Court as provided in Section VII herein.

2. No later than thirty (30) days following the Preliminary Approval Date, Defendant will provide the Claims Administrator with the following:

2.1. The last known address of all potential class members, identified within Sedgwick's computer system as New Jersey workers' compensation recipients with claims administered by Defendant between September 12, 2010 and the Preliminary Approval Date, whose records reflect a data entry for (i) employee-allocated litigation expenses; *and* (ii) a payment or subrogation recovery made by the workers' compensation recipient.

IV. CHANGE IN PROCEDURE

1. Defendant confirms that, as a result of this Litigation, as of January 1, 2017, Defendant has taken affirmative action to prevent any future improper inflation of Section 40 liens. Specifically, Defendant has offered enhanced instructions to its personnel stressing that no fees or costs allocated to its clients by the Division of Workers' Compensation are incorporated into the lien amount communicated to workers' compensation recipients or their representatives.

V. THE SETTLEMENT FUND, DISTRIBUTIONS AND CLASS ASSIGNMENTS

1. No later than thirty (30) days following the Preliminary Approval Date, Sedgwick shall transmit to the Claims Administrator the Gross Settlement Amount, which is to be held in an interest bearing checking account as the Settlement Fund. Subject to the provisions below, the Gross Settlement Amount shall satisfy payment of the Plaintiff's Incentive Award, all Settlement Payments, Class Counsel's fees, and Class Counsel's expenses, including the costs of administration and notice to the Class. Under no circumstances shall Sedgwick be liable to pay any additional amounts into the Settlement Fund above the Gross Settlement Amount.

2. In no event shall Sedgwick be liable for making payments under this Agreement,

or for providing any relief, before the deadlines set forth in this Agreement.

3. The Gross Settlement Amount will be allocated as follows:

3.1. Up to one third (33%) of the Gross Settlement Amount, after costs are deducted, may be paid in attorneys' fees to Class Counsel, subject to Court approval. In addition, Class Counsel may apply to the Court for reimbursement of reasonable litigation and administration costs and expenses. Any such reimbursement shall be in addition to the attorneys' fees approved by the Court and shall be paid from the Gross Settlement Amount (collectively, fees and costs, the "Fee and Expense Award").

3.2. An Incentive Award of up to $7,500 may be paid to the Named Plaintiff, subject to Court approval. Any such Incentive Award shall be paid from the Gross Settlement Amount.

3.3. Fees incurred in facilitating notice and related administration costs, as discussed further in Section VII shall be paid from the Gross Settlement Amount, prior to the calculation of Class Counsel's fees.

3.4. The remaining sum shall be referred to as the Net Settlement Amount. Specifically, the Net Settlement Amount shall be the Gross Settlement Amount, plus Settlement Fund Interest, if any, minus the sum of the amounts set forth above in Section IV.

3.5. Sedgwick will not oppose Class Counsel's application to the Court for attorneys' fees and costs as described above in Section V, Subparagraph 3.1. No later than 14 days following the Effective Date, and only if the Effective Date occurs, payment of the Fee and Expense Award shall be made from the Gross Settlement Amount to Class Counsel All attorneys' fees and costs will be paid from the Gross Settlement Amount and no

attorneys' fees or costs beyond the amounts provided for in this Agreement and approved by the Court will be paid to any attorney representing any Person in this Action.

3.6. Sedgwick will not oppose the Named Plaintiff's request to the Court for an Incentive Award as described above in Section V, Subparagraph 3.2. No later than 14 days following the Effective Date, and only if the Effective Date occurs, payment of the Incentive Award shall be made from the Gross Settlement Amount to the Named Plaintiff.

3.7. Provided the Settlement becomes Final and there is a Settlement Effective Date, no amount of the Gross Settlement Amount or the Net Settlement Amount shall revert to Sedgwick. One hundred percent (100%) of the Net Settlement Amount shall be paid to Class Members as set forth in the Settlement Formula.

3.8. The Settlement Formula is as follows:

a. Class A: For all Class Members with a Lien Satisfaction Percentage of fifty percent (50%) or more, each class member shall receive a payment equaling the "individual overcharge."

b. Class B: For all Class Members with a Lien Satisfaction Percentage of greater than forty percent (40%) and less than fifty percent (50%), each Class Members shall receive a payment equaling 65% of the "individual overcharge."

c. Class C: For all Class Member with a Lien Satisfaction Percentage of less than forty percent (40%) each class member shall be entitled to a pro rata share of the amounts remaining after the payments of Class A and Class B.

VI. CLAIMS ADMINISTRATION

1. The parties will use Angeion Group as claims administrator for the class. The administration duties shall include, without limitation, mailing Notices, calculating awards, processing requests for exclusion and objections, performing necessary address searches on Notices returned as undeliverable and re-sending such Notices; updating addresses in response to Class Members submitting updated addresses; mailing Class Member settlement checks, issuing any required tax reporting form; and providing weekly status reports to Counsel for the Parties. The cost of claims administration will be paid from the Gross Settlement Fund.

VII. NOTICE TO CLASS MEMBERS

1. If, by entering an order preliminarily approving this Agreement and the Class Notice, the court provides authorization to send the Class Notice, the Claims Administrator will mail the Class Notice to all Class Members at their Last Known Addresses. The Claims Administrator shall mail the Class notice via first class mail through the United States Postal Service, postage pre-paid.

2. The Class Notice will be in the form as annexed hereto as Exhibit A.

3. The Claims Administrator shall use the Gross Settlement Amount to pay the costs of identifying and notifying Class Members and otherwise administering the Settlement. Any notice and administration costs and escrow fees, shall be paid out of the Gross Settlement Amount. Notice and administration costs shall include, among other things, mailing and printing notice as directed by the Court and the cost of processing settlement and distributing the Net Settlement Amount to Class Members.

4. The Claims Administrator shall mark the Class Notice and its envelope(s) or covering to denote the return address of the Claims Administrator. The envelope or covering containing the Class Notice shall also bear the following note: "Important Legal Notice Enclosed."

The Claims Administrator shall include only the Class Notice in this mailing, in a form that does not materially differ from Exhibit A.

5. Prior to mailing the Class Notice to each Class Member, and to the extent possible within the requisite deadlines, the Claims Administrator shall include in the space provided on each Claim Form the Class Member's corresponding Class Assignment, as defined in Section V. Subparagraph 3.8 and the estimated amount of the Class Member's payment should the Settlement be Approved with no requests to exclude or objections from the Class. If a Class Member disagrees with his or her Class Assignment and provides documentation to support his or her claim for a different Class Assignment, the Claims Administrator, with the assistance of Class Counsel, will meet and confer informally to resolve the issue. If the Class Member and the Claims Administrator, with the assistance of Class Counsel, cannot agree on the Class Member's Class Assignment, the issue will be submitted to the Court, and each Class Member shall have the burden of proving that the Class Assignment provided to him or her is wrong, and the Court shall have the final authority to decide the appropriate Class Assignment.

VIII. OPT-OUTS

1. A Class Member who wishes to exclude himself or herself from this Settlement Agreement, and from the release of claims and defenses provided for under the terms of this Settlement Agreement, shall submit an Exclusion Request by mail to the Claims Administrator. For an Exclusion Request to be considered a Qualifying Exclusion Request, it must be postmarked on or before the "Bar Date to Opt Out." Any Qualifying Exclusion Request shall identify the Class Member, state that the Class Member wishes to exclude himself or herself from the Settlement Agreement, and shall be signed and dated.

1.1. The date of the postmark shall be the exclusive means used to determine whether an Exclusion Request has been timely submitted.

1.2. Class members who properly and timely submit a Qualifying Exclusion Request shall have no further role in this Action, and for all purposes shall be regarded as if they never were a party to or in this Action.

2. The Claims Administrator shall maintain a list of persons who have excluded themselves and shall provide such list to Defendant's counsel and Class Counsel at least five (5) days prior to the date Class Counsel is required to file the Motion for Final Approval. The Claims Administrator shall retain the originals of all Exclusion Letters (including the envelopes with the postmarks). The Claims Administrator shall make the original Exclusion Letters available to Class Counsel, Defendant's Counsel and/or the Court upon five (5) court days' written notice.

IX. OBJECTIONS

1. Any class Member other than a Class Member who timely submits an Exclusion Letter, may object to this Agreement.

2. To be valid and considered by the Court, the objection must be sent by first class mail, postage pre-paid, to the Court and the Claims Administrator. The objection must be postmarked on or before the "Bar Date to Object," and must include the following information:

2.1. A heading referring to *Dickens v. Sedgwick Claims Management Services, Inc.* with the case number MID-L-5305-16;

2.2. The objector's name, address, telephone number, and the contact information for any attorney retained by the Objector in connection with the objection or otherwise in connection with this case;

2.3. A statement of the factual and legal basis for each objection and any exhibits the objector wishes the Court to consider in connection with the objection; and

2.4. A statement as to whether the objector intends to appear at the Final

Approval Hearing, either in person or through counsel, and, if through counsel, identifying the counsel by name, address and telephone number.

3. Class Counsel shall file any responsive pleadings at least eight (8) days prior to the Final Approval Hearing Date.

X. TIMING OF PAYMENT TO PARTICIATING SETTLEMENT CLASS MEMBERS

1. The Claims Administrator shall issue to each Participating Settlement Class Member one check (or more if necessary for administrative convenience) for the gross amount of the Participating Settlement Class Member's share. The Claims Administrator shall mail this payment to each Participating Settlement Class Member at his or her last known address, on or before the first business day that falls 10 days after the Effective Date.

2. Following the mailing of payments to Participating Claimants, the Claims Administrator shall provide Class Counsel and Defendant's Counsel with a written confirmation of this mailing and a list of the names of all Participating Class Members.

XI. RELEASES

1. The Released Claims against each and all of the Released Parties shall be released and dismissed with prejudice (without an award of fees or costs to any party other than as otherwise provided in this Settlement Agreement) upon entry of the Superior Court's Final Approval Order.

2. All Participating Settlement Class Members, individually and on behalf of himself or herself and on behalf of each of his or her heirs, representatives, successors, assigns, estates trustees, executors, administrators, beneficiaries, agents, attorneys, successors and assigns, and anyone claiming through them or acting or purporting to act on their behalf, agrees to and hereby does forever release, discharge, hold harmless and covenant not to sue the Released Parties from each and all of the Released Claims and by operation of the Judgment shall have fully and finally

released, relinquished and discharged all such claims against each and all of the Released Parties; and they further agree that they shall not now or hereafter initiate, maintain or assert any of such claims as set forth in their respective releases against the Released Parties in any other court action or before any administrative body, tribunal, arbitration, panel or other adjudicating body. Without in any way limiting the scope of the releases described elsewhere in this Settlement Agreement or in the remainder of this Paragraph, this release covers, without limitations, any and all claims for attorneys' fees, costs, or disbursements incurred by Class Counsel or any other counsel representing the Class Members, or any of them, in connection with or related in any manner, to the Action, the administration of such Settlement or the Released Claims, except to the extent otherwise specified in this Settlement Agreement

3. Nothing in the above Paragraph or Released Claims shall serve as a waiver of any Participating Class Member's claims that arise after the Effective Date. The Released Claims do not include claims relating to the enforcement of this Settlement Agreement and/or relating to any Court order and judgment pertaining to same.

4. As of the Effective Date, the Participating Class Members shall be permanently barred from initiating, asserting or prosecuting against the Released Parties, in any state or federal court or tribunal or agency, any and all of the Released Claims.

5. All Participating Class Members shall be bound by the terms and conditions of this Settlement Agreement, including all orders issued pursuant thereto, and shall be deemed to have waived all unstated objections and opposition to the fairness, reasonableness, and adequacy of this Settlement Agreement, and any of its terms, and will have been deemed to have waived any right to recover proceeds from any individual settlement agreement regarding the Released Claims, whose terms will be void and unenforceable.

6. With respect to the Released Claims, each Participating Class Member shall be deemed to have expressly, knowingly, and voluntarily waived any relinquished to the fullest extent permitted by law, the provisions, rights and benefits he or she may other have had pursuant to the laws of the State of New Jersey. In connection with the Released Claims, the Participating Class Members acknowledge that they are aware that they may hereafter discovery claims presently unknown and unsuspected or facts in addition to or different from those which they now know or believe to be true with respect to matters released herein. Nevertheless, Participating Class Members acknowledge that a portion of the consideration received herein is for the release with respect to unknown damages and complaints, whether resulting from known injuries and known consequences or from unknown injuries or unknown consequences and state it is the intention of the Participating Class Members in agreeing to this released fully, finally and forever to settle and release all matters and claims that exist or that might have existed (whether or not previously or currently asserted in any action) up through and including the Effective Date.

7. Subject to Court approval, each Participating Class Member shall be bound by this Agreement and all of the Released Claims shall be dismissed with prejudice and released, even if they never receive actual notice of the Action or of this Settlement.

8. Sedgwick hereby releases Class Counsel and the Named Plaintiff from any and all claims, rights, demands and actions of any and every kind whether known or unknown to Sedgwick that could have been brought as counterclaims in this Action.

XII. TERMINATION OF AGREEMENT

1. Sedgwick has the right, in the exercise of its sole discretion, to void the Settlement Agreement within twenty (20) calendar days after expiration of the Bar Date for Objections, if 10% or more of the Class Members file Qualified Exclusions Requests and become non-Participating Class Members. If Sedgwick elects to nullify the Settlement Agreement pursuant to

this provision, Sedgwick shall be solely responsible for paying all costs to the Claims Administrator for work performed up to the date the Settlement is voided. The Parties agree they will not encourage any Class Member to forego objecting to the Settlement or to otherwise submit a Qualifying Exclusion Request.

2. In the event that the Court does not approve the Settlement set forth in this Settlement Agreement, one of the conditions upon which this Settlement Agreement is based is not satisfied, or the Settlement Effective Date does not occur, Sedgwick shall make no payments to anyone in accordance with the terms of this Agreement, the Parties will bear their own costs and fees with regard to the efforts to obtain Court approval, and this Settlement Agreement shall be deemed null and void with no effect on the Action whatsoever. Court changes to the dates of hearings provided for in this Agreement and/or reductions in the amount of the Fees and Expense Award, litigation costs, or Incentive Award shall not by themselves permit termination of this Agreement.

3. Sedgwick's acceptance of the Settlement is conditioned upon the execution of this Agreement, including, without limitation, the released provisions, on or before the Bar Date to Opt Out, by the Named Plaintiff, absent which Sedgwick has the right, in the exercise of its sole discretion, to terminate the Agreement within twenty (20) days after the Bar Date to Opt Out.

XIII. MISCELLANEOUS

1. The Parties represent that there has not been any assignment, transfer, conveyance, or other disposition of any rights, obligations, or liabilities released under the terms of this Settlement Agreement, and that there will be no assignment or transfer or purported assignment or transfer to any person or entity whatsoever, of any Released Claim.

2. The Named Plaintiff further acknowledges, agrees and understands that (i) he or she has read and understands the terms of this Settlement Agreement and (ii) he or she has had an

opportunity to obtain and consider legal or other counsel or advice as he or she deems necessary, including Class Counsel.

3. The Named Plaintiff represents that she has no conflicts or other personal interests that would in any way impact her representation of the class in connection with the execution of this Agreement

4. Defendant represents and warrants that it has obtained all corporate authority necessary to execute this Settlement Agreement.

5. The Parties understand and agree that this Settlement Agreement is the result of a good faith compromise settlement of disputed claims, and no part of this Settlement Agreement or any conduct or written or oral statements made in connection with Settlement and this Agreement, whether or not the Settlement is finally approved and/or consummated, or the Settlement Effective Date occurs, may be offered as or construed to be an admission or concession of any kind of Sedgwick or any of the Released Parties.

6. Neither the Named Plaintiff nor Class Counsel, prior to the filing of the motion for Preliminary Approval, shall publicize, or cause to be publicized, directly or indirectly, the discussions resulting in or the existence of this Settlement or its terms, in any type of mass media, including, but not limited to, speeches, press conferences, press releases, interviews, television or radio broadcasts, newspapers, messages on the Internet, Facebook, Twitter or any other social media, Class Counsel's, and any other, website. Without limiting Sedgwick's rights and remedies for a breach of this provision, such breach shall entitle Sedgwick, in the exercise of its sole discretion, to void the Settlement Agreement at any time before Preliminary Approval by the Court. Should the Named Plaintiff at any time breach this provision, the Named Plaintiff shall forfeit to Sedgwick the full amount of her Incentive Award, if any. Without limitation by the

foregoing, Sedgwick may also enforce this provision through an action for injunctive relief. Class Counsel may include the name of this lawsuit on a declaration of representative cases for filing with the court in other proceedings. If counsel for any Party receives an inquiry about the Settlement or this Settlement Agreement or the Action from the media, counsel for any Party may only respond after the motion for Preliminary Approval has been filed and only by confirming the accurate terms of the Settlement Agreement. Nothing in this provision shall prevent Sedgwick or Class Counsel or Named Plaintiff from making any disclosure required by law.

7. Without further order of the Court, the Parties hereto may agree in writing to reasonable extensions of time to carry out any of the provisions of the Settlement Agreement.

8. This Settlement Agreement was entered into after substantial good faith, arms-length negotiations between the Parties and their counsel. This Settlement Agreement has been entered into without any coercion and under no duress. The Parties acknowledges and agree that all Parties had an equal hand in drafting this Settlement Agreement so that it shall not be deemed to have been prepared or drafted by on party to this Agreement or the other.

9. This Settlement Agreement (including all Exhibits hereto) sets forth the entire agreement of the Parties with respect to its subject matter and superseded any and all other prior agreements and all negotiations leading up to the execution of this Settlement Agreement, whether written or oral, regarding the subjects covered herein. The Parties acknowledge that no representations, inducements, warranties, promises, or statements relating to the subjects covered herein, oral or otherwise, have been made by any of the Parties that are not embodied or incorporated by reference herein.

10. This Settlement Agreement may not be modified or amended except in a writing signed by all signatories hereto or their successors in interest.

11. This Settlement Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective heirs, executors, administrators, successors and assigns and upon any corporation, partnership or other entity into or with which any Party hereto may merge, combine or consolidate. This Settlement Agreement is not intended to confer third-party beneficiary status on any party not expressly named herein.

12. The waiver by any Party of any breach of this Agreement shall not be deemed or construed as a waiver of any other breach, whether prior, subsequent, or contemporaneous, of this Settlement Agreement.

13. This Settlement Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument, and facsimile signatures and/or scanned or photographed signed copies may be accepted as originals for any and all purposes of executing this Agreement.

14. The terms of this Settlement Agreement shall be governed, construed, enforced, and administered in accordance with the internal laws of the State of New Jersey, without regard to conflict of law principles.

15. The headings contained in this Settlement Agreement are for convenience and reference purposes only, and shall not be given weight in its construction.

16. In the event any one or more of the provisions of this Settlement Agreement is determined to be invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions contained in this Agreement will not in any way be affected or impaired thereby.

17. Any issues arising out of or relating to this Settlement Agreement that cannot be resolved by the Parties and/or Class Counsel and/or the Claims Administrator shall be submitted

to the Court, which shall retain jurisdiction over this Action for the limited purposes of resolving any issues relating to enforcement or interpretation of this Settlement Agreement including any and all issues relating to payment of administration costs, litigation costs, attorneys' fees and/or distributions to Participating claimants. The Court shall not retain jurisdiction of this Action for any other reason or purpose.

18. Any notices, request, demands, or other communications required or permitted to be given pursuant to this Settlement Agreement, other than notice to Class Members, shall be in writing and mailed as follows:

Class Counsel
Locks Law Firm, LLC
Attn: James Barry, Alfred M. Anthony
801 North Kings Hwy.
Cherry Hill, NJ 08034
Tel: (856) 663-8200
Email: jbarry@lockslaw.com; aanthony@lockslawcom

Sedgwick
Winget, Spadafora & Schwartzberg, LLP
Attn: William G. Winget, Garry Stevens
45 Broadway, 32nd Floor
New York, New York 10006
Tel: (212) 221-2900
Email: winget.w@wssllpp.com; stevens.g@wssllp.com

19. No Person shall have any claim against Class Counsel, the Claims Administrator, or counsel for Sedgwick based on the payments made or other actions taken substantially in accordance with this Agreement or further orders of the Court.

20. The Parties (i) acknowledges that it is their intent to consummate this Settlement Agreement; and (ii) agree to cooperate to the extent reasonably necessary to effect and implement all terms and conditions of this Settlement Agreement and to exercise their best efforts to accomplish the foregoing terms and conditions of this Settlement Agreement.

21. All Confidential Material within the meaning of the Stipulated Protective Order of Confidentiality, filed in this Action on October 19, 2017 ("Confidentiality Order"), shall be destroyed and/or permanently deleted within forty-five (45) days after the Effective Date, and certified to have been destroyed by an affidavit to the Supplying Party as provided for in Paragraph 25 of the Confidentiality Order.

22. Each Person executing this Agreement or any of its exhibits on behalf of any Party or Participating Class Member hereby warrants that he or she has the full authority to do so.

Dated: May 15, 2019

LOCKS LAW FIRM, LLC

By: _____
Alfred M. Anthony
James A Barry
Attorneys for Plaintiff Tracey Dickens

Dated: May 20, 2019

WINGET SPADAFORA & SCWARTZBERG, LLP

By: _____
William G. Winget
Garry Stevens
Attorneys for Defendant, Sedgwick Claims Management Services, Inc.

Dated: May 19, 2019

By: _____
Representative for Defendant, Sedgwick Claims Management Services, Inc.

Dated: May 15, 2019

By: _____
Tracey Dickens
Plaintiff and Class Representative

Tracey Dickens
v.
Sedgwick Claims Management Services, Inc.

NOTICE OF PENDING CLASS ACTION AND PROPOSED SETTLEMENT

READ THIS NOTICE FULLY AND CAREFULLY; THE PROPOSED SETTLEMENT MAY AFFECT YOUR RIGHTS!

IF YOU HAD A WORKERS' COMPENSATION CLAIM ADMINISTERED BY SEDGWICK CLAIMS MANAGEMENT SERVICES, INC. ("SEDGWICK"), BETWEEN SEPTEMBER 12, 2010 AND NOVEMBER 15, 2018, *AND* YOU SATISFIED SOME PORTION OF YOUR CORRESPONDING WORKERS' COMPENSATION LIEN AS PROVIDED FOR UNDER *N.J.S.A.* 34:15-40 ("SECTION 40"), THEN YOU MAY BE ENTITLED TO A PAYMENT FROM A CLASS ACTION SETTLEMENT

The Superior Court of New Jersey, Law Division: Middlesex County has authorized this Notice; it is not a solicitation from a lawyer.

SUMMARY OF YOUR OPTIONS AND THE LEGAL EFFECT OF EACH OPTION	
DO NOTHING	**If you do nothing, you will remain a member of the Settlement Class and will be mailed a settlement payment.**
EXCLUDE YOURSELF FROM THE SETTLEMENT; RECEIVE NO PAYMENT BUT RELEASE NO CLAIMS	**You can choose to exclude yourself from the settlement or "opt out." This means you choose not to participate in the settlement and cannot object to the settlement. You will keep your individual claims against Sedgwick but you will not receive a payment. Opting out allows you to file a separate individual lawsuit against Sedgwick.**
OBJECT TO THE SETTLEMENT	**To object to the settlement, you must submit your objections in writing by filing them with the Court. If your objection is overruled by the Court, then you will receive a payment and you will not be able to separately sue Sedgwick for the claims asserted in this litigation (or the claims that could have been asserted). If the Court agrees with your objection, the settlement may not be approved.**

These rights and options – *and the deadlines to answer them* – along with the material terms of the settlement are explained in this Notice.

1. What is this lawsuit about?

The lawsuit that is being settled is entitled *Tracy Dickens v. Sedgwick Claims Management Services, Inc.*, pending in the Superior Court of New Jersey, Law Division: Middlesex County, Docket No. MID-L-5305-16. The case is a "class action." That means that the "Named Plaintiff," Tracey Dickens, is an individual who is acting on behalf of all persons who, between September 12, 2010 and November 1, 2018 (the "Class Period") (i) have had a worker's compensation claim that was administered by Sedgwick and adjudicated by the New Jersey Division of Workers' Compensation, (ii) who either directly or through counsel received notice from Defendant purporting to require the payment of liens pursuant to *N.J.S.A.* 34:15-40 ("Section 40 Lien") that incorporated employer-allocated fees or expenses, ***and*** (iii) who paid any amount of money in satisfaction of that lien. This group is called the "Class," and individuals within the Class are referred to as "Class Members." Plaintiff is asserting a claim for unjust enrichment against Sedgwick. Plainiff alleges that Sedgwick improperly incorporated certain fees and expenses to the value of her lien and seeks a refund of funds paid in satisfaction of her Section 40 Lien. Sedgwick maintains that this practice was in line with prevailing guidelines issued by the New Jersey Compensation Rating and Inspection Bureau, and that in any event, Sedgwick only retained a small portion of those funds collected in satisfaction of the Section 40 Liens it administered with respect to all Class Members.

2. Why did I receive this Notice of this lawsuit?

You received this Notice because Sedgwick's records indicate that during the Class Period, you (i) had a worker's compensation claim that was administered by Sedgwick and adjudicated by the New Jersey Division of Workers' Compensation, (ii) either directly or through counsel received notice from Defendant purporting to require the payment of a Section 40 Lien that incorporated employer-allocated fees or expenses, ***and*** (iii) paid some amount of money in satisfaction of that lien. The Court directed that this Notice be sent to all Class Members because each Class Member has a right to know about the proposed settlement and the options available to him or her before the Court decides whether to approve the settlement.

3. Why did the Parties settle?

The Court did not decide in favor of Plaintiff or Defendants in this lawsuit. Instead, both sides agreed to a settlement. That way, the parties avoided the risks and costs of a trial, including the risk that there would be no recovery, and the Class Members will get compensation. The Settlement Class Representative and the attorneys appointed by the Court for the Settlement Class think the settlement is best for everyone who is a Settlement Class Member.

WHO IS IN THE SETTLEMENT

4. How do I know if I am part of the Settlement?

If you received this Notice, then Sedgwick's records indicate that you are a Class Member who is entitled to receive a payment pursuant to the terms of the Settlement Agreement.

YOUR OPTIONS

5. What options do I have with respect to the Settlement?

You have three options: (1) do nothing and away a disbursal of the remaining settlement funds; (2) exclude yourself from the settlement ("opt out" of it); or (3) participate in the settlement but object to it. Each of these options is described in a separate section below.

6. What are the critical deadlines?

The deadline for sending a letter to exclude yourself from or opt out of the settlement is _____.

The deadline to file an objection with the Court is _____.

8. What has to happen for the Settlement to be approved?

The Court has to decide that the settlement is fair, reasonable, and adequate before it will approve it. The Court already has decided to provide preliminary approval of the settlement, which is why you received this Notice. The Court will make a final decision regarding the settlement at a "Fairness Hearing" or "Final Approval Hearing", currently scheduled for _____.

THE SETTLEMENT PAYMENT

9. How much is the Settlement?

Sedgwick has agreed to create a Settlement Fund of $140,000, and has also changed its practices in aggregating Section 40 lien totals to avoid incorporating any employer-assessed fees or expenses into its lien notices. As discussed separately below, attorneys' fees, litigation costs, an Incentive Award to the Named Plaintiff, and the costs paid to a third-party Claims Administrator to administer the settlement (including mailing this notice) will be paid out of this "Gross Settlement Amount." The balance of the Settlement Fund (or "Net Settlement Amount") will be divided among all Class Members as described in #12.

10. How much of the settlement fund will be used to pay for attorneys' fees and costs?

Class Counsel has requested that the Court award 33-1/3% (one-third) of the settlement fund as attorneys' fees. Class Counsel has also requested that it be reimbursed approximately $_____ in litigation and administration costs incurred in prosecuting the case. The Court makes the decision on the request for attorneys' fees and costs, and will decide the amount of the attorneys' fees based on a number of factors, including the risk associated with bringing the case on a contingency basis, the amount of time spent on the case, the amount of costs incurred to prosecute the case, the quality of the work, and the outcome of the case.

11. How much of the settlement fund will be used to pay the Named Plaintiff an Incentive Award?

The Named Plaintiff will apply to the Court for an Incentive Award of $ _____ for her role in securing this settlement on behalf of the class. The Court will decide if an Incentive Award is appropriate and if so, the amount of the award.

12. How much will my payment be?

After payment of attorneys' fees and costs of litigation, the Incentive Award payment to the Named Plaintiff and the costs of the Claims Administrator, the Net Settlement Amount will be disbursed to Class Members pursuant to an agreed-upon Settlement Formula. The Settlement Formula provides that Class Members be assigned one of three "Class Assignments" depending on their "Lien Satisfaction Percentage" (*i.e.*, the amount of money paid in satisfaction of the Section 40 Lien administered by Sedgwick as measured against the total value of the Section 40 Lien):

Class A: For all Class Members with a Lien Satisfaction Percentage of fifty percent (50%) or more, each class member shall receive a payment equaling the "individual overcharge."

Class B: For all Class Members with a Lien Satisfaction Percentage of greater than forty percent (40%) and less than fifty percent (50%), each Class Members shall receive a payment equaling 65% of the "individual overcharge."

Class C: For all Class Member with a Lien Satisfaction Percentage of less than forty percent (40%) each class member shall be entitled to a pro rata share of the amounts remaining after the payments of Class A and Class B. It is estimated that these payments will be no less than ____.

Sedgwick's records reflect that your Class Assignment is Class ___ and your estimated payment under the settlement is _____.

14. When will I receive my payment?

The Court will hold a Fairness Hearing (explained below in Questions ____) on _____ to consider whether the settlement should be approved. If the Court approves the settlement, then the Claims Administrator may begin to process claims. However, if someone objects to the settlement, and the objection is sustained, then there is not settlement. Even if all objections are overruled and the Court approves the settlement, and objector could appeal and it might take months or even years to have the appeal resolved, which would delay any payment.

EXCLUDING YOURSELF FROM THE SETTLEMENT

15. How do I exclude myself from the settlement?

If you do not want to receive a payment, or if you want to keep any right you may have to sue Sedgwick for the claims alleged in this lawsuit, then you must exclude yourself or "opt out."

To opt out, you must send a letter to the Claims Administrator that you want to be excluded. Your letter can simply say, "I hereby elect to be excluded from the settlement in the *Dickens v. Sedgwick Claims Management Services, Inc.* class action. Be sure to include your full name, your date of birth, the address, telephone number and email address. Your exclusion or opt out request must be postmarked by _____, and sent to:

Attn:

Please note that failure to include all necessary information in your exclusion request will invalidate the request, and you will not have successfully removed yourself from the settlement.

16. What happens if I opt out of the settlement?

If you opt out of the settlement, you will preserve and not give up any of your rights to sue Sedgwick for the claims alleged in this case. However, you will not be entitled to receive a payment from this settlement.

17. If I exclude myself, can I obtain a payment?

No. If you exclude yourself, you will not be entitled to a payment.

OBJECTING TO THE SETTLEMENT

18. How do I notify the Court that I do not like the settlement?

You can object to the settlement or any part of it that you do not like *IF* you do not exclude yourself or opt out from the settlement. (Class Members who exclude themselves from the settlement have no right to object to how other Class Members are treated.) To object, you must send a written document to the Court and the Claims Administrator at the address below saying that you want to be excluded from *Tracy Dickens v. Sedgwick Claims Management Services Inc.*, MID-L-5305016. Be sure to include your name, address, your telephone number and your email address, if you have one. Your objection should say that you are a Class Member, that you object to the settlement, and the factual and legal reasons why you object. In your objection, you must include your name, address, telephone number, email address (if applicable) and your signature, and whether you intend to appear at the Fairness Hearing.

All objections must be post-marked no later than _____, and must be mailed as follows:

COURT	CLAIMS ADMINISTRATOR
Clerk of Court Middlesex County Courthouse 56 Paterson Street New Brunswick, NJ 08903	*Dickens v. Sedgwick Claims Management, Inc. Claims Administrator* [CLAIMS ADMIN NAME AND ADDRESS]

19. What's the difference between objecting and requesting exclusions from the settlement?

Objecting is simply telling the Court that you do not like something about the settlement. Opting-out is telling the Court that you do not want to be part of the Settlement Class. If you exclude yourself, you cannot object because the case no longer affects you.

20. What happens if I object to the Settlement?

If the Court sustains your objection, or the objection of any other Class Member, then there is no settlement. If you object, but the Court overrules your objection and any other objection(s), then you will be part of the settlement.

THE COURT'S FAIRNESS HEARING

21. When and where with the Court decide whether to approve the settlement?

The Court will hold a Final Approval or Fairness Hearing at ____ on _____ at the Superior Court of New Jersey, Middlesex County Courthouse, located at 56 Paterson Street, New Brunswick, NJ 08903, Room ____. At this hearing, the Court will consider whether the settlement is fair, reasonable and adequate. If there are objections, the Court will consider them. The Court may also decide how much to award Class Counsel for attorneys' fees and expenses and how much the Named Plaintiff should get as an "Incentive Fee" for acting as the class representative.

22. Do I have to come to the hearing?

No. Class Counsel will answer any questions the Court may have. You may attend if you desire to do so. If you have submitted an objection on time and in compliance with this notice the Court will consider it whether you come to the hearing or not. You may also pay your own lawyer to attend.

23. May I speak at the hearing?

If you have objected, you may ask the Court for permission to speak at the Final Approval Hearing as provided in question #18. You cannot speak at the hearing if you excluded yourself.

IF YOU DO NOTHING

24. What happens if I do nothing at all?

You do not need to submit a claim form or any documentation to qualify for a settlement payment if you are a Settlement Class Member. Al Settlement Class Members for whom an address can be found will receive a settlement payment. IF you do nothing you will remain a member of the Settlement Class and be subject to and participate in any finally approved settlement. You will give up claims against Sedgwick for the conduct alleged in the Lawsuit.
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THE LAWYERS REPRESENTING YOU

25. Do I have a lawyer in this case?

The Court ordered that the lawyers and their firm referred to in this notice as "Class Counsel" will represent you and the other Class Members for the purposes of facilitating this settlement. They are:

Alfred M. Anthony
James A. Barry
Locks Law Firm, LLC
801 North Kings Highway
Cherry Hill, NJ 08034
Tel: (853) 663-8200

These attorneys and their firm are called Settlement Class Counsel. You will not be charged

personally for these lawyers, but they will ask the Court to award them a fee to be paid out of the Settlement Fund. If you want to be represented by your own lawyer, you may hire one at your own expense. You can hire a lawyer to represent you and to consult about this notice and the proposed settlement.

26. How will the lawyers be compensated?

Settlement Class Counsel will ask the Court to award them attorney's fees of not more than 1/3 of the Settlement Fund, after expenses of litigation and administration are deducted from the Settlement Fund. Counsel anticipates the total amount of fees and costs requested in this matter will not exceed _____. The Court will be asked to approve the amount of attorneys' fees at the Fairness Hearing.

GETTING MORE INFORMATION

This Notice only summarizes the proposed settlement. More details are contained in the settlement agreement, which can be viewed/obtained online at [WEBSITE].

To change your address for purposes of receiving a payment, you should contact the Claims Administrator as follows:

Dickens v. Sedgwick Claims Management Services, Inc. Claims Administrator
CLAIMS ADMINISTRATOR NAME AND ADDRESS

For more information you can also contact the Class Counsel at the address listed in #25.

PLEASE DO NOT CONTACT THE COURT OR ANY REPRESENTATIVE OF SEDGWICK CONCERNING THIS NOTICE OF THE SETTLEMENT.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
MIDDLESEX COUNTY
DOCKET NO. L-5305-16
A.D.#_____

TRACEY DICKENS,

Plaintiff,

v.

SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., ET AL.,

Defendant.

TRANSCRIPT
OF
DECISION ON
MOTION TO DISMISS

Place: Middlesex County Courthouse
56 Paterson Street
New Brunswick, New Jersey 08903

Date: May 10, 2017

BEFORE:

HONORABLE ARNOLD L. NATALI, JR., J.S.C.

TRANSCRIPT ORDERED BY:

JAMES A. BARRY, ESQ. (Locks Law Firm)

APPEARANCES:

JAMES A. BARRY, ESQ.
ANDREW P. BELL, ESQ.
(Locks Law Firm)
Attorneys for the Plaintiff

WILLIAM G. WINGET, ESQ.
GARRY T. STEVENS, JR., ESQ.
(Winget Spadafora & Schwartzberg)
Attorneys for the Defendant

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I N D E X

THE COURT: All right, Counsel. Thank you. I'm sorry for the brief delay. It's 3:05. I advised the parties that I intended to put on the record the Court's oral decision with respect to the pending motion to dismiss that was filed by the defendant, Sedgwick Claims Management Services, Inc.

The motion was argued orally and papers were submitted in support and opposition and reply, all of which I have read and all of which we have discussed in oral argument. Today is the time where I will put my decision on the record. Could I kindly have appearances from the law firm on behalf of the plaintiff, as well as on behalf of the defendant.

MR. BARRY: James Barry from the Locks Law Firm.

THE COURT: Thank you.

MR. BARRY: Hi, Your Honor.

THE COURT: Hi, Mr. Barry. How are you?

MR. BELL: Good. Andrew Bell, also from the Locks Law Firm, Your Honor.

THE COURT: Thank you.

MR. WINGET: And good afternoon, Your Honor. Bill Winget and Gary Stevens from Winget Spadafora & Schwartzberg for the defendant, Sedgwick Claims Management Services.

THE COURT: Okay. So I suspect this decision will take a little bit more than an hour, but I'll tell you up front what I'm going to do and you can stay for the entire time or whatever you choose to do. I'll also be issuing a conforming order.

So let me start by first thanking the parties for their patience. As you know, I was reassigned from the Civil Division to the Chancery Division and then named the Presiding Judge, so I have some -- some matters that I needed to attend to on an emergent basis over the last 30 or 45 days, and that's what led me to having the matter scheduled. So I apologize to you all. On behalf of the Court and your clients, please extend my apologies. But this will be the Court's decision with respect to the pending motions.

In her class action complaint, the plaintiff, Tracey Dickens, on behalf of herself and others similarly situated, alleges that defendant, Sedgwick Claims Management Services engaged in improper and deceptive practices by misrepresenting the amounts of workers' compensation liens owed by individuals, and that's the complaint at Paragraph 1.

The plaintiffs seek legal and equitable relief pursuant to New Jersey Truth in Consumer Contract Notice and Warranty Act, hereinafter TCCWNA,

at N.J.S.A. 56:12-14 et seq., and in the New Jersey Consumer Fraud Act, hereinafter CFA, N.J.S.A. 56:8-1 et seq. Additionally, plaintiff seeks relief under common law theories of unjust enrichment and breach of the duty of good faith and fair dealing.

In lieu of answering the complaint, defendant has filed the instant motion to dismiss pursuant to Rule 4:6-2E. For the reasons detailed in this oral opinion, the Court holds that plaintiff's CFA claim is dismissed without prejudice because, as pled, any unconscionable business practices was not "in connection with the sale or advertisement of any merchandise or real estate" or with any "subsequent performance."

Plaintiff's TCCWNA claim is dismissed without prejudice because based on the allegations in the complaint, plaintiff is not a "consumer" under the TCCWNA statute. It is not alleged that she "bought, leased, or borrowed any money, property or services" from Sedgwick.

Plaintiff's claim that Sedgwick breached an implied duty of good faith and fair dealing is similarly dismissed without prejudice as based upon the pleadings in the complaint, has failed to plead the essential elements of such a claim, such as the

existence of the contract and any related malice.

Defendant's request to dismiss Count 4, which sounds in unjust enrichment, is denied. Plaintiff's complaint adequately pleads a claim for unjust enrichment under New Jersey law.

The procedural and factual background is as follows. Based on the allegations in the complaint, which the Court accepts as true, plaintiff, on March 21st, 2012, sustained an injury during the course of her employment with Pfizer and filed a claim with the New Jersey Division of Workers' Compensation, as complained at Paragraphs 14 to 15.

On July 28th, 2014, Judge George Geist awarded plaintiff certain benefits pursuant to the New Jersey Workers' Compensation Act, N.J.S.A. 34:15-40, complaint at Paragraphs 14 and 15 and Exhibit 1. The Court permitted $800 for medical fees, $3,885 for attorneys' fees, $500 in costs, and $90 for stenographic expenses. This is the complaint at Paragraph 17. Of this amount, plaintiff is responsible only for $400 of the $800 in medical fees and $1,554 for Counsel fees, for a total of $1,954.

Sedgwick, as alleged in the complaint, "holds itself out as an expert in the area of subrogation" and provides "services to employees related to the

management of employee's workers' compensation liens against third-party personal injury suits brought by injured employees," complaint, Paragraph 9 and 11.

On March 17, 2015, Sedgwick wrote to plaintiff's Counsel prosecuting the third-party claim on behalf of her and stated, "this is to put you on notice that Sedgwick has a workers' compensation claim for Tracey J. Dickens and has a lien on any settlement you may come to concerning Tracey J. Dickens.

Sedgwick's lien is currently $26,658.77, comprised of $3,987.77 and bracket, I put the word [in medical payments] and $22,671 and I put again, [in indemnity payments]. The preposition in was not included in the letter.

Sedgwick's workers' compensation payments are continuing and are lien may be increasing daily. So please contact the undersigned to determine the current amount of the statutory lien, partaking any efforts towards settlement with your client. That's complaint at Exhibit 2.

According to plaintiff, the March 17 letter was an improper -- "improper and deceptive practice" because it, one, represented defendant itself had a value New Jersey lien; two, the lien was $26,658.77, which included $5,184 due to plaintiff's workers'

compensation attorneys' fees and, three, the lien claimed defendant exceeded the amount permitted by Judge Geist's order by $3,231, and that's the complaint at Paragraph 20 through 22 and 27.

Plaintiff avers that she paid the lien -- paid the total lien, less the statutory reductions as permitted by N.J.S.A. 34:15-40E in the amount of $17,022.51. The correct amount due, however, was $15,118.51, causing plaintiff to sustain an ascertainable loss in the amount of $1,904.

The parties contend as follows. Sedgwick maintains that plaintiff's CFA claim must be dismissed because the complaint is devoid of allegations that are engaged in the "sale or advertisement of any merchandise or service." Sedgwick maintains there are no allegations that it even dealt directly with Sedgwick or that Sedgwick made any misrepresentation to induce or purchase any goods or services.

Sedgwick also contends plaintiff's TCCWNA claim is defective, as the plaintiff's complaint does not properly allege through necessary factual allegations that plaintiff is a consumer under the statute. Simply put, defendant maintains that under the facts pled, plaintiff did not buy, lease, or borrow any money, property, or service from Sedgwick.

Plaintiff's breach of implied covenant of good faith and fair dealing claim should be dismissed according to Sedgwick because plaintiff did not allege the existence of a contract between plaintiff and Sedgwick. Likewise, defendant avers that plaintiff's unjust enrichment claim fails to allege a necessary element to sustain such a claim, even at the Rule 4:16-- 4:6-2E stage.

In response, plaintiff avers that her unjust enrichment claim should not be dismissed because a complaint would (indiscernible) as required by Rule 4:6-2E. And the PRINTING MART MORRISTOWN decision alleges that Sedgwick received the benefit from plaintiff and the retention of that benefit would be inequitable.

As to its claims, based on the breach of duty of good faith and fair dealing, plaintiff maintains that the complaint adequately (indiscernible) the existence of the contract under one of two situations. "Either there is a workers' compensation consumer contract according to which Sedgwick provides services to plaintiff to which he is entitled and receives benefits of third-party beneficiary or the compensation benefits and lien services were provided through plaintiff's own employment contract, plaintiff's

opposition brief at Page 7.

Plaintiff further maintains the unclear staff of defendant's role in the transaction supports a CFA claim. Specifically, plaintiff alleges that "defendant, either acting as the insurer or as an agent/assignee of the insurer misrepresented, one, is entitled to collect the lien and, two, the amount of the lien and that, as a result, plaintiff sustained an ascertainable loss by paying the inflated amount demanded by defendant," plaintiff's opposition brief at 11, citing WEISS V. FIRST UNION LIFE INSURANCE COMPANY, 482 F.3d 254 at 266, Third Circuit (2007).

As to its TCCWNA claim, the plaintiff maintains Sedgwick qualifies as a "creditor" or "lender," that plaintiff is a consumer under Sedgwick's lien either constitutes money or property or that Sedgwick provides a service to plaintiff and that the money, property, or service was personal.

In considering the motion to dismiss pursuant to Rule 4:6-2E, a Court must search the complaint in depth and with liberality to ascertain whether the fundament of the cause of action "may be gleaned, even from an obscure statement of claim opportunity being given to amend, if necessary." PRINTING MART MORRISTOWN -- PRINTING MART MORRISTOWN V. SHARP

ELECTRONICS CORP., 116 N.J. 739 at 746, it's a 1989 decision of the Supreme Court.

Every reasonable inference of fact must be accorded of plaintiff. At such a preliminary stage of the litigation, "the Court is not concerned with the ability of plaintiffs to prove the allegations contained in the complaint." The motion to dismiss for failure to state a claim will be granted only if an even generous reading of the allegation does not reveal a legal basis for recovery, and that's CAMDEN COUNTY ENERGY RECOVERY ASSOCIATES V. NJDEP, 320 N.J. Super. 59, 65, App. Div. 1999, affirmed 170 N.J. 246 (2001).

As a result, the movant will face a difficult task to meet its burden of persuasion prescribed at Rule 4:6-2E, PRINTING MART MORRISTOWN Super. 116 N.J. 746.

Finally, in the rare circumstance that the Court grants such a motion, it is typically dismissed without prejudice and that's what the Court is doing here, giving the plaintiff an opportunity to replead. When Rule 4:6-2E relies upon matters outside the pleadings, the matter is typically treated as one for summary judgment. Under such circumstances, the matter will be addressed in accordance with Rule 4:46, given the parties "a reasonable opportunity to present all

material pertinent to such motion."

However, a motion dismissed pursuant to Rule 4:6-2E is not converted to a summary judgment motion if a Court considers documents referenced in the complaint. See MYSKA V. NEW JERSEY MANUFACTURERS INSURANCE, 440 N.J. Super. 458, 482, App. Div. 2015. In MYSKA, the Court noted in evaluating motions to dismiss "Courts consider allegations in the complaint, exhibits attached to the complaint matters of public record and documents that form the basis of the claim. The pin cite for that is 482 and the Court cited the BANCO POPULAR NORTH AMERICA V. GHANDI decision, 184 N.J. 161 (2005), which quoted the Third Circuit's decision in LUM V. BANK OF AMERICA, 361 F.3d 217, 223, Footnote 3.

The Court did not consider matters that were not properly before it on a Rule 4:6-2E application. I know that the plaintiff and opposition maintained that this matter should be converted to summary judgment, but the Court would only consider the allegations of the complaint, the information that was attached to the complaint, namely, the exhibits. I also note that there was a reference to a DOBI website, Department of Banking and Insurance, to confirm that Sedgwick was not an insurer. I -- it's certainly within the Court's

power to consider those public resources, but did not as felt it unnecessary to resolve the issue.

I'm going to first address the CFA claim. Then I'm going to address the TCCWNA claim, followed by the breach of good faith and fair dealing claim and I'll finalize the oral opinion with a discussion with respect to the unjust enrichment claim.

New Jersey Consumer Fraud Act or the CFA prescribes the act, use, or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that other rely upon such concealment, suppression, or omission with connection with the sale or advertisement of any merchandise or real estate or of the subsequent performance of such person as aforesaid, whether or not any person has, in fact, been misled to see either damage thereby is declared to be an unlawful practice, N.J.S.A. 56:8-2.

Initially, the CFA was enacted to counteract "deception for a falsity in connection with the sale and advertisement of merchandise and real estate," FENWICK V. KAY AMERICAN JEEP, 72 N.J. 372, 376, 377. The enforcement of the CFA has been aimed at helping to

"establish a broad business ethic, promote a standard of commonplace and good faith, honestly and fact and observe it's a fair dealing." SUAREZ V. EASTERN INTERNATIONAL COLLEGE, 420 N.J. Super. 1031, App. Div. 2012.

Expanding on the aims of the CFA, the Act is enforced with the intention "to protect consumers from deception and fraud, even when committed in good faith" in addition to "promoting disclosure of relevant information to enable the consumer to make intelligent decisions in the selection of products and services," id. at 31, 32.

To be successful under the CFA, a plaintiff must prove the following elements, one, unlawful conduct by the defendants; two, an ascertainable loss on the part of the plaintiff; and three, a causal relationship "between the defendant's unlawful conduct and the plaintiff's ascertainable loss." DABUSH V. MERCEDES BENZ USA, LLC, 370 N.J. Super. 105, 114, App. Div. 2005.

The CFA, the Court concludes, is inapplicable under the facts as pled. I agree that any misrepresentations by Sedgwick, if they were made, do not appear to have been made with the sale of goods or services to the plaintiff. There's not an allegation

that she made any decisions to deal directly with Sedgwick, and I do agree with the plaintiff that privity is not required, but there is still, nevertheless, a requirement to satisfy the requirements of the CFA and I concur that privity is not an element that the Court relies upon here or the lack of privity.

Continuing, or that Sedgwick made a material misrepresentation to her in order to induce her to purchase or retain Sedgwick's services. I also note that there wasn't much discussion on the subsequent performance issue in the moving papers or the reply papers, but I'll address the issue of subsequent performance as a recovery -- a potential recovery under the CFA that I don't believe has been established here.

The movant relies upon KUHNEL V. CNA INSURANCE COMPANIES. The pin cite for that is 322 N.J. Super. at 568. It was cited by plaintiff in the complaint at Paragraph 2. I do believe that case has import here of a significant measure.

In that case, plaintiff had similar class action allegations against CNA. What occurred there was CNA included a portion of the petitioner's attorney expert fees in a Section 40 lien. The Court -- the trial Court dismissed on a -- pursuant to Rule 4:6-2E the CFA claims on a motion to dismiss and the Court

specifically noted, "plaintiff's claims pertain strictly to defendant's interpretation of the workers' compensation statutes and do not implicate the marketing or sale of the policies to their employees by the carriers, 322 N.J. Super. at 852.

The Court also concluded the decision written by Judge Carchman, I believe, that "the issues here involve the receipt of benefits issues, which have held to be beyond the scope of the CFA. There is much issue in this case as to what -- who is Sedgwick, and the Court spent significant time considering is Sedgwick an insurer because, certainly, the attachment to the complaint could be read to represent that they are either the lienholder or the insurer and I'm concluding that even if I were to assume that they were the insurer, understanding that the plaintiff did not specifically plead that, although the attachment to it could so imply, I would conclude that under these facts as pled, KUHNEL would preclude the CFA claims, if, in fact, they were the insurer.

So then the Court began an analysis if the complaint could plead a cause of action under subsequent performance, if, in fact, there was some other role that Sedgwick played here, and I could not glean from the complaint such allegations that would

permit the claim to come under the rubric of the CFA as pled. If, in fact, the pleadings are amended to include that, perhaps, Sedgwick plays some role here that would come within it, the Court will certainly permit the pleading.

All right. I do concur that even if this was similar to the collection of a debt, there does not appear from the allegations in the complaint that it's connected to the sale of merchandise or services nor the subsequent performance. There is a citation to two cases, the District Court, CHULSKY V. HUDSON LAW OFFICES, 777 F.2d 823, 847, and JOE HAND PROMOTIONS V. MILLS, 567 F. Supp. 2d 719. The JOE HAND PROMOTIONS case is a decision, I believe, that was decided by Judge Irenas, and both those cases, I think, stand for clear propositions of law as stated, but they do require the connection to a sale of merchandise or other indications identified in the complaint.

Here, I think it's important to illuminate a bit more what the Court meant by the concerns it had with the complaint as pled. The CFA also has a component of it permitting a violation to exist, if there is a violation in the subsequent performance and plaintiff maintains that this is a subsequent performance case.

It's -- I think at oral argument, plaintiff's Counsel was very candid to indicate that if, in fact, Sedgwick was not the insurer or if Sedgwick, I believe, was the insurer, they would not have a claim against them for these two causes of action, but the record is what it is, if I'm misquoting or misstating anything.

But the issue of subsequent performance really requires a bit of further analysis. The issue of subsequent performance comes up in the insurance context and in a number of contexts. Counsel has cited the WEISS V. FIRST UNION case that I mentioned earlier that stands for the proposition that an insurer may be liable under the CFA post-LEMELLEDO if they performed something improperly by way of the payment of benefits.

In the WEISS case, the Court did as a Third Circuit decision in 2007, have concluded that, respectively, the Court said they weren't so convinced that this New Jersey Supreme Court would deem such allegations regarding the failure to pay benefits outside the scope of the Consumer Fraud Act. The concern, however, is that no New Jersey state court, appellate or trial, that I was able to locate has followed the analysis of WEISS -- of the WEISS decision and that's even after LEMELLEDO. LEMELLEDO, I'm citing is LEMELLEDO V. BENEFICIAL MANAGEMENT and that case had

really undermined the regulatory conflict rationale that existed in PERSGA (phonetic) and the Court in WEISS had acknowledged that the Supreme Court in LEMELLEDO didn't resolve the issue that was before it.

But there have been a number of Appellate Division cases to which this Court is bound by that have continued to conclude that the Consumer Fraud Act doesn't apply to an insurer's benefit payment decisions, and that's the KUHNEL decision. There's also the MYSKA V. NEW JERSEY MANUFACTURERS decision. That's 440 N.J. Super. 458, 485, 486, as well as additional other cases, BEAVER V. MAGELLEN HEALTH INSURANCE and RICHARDSON V. STANDARD GUARANTEE INSURANCE. BEAVER citation is 433 N.J. Super. at 430 and RICHARDSON is 375 N.J. Super. 449.

So then if, in fact, I were to give the plaintiff the benefit of the assumption that Sedgwick is the insurer, they would fall clearly within the holding of -- of KUHNEL and so I don't see how that visits any positive development for the plaintiff. I might also add that if, in fact, that's what the plaintiff is maintaining Sedgwick is, they should so plead it. If they're maintaining that Sedgwick is the insurer and they commit a subsequent performance violation, I think it's fair to require that to be so

pled.

But I'm giving the plaintiff the benefit of the doubt that was there -- was there -- that the complaint can be so read and I conclude that it wouldn't be a CFA claim even under that situation.

What becomes more difficult is can Sedgwick by described or defined as a subsequent performer as a lender or an assignee or as a debt purchaser? The difficulty I have is the complaint doesn't allege it. So if that's what they are alleging, I don't believe that's before us today and they would have to replead it.

The difficulty there, of course, is -- and why I think it's important to have it pled and why I don't believe I can conclude on this record -- on the pleading that, in fact, the motion should be denied because a fair reading would conclude that they're a debt purchaser or a lender and assignee that committed some subsequent performance violation because, number one, it's not pled and, number two, I think that it really depends upon whether or not the lender or assignee in certain circumstances is a pre-default or a post-default because in those circumstances, the CFA may apply or may not apply.

But I'm not able to, even given the plaintiff

the broadest reading and the most favorable interpretation characterize Sedgwick as such when their own pleading identifies them as a manager of certain claims as defined in their complaint and, specifically, if I were to go to the opposition papers and go to the complaint attached as Exhibit A, they specifically -- "they" being the plaintiff, she -- specifically, it defines Sedgwick not in that context but as an entity that services -- provides services to employers with respect to the management and assertion of workers' compensation liens.

So if they are somehow an assignee of something, I think that needs to be pled and identified and if they're an insurer, then I think they have a difficult time because of what is -- I've stated with respect to the law in New Jersey as it currently stands because then I understand it.

Likewise, if they're alleged to be a debt purchaser, which I don't believe that is an allegation here, a debt purchaser clearly has a different analysis, if there is a connection to the initial transaction. But the additional difficulty the Court has on the pleading and why I simply can't read it in such a manner to deny the motion is, the language under the Consumer Fraud Act also requires that any wrongful

conduct in connection with, again, the advertisement, sale, or subsequent performance in which defendant's liability is based and rather than the Court to try to determine from the pleadings what that is or what the role is because, as pled, they're not pleading as an insurer, they're not pleading as an assignee of anything, and they haven't identified what that subsequent performance and how it's, again, connection with that advertisement, sale, or subsequent performance.

The Court doesn't believe it can grant the relief as requested but deny the application. So -- and there's -- obviously, the parties know there's a number of cases that illuminate this principle. In, for example, there's case DEPOLINK COURT V. ROCHMAN, 430 N.J. Super. 325, 339, and that really is not factually really on point, but it does describe the in connection with requirement of N.J.S.A. 56:8-2.

So if any complaint is going to be repled, it has to be repled with these factors in mind. So for those reasons, I'm going to deny the application -- or I'm going to grant the application to dismiss without prejudice. Well, the movant sought to dismiss with prejudice. I'm clearly not going to do that.

Well, plaintiff's CFA claim fails, I said,

for the fundamental reason that the complaint doesn't allege even under Rule 4:6-2 analysis that defendant engaged in an unconscionable practice or any other violations or actions detailed in the CFA "in connection with the sale or advertisement of any merchandise, real estate, or with the subsequent performance."

The issue in this case, again, is not (indiscernible) but, rather, the utter (indiscernible) of factual allegations as satisfied this textual requirements as required by the CFA and so interpreted by the case law.

And I do believe that Counsel's citation to the GONZALEZ decision is factually distinguishable because of the connection that existed thereto the initial transaction and if, in fact, there is some connection, if, in fact, Sedgwick took a role different than insurer or was -- took a role as an assignee or some other basis, I would ask that you replead that and replead it with these conflicts in mind.

The issue at hand, just to put a final point on it, -- you know, unlike GONZALEZ, -- the GONZALEZ decision, the plaintiff didn't purchase and more poignantly, the defendant did not sell or averse anything to plaintiff in the subsequent performance

relating to the collecting of the lien does not within the purview of the CFA as I -- as pled, as I don't understand having anything to do with that commercial transaction.

As plaintiff has noted, please, defendant provides services to employees related to managing and asserting workers' compensation liens. That's the complaint at Paragraph 3. And this is, again, now, that I've gotten over the hurdle of whether or not the insurer, if I were to assume that there's something else, the lien at issue emanates from a workers' compensation claim plaintiff made against their employer, Pfizer, relating to a date of loss that occurred on March 21st, 2012. That's Exhibit 2.

Nowhere in the complaint does plaintiff allege defendant sold any merchandise or service to the plaintiff. Rather, plaintiff alleges that defendant was a lienholder and improperly overstated the amount of the lien.

The Truth in Consumer Contract Warranty and Notice Act, TCCWNA, provides that no seller, lessor, creditor, lender, or bailee shall enter into a written consumer contract or give or display any written consumer warranty, which includes any provision that violates or -- any clearly-established legal right of a

consumer responsibility to the seller, lessor, creditor, lendor, or bailee as established by state or federal law at the time the offer is made or consumer contract is signed, N.J.S.A. (indiscernible) 12-15.

The TCCWNA is a vehicle to reinforce "rights established by other laws. It does not create any new consumer rights," MATTSON V. AETNA LIFE INSURANCE COMPANY, 124 F. Supp. 3d 381, 393, District of New Jersey (2015), citations are omitted. The viability of the plaintiff's claim is dependent upon the satisfaction of certain statutory requirements that are outlined in the text of the provisions.

First, prohibitive conduct must have occurred by a "seller, lessor, creditor, lendor, or bailee" who targets a -- who targets -- excuse me -- a consumer -- prospective consumer by making an offer or entering into a written consumer contract, N.J.S.A. 56:12-15. For the remedies of the TCC-- for the remedies of TCCWNA to be applicable, the Court must conclude that the plaintiff as a consumer at the time the defendant engaged in prohibitive conduct. That's SHELTON V. RESTAURANT.COM, INC., 214 N.J. 419, 429 (2003).

Under the terms of the statute, a consumer is defined as any "individual who buys, leases, borrows, or bails any money, property, or services, which is

primarily for personal, family, or household purposes." As the TCCWNA does not provide a definition for the term property, the default definition applies in accordance with the language of N.J.S.A. 1:1-2. In applying the broad definition of the term "property" under the TCCWNA, it encompasses personal -- "personal property and personal property expressed." That includes tangible property, so just goods, money, and written instruments and intangible property such as (indiscernible) accident rights. That's SHELTON, 214 N.J. at 431.

In a somewhat similar, albeit, not identical set of facts, the Court in MATTSON ruled that a plaintiff who received notice of an improper lien was not a consumer. In MATTSON, the plaintiff was a member of a joint insurance fund for the purpose of receiving health insurance benefits, 124 F. Supp. at 384. Plaintiff's complaint in relevant part named two defendants, the administrator of the funds healthcare benefits and (indiscernible) contract with the administrator or provide insurance claims recovery services.

After plaintiffs have been injured, a particular provider of the administrator demanded plaintiff remit payment with respect to certain

hospital bills. In opposing the defendant's contention that plaintiffs would not consider (indiscernible) the TCCWNA, plaintiffs argue that the defendants had "acted as bailees on behalf of plaintiffs," id. at 9-- 393.

Similarly, if plaintiffs argue that a bailee/bailer relationship existed because the parties based on the following relationship. One, the defendants demand and take money to pay for the subrogation claim from the plaintiffs for payment to the fund; two, -- and pays medical claims on behalf of the plaintiffs and the fund to third-party creditors."

The Court identified the elements of bailee as the delivery of "personal property by one person to another in trust for a specific purpose except as such delivery in express or implied agreement to carry out the trusts and return the properties to the bailor. That's id. at -- let's see, I'm sorry -- the MATTSON case at 393 citing -- quoting SGRO V. GETTY PETROLEUM, 854 F. Supp. 1164, 1174, 75.

As the Court understood plaintiff's position, the plaintiffs maintained that they had bailed money with the defendants by the subrogation demand and that the property was subsequently returned to plaintiffs in the form of medical benefits. This agreement with the plaintiffs, the Court highlighted the fact that the

plaintiffs had yet to give defendants any money and demand for those payments post-dated the plaintiff's receipt of the benefits.

If the Court would have adopted the plaintiff's viewpoint, the Court concluded the end result would defy logic because the plaintiff would have had the "bailment property returned to him before he put in another's trust. Based on plaintiff's inability to be classified as consumers and, additionally, the Court having concluded that plaintiffs are unable to present statute or authority that confers to them a "right to be free from subrogation," the Court dismissed the plaintiff's TCCWNA claim, and that's the MATTSON case at 394.

As pled, in viewing the complainant's allegations, correctly through the 4:6-2E prism and the PRINTING MART decision, the Court concludes that it does not state a claim upon relief can be granted. Specifically, plaintiff simply has not met the basic definition of consumer. Specifically, there are no factual allegations that plaintiff has alleged that they bought, "leased or borrowed any money, property, or service from Sedgwick.

Plaintiff alleges that Sedgwick is a "creditor" or a "lendor," who gave a written consumer

notice that included a provision of a duly established right of a consumer or a responsibility of a creditor as established by state law, namely, the Section 40 lien at issue.

Plaintiff also maintains that the lien at issue is either money, property, or services and is personal. Defendant's application is not based and does not oppose for the purposes of this motion the elements of the statute related to the money, property, or services but, rather, whether plaintiff can qualify as a consumer, as she did not "buy," "lease," "borrow," or bail any of these items from defendant.

Plaintiff's entire argument at this point is really found at Page 20 of its opposition brief in which it maintains that plaintiff is a "borrower," as it borrowed money from Sedgwick when the monies constituting Sedgwick lien were expended for a medical care on the condition that those sums would be recoverable, if she received funds in the conduct of the third-party recovery.

Plaintiff believes that the contingency of such recovery should not affect the analysis as to whether she "borrowed" money from defendant refers to the statute. The Court agrees that plaintiff's interpretation given credence to its arguments that

there should be a broad remedial purpose of this legislation, and the Court agrees with that proposition, citing SHELTON, 214 N.J. at 442.

But I don't believe the complaint pleads appropriately that the workers' compensation order is -- should be interpreted in a manner that the plaintiffs do. In accordance with Section 40, a lien has as its foundation the statute itself and any judgments or compromise of the third-party settlement need to be paid from the -- any -- the lien has to be satisfied from payment of the -- any third-party action.

Had there been no third-party action or any recovery, "she" being the plaintiff would not have had to reimburse any amounts of the lien. There's simply not a scenario as pled where plaintiff can be characterized as borrowing money. Rather, I think it's more accurately characterized, giving the plaintiff ever inference, that the funds were rightfully awarded subject to a lien, pursuant to a specific statutory framework.

Plaintiff can, of course, replead to assert sufficient factual allegations to satisfy the definition of consumer and, specifically, that plaintiff "bought, leased, borrowed, or bailed any

money of property of service. But I think to divorce the situation from its reality wouldn't really be appropriate. What occurred here was a lien was created as a result of a workers' compensation judgment. That lien was to be satisfied, if at all, through third-party recovery and I know of no published case or any authority that would characterize that as a loan and, absent that authority, the Court doesn't believe that plaintiff has fallen within the definition of consumer.

The issue of the breach of the duty of good faith and fair dealing is as follows. After entering into a contractual relationship, each party is bound to abide by an implied duty of good faith and fair dealing, which prohibits the parties from engaging in any conduct that will have any effect of destroying or injuring the rights of the other party to receive the contractual benefits. To BRUNSWICK HILLS RACQUET CLUB, INC., V. ROUTE 18 SHOPPING CENTER, 182 N.J. 210 at 224. Absent a contract, there can be no breach of an implied covenant of good faith and fair dealing. WADE V. KESSLER INSTITUTE, 343 N.J. Super. 338, 345.

The analysis to be applied in determining whether the implied covenant of good faith and fair dealing has been breached is as follows. A party exercising its rights to use discretion in setting

price under contract breaches the duty of good faith and fair dealing, if that party exercises discretion or authority arbitrarily, unreasonably, or capriciously. We objected to preventing the other party from receiving its reasonably expected (indiscernible) under the contract. That's WILSON V. AMERADA HESS CORP., 168 N.J. 236, 251 (2001).

The law of precise definition of good faith and fair dealing has yet to be formulated. The Court in WILSON V. AMERADA did summarize it as follows. The Restatement 2nd of Contracts notes that every contract imposes on each party a duty of good faith and fair dealing in its performance and enforcement. A comment to the Restatement states that good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party. It excludes a variety of types of conduct characterizes involving bad faith because they've (indiscernible) community standards of decency, fairness, or reasonableness. That's 168 N.J. 236 at 245 (2001).

Further, even though the implied covenant of good faith and fair dealing cannot override an express term in a contract, a party's performance under a contract may breach that implied covenant, even thought

that performance did not violate an express term. The plaintiff's ability to show the defendant's conduct was founded upon "bad motive for intention" is essential and that's the WILSON case, 168 N.J. at 251.

In the absence thereof, "discretionary decisions that happen to result in economic disadvantage to the other party are of no legal significance." Generally, "subterfuges and evasions in the performance of a contract violate the covenant of good faith and fair dealing, even though the actor believes his conduct to be justified." BRUNSWICK HILLS RACQUET CLUB, INC., 182 N.J. at 226.

Although it may be difficult to identify the appropriate level of bad faith, it may also vary depending upon the nature of the alleged breach and the type of business engaged by the parties. The Court in SEIDENBURG V. SUMMIT BANK, 348 N.J. Super. 243, App. Div. (2002) conclude that the plaintiff had adequately pled the bad faith element of overall covenant.

In that case, the plaintiff's cause of action rested upon several allegations, including that the defendant had failed to create a close working relationship between the companies, failed to increase plaintiff's potential customer base, and failed to take existing relationships and foster them into clientele.

Based on this overall inaction, the plaintiff contended that defendant never had any intention to perform to begin with and was never invested in developing his property. Without commenting on the merits of the breach of good faith and fair dealing claim, the Court concluded the evidentiary record was adequate to allow the claim to survive dismissal.

And, here, we are just devoid of too many critical elements for the Court to determine that there's been an adequate pleading of that cause of action. I will allow the parties to replead this, plaintiff to replead it because I'm only dismissing it without prejudice.

When I apply those legal principles and the Rule 4:6-2 as standard to the allegations of the plaintiff's complaint, I'm not satisfied plaintiff has failed -- I'm satisfied that plaintiff has failed to adequately plead a claim for breach of duty of good faith and fair dealing.

As to the requirement that a plaintiff plead the existence of a contract, plaintiff avers at Paragraph 62 that defendant was an agent of a workers' compensation carrier. Further, at Paragraph 9, he characterizes Sedgwick as an entity that manages and asserts workers' compensation liens, exhibits to the

complaint, as well as the order characterizes Sedgwick as the insurer and plaintiff relies on such designation at certain times in its briefs.

The status of defendant, again, is not insignificant to this analysis, for as the plaintiff correctly -- excuse me -- whereas is correctly noted, defendant asserts plaintiff maintains that it -- that defendant misstated its status as a lienholder and they maintain, I believe correctly so, that it affects the analysis under the breach of duty of good faith and fair dealing.

The plaintiff maintains that either there's a workers' compensation insurance contract, which plaintiff provides service to the plaintiff as an insurer or the compensation benefits and lien services were provided to plaintiff's own employment contract. And I believe that the plaintiff has not clearly identified in its complaint what is the contract that has been breached.

Secondly and equally as importantly, there is not sufficient information in the complaint that establishes the issue of the intent that's required, that the pleading does not contain the necessary bad faith allegations or the malice allegations. So I am requiring plaintiff to specifically replead to identify

the contract to which it seeks to have a breach of a duty of good faith and fair dealing and, again, they have to simply plead it and, also, to plead the bad faith component.

With respect to the dismissal of the unjust enrichment claim, defendant observes that unjust enrichment is not an independent theory of liability. The defendant cites the Law Division opinion in NATIONAL AMUSEMENT, INC. V. NEW JERSEY, 261 N.J. Super. at 460, Law Division (1992). Defendant's claim that plaintiff did not expect remuneration from defendant at the time it conferred a benefit.

The Appellate Division has recognized as the doctor of unjust enrichment finds its basis in a quasi contract recovery. However, it may also arise outside such settings. Specifically, the Supreme -- the Appellate Division has held in GOLDSMITH V. CAMDEN COUNTY SURROGATE'S OFFICE, 408 N.J. Super. 376, 382.

The doctrine of unjust enrichment rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. A cause of action for unjust enrichment requires proof that defendants received the benefit and that the intention of that benefit without paying it would be unjust.

Unjust enrichment is not an independent theory of liability but is the basis for a claim of quasi-contractual liability. We have recognized -- whatever that claim for unjust enrichment may arise outside the usual quasi-contractual setting.

I think as the plaintiff correctly also points out, New Jersey Courts have regularly used the term unjust enrichment to encompass, again, the quasi-contractual claims that the Court just mentioned. The Court in WANAQUE BOROUGH SEWERAGE AUTHORITY V. TOWNSHIP OF WEST MILFORD, 144 N.J. 564, 75, a case relied upon by the plaintiff, has explained that the key element of a quasi-contract claim is that one party has been unjustly enriched at the expense of another and it rests upon the equitable principle that a person should not be "allowed to enrich himself unjustly at the expense of another and on the principle that what (indiscernible) ought to do that the law supposes him to have promise to do, ST. PAUL FIRE AND MARINE INSURANCE COMPANY V. INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, 32 N.J. 17 at 22. It's a case also cited by plaintiff at Page 5 of their opposition brief.

Plaintiff correctly also notes there's two elements to an implied contract registration claim. One, that the defendant received the benefit; and, two,

the retention is inequitable. And, again, that's relied upon the ST. PAUL FIRE AND MARINE INSURANCE COMPANY V. INDEMNITY INSURANCE COMPANY OF NORTH AMERICA case.

I'm satisfied that the plaintiff has alleged in her complaint -- that plaintiff has alleged appropriately that her payment was based on defendant's misrepresentation of his lien, that plaintiffs further averred that defendant benefit as a result of the overpayment that plaintiff has alleged that the payment was not gratuitous. In other words, they weren't given as a gift of any manner and that had the plaintiff been apprised of the actual value, it would not have been paid. So I believe that an unjust enrichment claim has been properly pled. I will enter an order dismissing without prejudice consumer fraud, TCCWNA, and the breach of duty of good faith and fair dealing permitting the plaintiff an opportunity to replead. I'll allow the plaintiff 21 days to replead and refile the complaint.

I will -- I'm also going to put in my order a date to come in for a case management conference after that repleading. I'm not sure what the defendant is going to do, but I'll have a case management conference where we can discuss it. You may recall when we were

together for oral argument, I had asked if the parties would like to take some discovery and just answer the complaint. I had hoped to kind of expedite matters, but I understand that that wasn't acceptable and I understand that and I certainly don't begrudge anyone for that position.

So I will enter an order today that's going to deny without prejudice those three claims. I'll permit the unjust enrichment claim to survive as pled, allowing the plaintiff to replead within 21 days. Service will be effectuated upon Counsel for the defendant, unless that's objected to. Is that all right, Counsel for the defendant? You accept service?

MR. MR. WINGET: We certainly did. If you wouldn't mind us just verifying with the client that that's acceptable, but that will certainly be our recommendation, Your Honor.

THE COURT: Okay. Very well. And if there's any problem with that, please let me know. And, finally, I'll set a date for a case management conference for you to come in here probably within 30 days or give us about ten days after the complaint has been repled, if it is going to be repled. Okay? Is there anything else for the good of the specific general order today for the plaintiff?

MR. BARRY: Not from plaintiffs, Your Honor.

THE COURT: No? Okay. Well, thank you very much for your briefs. They're really well done and if there's nothing else, I'll let you go. You were on the phone with me for an hour, so.

MR. WINGET: Thank you so much, Your Honor.

THE COURT: Okay.

MR. BARRY: Thank you, Your Honor.

THE COURT: Thank you for the plaintiffs. Thank you very much. Bye now.

MR. BARRY: Bye-bye.

(Proceedings concluded)

CERTIFICATION

I, SHERRY M. BACHMANN, the assigned transcriber, do hereby certify the foregoing transcript of proceedings, time from 3:07 p.m. to 3:55 p.m., is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.

Sherry Bachmann

_____

SHERRY M. BACHMANN AOC #454
G&L TRANSCRIPTION OF NJ Date: May 15, 2017

2006 WL 3780789
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

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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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 V8–6–4 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 *Pettway 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. Guiliani,* 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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EDUCATION

2008 JD	–	Rutgers University School of Law – Camden *Cum Laude* Associate Articles Editor – Rutgers Journal of Law and Religion Maro R. Sondahl Award for Excellence in International Commercial Law and Arbitration Award Recipient
2004 BA	-	Rowan University – Glassboro, New Jersey *Cum Laude* Phi Alpha Theta History Honors Society

EMPLOYMENT

2008 – 2009	-	Law Clerk, Honorable F.J. Fernandez-Vina, P.J. Cv. Superior Court of New Jersey – Camden Vicinage
2009 – 2011	-	DuBois, Sheehan, Hamilton, Levin & Weissman, LLC, Camden, NJ
2011 – 2013	-	Lundy Law, Philadelphia, PA
2013 – Present	-	Locks Law Firm, LLC, Cherry Hill, NJ

BAR ADMISSION:

2008	-	New Jersey
2008	-	District of New Jersey, U.S. Dist. Court
2009	-	Pennsylvania
2015	-	Third Circuit Court of Appeals
2017	-	U.S. Supreme Court

MEMBERSHIPS:

American Association for Justice (AAJ)
New Jersey State Bar Association (NJSBA)
Co-Chair Consumer Law Committee – 2018-2019
New Jersey Association for Justice (NJAJ) –
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Camden County Bar Association (CCBA)

EXPERIENCE:

Tried cases to verdict in the State Courts of both Pennsylvania and New Jersey State as lead counsel. Second chair experience as trial counsel in pharmaceutical/product liability claims.

Notable Decisions:

Morgan v. Sanford Brown Institute, 225 N.J. 289 (2016): Argued on behalf of Amicus Curiae; The Court adopted our argument that no agreement to delegate the question of arbitrability was formed and there was no clear and unmistakable agreement to delegate arbitrability questions to an arbitrator.

Spade v. Select Comfort, 232 N.J. 504 (2018): Argued on behalf of Amicus Curiae as to the whether the TCCWNA applied to regulatory violations and the definition of "aggrieved consumer" under the Act.

Moore v. Atlantic County, 2018 WL 4354304 (App. Div. 2018): Argued on behalf of Amicus Curiae as to whether certification of class of inmates subjected to strip searches was appropriate under New Jersey law.

Kernahan v. Home Warranty Administrator of Florida, Inc., 236 N.J. 301 (2019): Argued on behalf of Amicus Curiae as to whether arbitration agreement satisfied New Jersey law and whether New Jersey arbitration jurisprudence was overturned by Supreme Court's Kindred Nursing Decision.

Roach v. BM Motoring, LLC, et al., 228 N.J. 163 (2017) ; Amicus Curiae on behalf of the Consumer's League of New Jersey. Held that Defendant's failure to pay/appear for arbitration constituted a material breach of the agreement and rendered the clause unenforceable by defendant.

Mellett v. Aquasid, LLC, 452 N.J. Super 23 (App. Div. 2017) *cert den.* 231 N.J. 224 (2017): Addressing question of whether Retail Installment Sales Act applies to gym membership agreements.

Johnson v. Wynn's Extended Care, 635 Fed. Appx. 59 (3d Cir. 2015): Reversed dismissal of class action complaint under the TCCWNA.

Dugan v. TGI Fridays, Inc., et al., 231 N.J. 24 (2017): Amicus Curiae on behalf of NJAJ regarding the propriety of Appellate decision to reverse trial court's grant of class certification.

Castro v. Sovran Self-Storage, Inc., 114 F. Supp. 3d 204 (D.N.J. 2015): Denial of a motion to dismiss class action claims under the CFA and TCCWNA. $8 million class settlement preliminarily approved February 15, 2018.

Martinez-Santiago v. Public Storage, 28 F. Supp 3d 500 (D.N.J. 2014): Denial of a motion to dismiss class action claims under the TCCWNA and CFA. Class certified at 312 F.R.D. 380.

Caprarola v. Wells Fargo, Superior Court of New Jersey: $1.312 million class action settlement for employees alleging illegal deductions from employee pay.

Richardson v. Liberty Mutual, 2014 N.J. Super. Unpub. LEXIS 2120 (App. Div. 2014): Reversed summary judgment for defendant based on requests for admissions.

CLASS COUNSEL

Caprarola v. Wells Fargo, Docket No. CAM-L-3570-13 (Super Ct. N.J. 2015)($1,312,500 class settlement on behalf of a class of 494 employees as a result of claims based on New Jersey's Wage Deduction law).

Martinez-Santiago v. Public Storage, 1:14-cv-00302-JBS-AMD (D.N.J.) (Certified 11/17/15)

Castro v. Sovran Self Storage, Inc., 1:14-cv-06445-RBK-JS (D.N.J.)(Final Approval of $8 million class settlement 6/12/18)

In re Experian Data Breach Litigation, 8:15-cv-01592-AG-DFM (C.D.CA.) (Locks Law Firm appointed to interim Plaintiff Steering Committee)(Final Approval of Settlement valued at over $170 million ganted 5/13/2019)

In re Yapstone Data Breach Litigation, 4:15-cv-04429-JSW (N.D. Cal)(Locks Law Firm appointed to Plaintiff's Executive Committee)(Final Approval of Class Settlement granted 8/8/17)

MASS TORT EXPERIENCE

In Re Physiomesh Litigation (Flexible Composite Mesh), MCL 627 (Atlantic County) – Appointed Plaintiff Executive Committee member.

INVITED SPEAKER

NEW JERSEY ASSOCIATION FOR JUSTICE
Evidence Rules Before and During Trial
East Rutherford, New Jersey – November, 2014

NEW JERSEY ASSOCIATION FOR JUSTICE
Compulsory Arbitration Provisions in Consumer Contracts
Jamesburg, New Jersey – May, 2015

NEW JERSEY ASSOCIATION FOR JUSTICE
Rising Stars Panel
Atlantic City, New Jersey – April, 2016

AMERICAN LAWYER MEDIA, INC.
The Locks Law Firm Presents The ABCs of Complex Litigation: Asbestos, Benzene, CRPS and More
Philadelphia, Pennsylvania – October 2016

LIGHTSTREAM COMMUNICATIONS CLE
David vs. Goliath: What Can We Learn from Class Action Lawsuits?
Bryn Mawr, Pennsylvania – April, 2017

NEW JERSEY ASSOCIATION FOR JUSTICE
Boardwalk Seminar
Data Breach: Who is Looking at What?
TCCWNA Update
Forced Arbitration Update
Atlantic City, New Jersey – April, 2017

HARRIS MARTIN PUBLISHING
HarrisMartin's Equifax Data Breach Litigation Conference
Damages
Atlanta, Georgia – November 2017

NEW JERSEY ASSOCIATION FOR JUSTICE
Boardwalk Seminar
TCCWNA Update
Atlantic City, New Jersey – May, 2018

NEW JERSEY STATE BAR ASSOCIATION (ICLE)
How the Latest Consumer Protection Laws Impact Your Clients and Practice
A look at health club cases – contracts, cancellation and other provisions
New Brunswick, New Jersey – May, 2019

NEW JERSEY ASSOCIATION FOR JUSTICE
Boardwalk Seminar
Data Breach Litigation
Atlantic City, New Jersey – May, 2019

Admitted to Practice

New Jersey, 1992
United States District Court for the District of New Jersey, 1992
New York, 1994

Education

J.D., Syracuse University College of Law, magna cum laude, 1992
M.P.A., Syracuse University Maxwell School of Citizenship and Public Affairs, magna cum laude, 1992
B.A., Seton Hall University, magna cum laude, 1989

Professional Affiliations

American Association of Justice
American Association for Justice Benzene Litigation Group
Essex and Middlesex County Bar Associations
Board of Governors of the New Jersey Association for Justice

Honors

New Jersey Rising Star, 2006
NJBIZ Forty Under Forty, 2006

Certifications and Awards

New Jersey Super Lawyers, 2012-present
The Best Lawyers in America, 2010-present
National Trial Lawyers' Top 100 Trial Lawyers. 2012-present
Million Dollar Advocates Forum

Alfred M. Anthony, Partner

Background and Experience

Alfred M. Anthony, one of New Jersey's most prominent mass tort and class action attorneys, heads the firm's Roseland, New Jersey office and also works out of the firm's New York City office.

Mr. Anthony has spent his entire career specializing in environmental contamination, toxic and mass torts, chemical exposure, benzene exposure, asbestos exposure, pharmaceutical torts and products liability litigation.

In 1994, Mr. Anthony established legal precedent in New Jersey by certifying the first toxic exposure personal injury and medical monitoring class action (Russo v. Allied Signal). As a result of the settlement, a 30-year medical monitoring program was established for people who played on a chromium contaminated ball field in Jersey City, NJ.

In 1997, he received the Association of Trial Lawyers of America's Outstanding Achievement Award for his work on behalf of 427 Pompton Lakes residents in an environmental contamination suit against DuPont that resulted in a $38.5 million settlement (Armona v. DuPont).

Mr. Anthony also has played key roles in several other environmental contamination suits and chemical exposure cases, obtaining very positive results for his clients. Within the past few years, Mr. Anthony certified two additional class actions in West Caldwell, New Jersey and Tonawanda, New York, representing over 38,000 victims of environmental contamination. Both have been upheld on appeal.

Outside the Office

Mr. Anthony is very active in community and civic affairs and was elected to the Livingston, New Jersey Town Council in 2012 and 2016. He served as mayor in 2016 and deputy mayor in 2015 and 2018. He and his wife Lori of 23 years have four beautiful children.