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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BAERBEL MCKINNEY-DROBNIS, JOSEPH B. PICCOLA, and CAMILLE BERLESE, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MASSAGE ENVY FRANCHISING, LLC, a Delaware Limited Liability Company,

Defendant.

KURT ORESHACK,

Objector.

Case No. 3:16-cv-6450-MMC

Judge: Hon. Maxine M. Chesney
Courtroom: 7, 19th Floor
Date: November 1, 2019
Time: 9:00 A.M.

OBJECTION OF KURT ORESHACK

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INTRODUCTION

The settlement here creates a single class of both former and current Massage Envy ("MEF" or "the Defendant") subscribers. But the interests of those former and current subscribers are not aligned. The only relief the settlement provides are coupons towards Massage Envy services or products. While a current subscriber may value such a coupon, former subscribers are forced to return to do business with a company with which they had cut ties. Such an intraclass conflict precludes Rule 23(a)(4)'s adequacy of representation and the single class cannot be certified. *See Hahn v. Massage Envy Franchising, LLC,* No. 12-cv-00153-DMS (BGS), 2016 U.S. Dist. LEXIS 196046 (S.D. Cal. Mar. 30, 2016). The conflict can only be resolved by subclassing, with separate representatives and separate class counsel for each subclass. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999).

Even if the single settlement class could be certified, this coupon settlement must be rejected because class members are receiving a small fraction of what class counsel are seeking in fees. Ninth Circuit law requires settlement fairness to be evaluated based on "economic reality"—or what class members actually receive. *Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015). The economic reality here: the vast majority of the "$10 million" of vouchers will expire unused after sixteen months; it is likely that no more than 10% of the coupon value will actually be used by class members. This means that unlike the fictitious $10 million "face value" plaintiffs rely on, class members will likely receive only $1,000,000 in relief, while the attorneys will walk away with $3.3 million. Such an extraordinary disproportion violates Ninth Circuit law. With a typical common fund, the Court could correct the disproportion by reducing the requested fees and returning the surplus to the class. *See Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014). But the problem here is that class counsel structured the settlement so that any reduction in their fees goes back to Massage Envy. Even if the Court wanted to flip the numbers to give the class $3.3 million and the attorneys $1 million (returning $2.3 million in cash to the 58,000 claimants), the settlement structure prohibits this Court from making such a correction; therefore, the entire settlement must be rejected.

In addition to providing preferential treatment to class counsel, the settlement asks the Court to provide a boon to Massage Envy by ratifying a contract reformation of each class member's Massage Envy membership agreement unless that class member opts out of the settlement. Plaintiffs designate this as "injunctive relief" but in actuality it is an unauthorized release of future claims and allows Massage Envy to

escape the locked-in monthly rates with current subscribers.

The Court should deny class certification and the accompanying settlement until the parties present a class that is certifiable and a settlement that is approvable. In the alternative, if the Court certifies the settlement class and approves the settlement, it should defer any award of attorneys' fees until after the redemption rate of the vouchers is known.

I. Objector Oreshack is a member of the settlement class.

Objector Kurt Oreshack is a long-time member of Massage Envy whose membership fees have increased during the class period. *See* Declaration of Kurt Oreshack, ¶ 3 (attached). Oreshack is not within any of the classes of persons excluded from the settlement. *Id.* He therefore has standing to object. His full name is Kurt Andrew Oreshack and his address is 15540 Tanner Ridge Rd., San Diego, CA 92127. *Id.* at ¶ 2.

Hamilton Lincoln Law Institute's Center for Class Action Fairness ("CCAF") represents Oreshack *pro bono*, and CCAF attorney Theodore H. Frank intends to appear at the fairness hearing on his behalf. CCAF represents class members *pro bono* where class counsel employs unfair procedures to benefit themselves at the expense of the class. *See, e.g., Pearson*, 772 F.3d at 787 (CCAF "flagged fatal weaknesses in the proposed settlement" and demonstrated "why objectors play an essential role in judicial review of proposed settlements of class actions"); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 716-17 (6th Cir. 2013) ("*Pampers*") (CCAF's client's objections "numerous, detailed, and substantive"); *see generally* Declaration of Theodore H. Frank. Since it was founded in 2009, CCAF has "develop[ed] the expertise to spot problematic settlement provisions and attorneys' fees." Elizabeth Chamblee Burch, *Publicly Funded Objectors*, 19 THEORETICAL INQUIRIES IN LAW 47, 55-57 & n.37 (2018). Over that time CCAF has recouped more than $200 million for class members by driving settling parties to reach an improved bargain or by reducing outsized fee awards. *See* Andrea Estes, *Critics hit law firms' bills after class-action lawsuits*, BOSTON GLOBE (Dec. 17, 2017) (more than $100 million at time). Oreshack brings this objection through CCAF in good faith to protect the interests of the class. Oreshack Decl. ¶¶ 6-7. His objection applies to the entire class; he adopts any objections not inconsistent with this one.

II. The district court has a fiduciary duty to the unnamed class members.

"Class-action settlements are different from other settlements. The parties to an ordinary settlement bargain away only their own rights—which is why ordinary settlements do not require court approval." *Pampers*,

724 F.3d at 715. Unlike ordinary settlements, "class-action settlements affect not only the interests of the parties and counsel who negotiate them, but also the interests of unnamed class members who by definition are not present during the negotiations." *Id.* "[T]hus, there is always the danger that the parties and counsel will bargain away the interests of unnamed class members in order to maximize their own." *Id.*

To guard against this danger, a district court must act as a "fiduciary for the class . . . with 'a jealous regard'" for the rights and interests of absent class members. *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010) (quoting *In re Wash. Pub. Power Supply Sys. Litig.*, 19 F.3d 1291, 1302 (9th Cir. 1994)). It "must remain alert to the possibility that some class counsel may urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees." *In re HP Inkjet Printer Litig.* ("*Inkjet*"), 716 F.3d 1173, 1178 (9th Cir. 2013) (citation and internal quotation omitted). And it must not "assume the passive role" that is appropriate for an unopposed motion in ordinary bilateral litigation. *Redman v. RadioShack Corp.*, 768 F.3d 622, 629 (7th Cir. 2014). In particular, settlement value "must be examined with great care to eliminate the possibility that it serves only the 'self-interests' of the attorneys and the parties, and not the class, by assigning a dollar number to the fund that is fictitious." *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012). It is error to exalt fictions over "economic reality." *Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015).

There is no presumption in favor of settlement approval: the proponents of a settlement bear the burden of proving its fairness. *See, e.g., Koby v. ARS Nat'l Servs.*, 846 F.3d 1071, 1079 (9th Cir. 2017). Any such presumption would be "inconsistent with [the] probing inquiry" required in this Circuit. *Retta v. Millennium Prods.*, No. CV 15-1801 PSG, 2016 WL 6520138, at *4 (C.D. Cal. Sept. 21, 2016) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)). "The court cannot accept a settlement that the proponents have not shown to be fair, reasonable and adequate." *In re GMC Pick-Up Truck Fuel Tank Prod. Liab. Litig.* ("*GMC Pick-Up*"), 55 F.3d 768, 785 (3d. Cir. 1995) (internal quotation and alteration omitted).

III. An intra-class conflict between former and current Massage Envy subscribers precludes single-class certification.

The proposed settlement class cannot be certified because it fails Rule 23(a)(4)'s adequacy of representation requirement: there is an intra-class conflict between class members that are former Massage Envy subscribers and class members that are current Massage Envy subscribers. The court's duty to vouchsafe the rights of the absent plaintiffs extends to the decision to grant class certification, obliging district courts to

conduct a "rigorous analysis" to ensure compliance with the Rule 23 certification prerequisites. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011). The proponents of certification bear the burden to demonstrate compliance with Rule 23's prerequisites for certification. *Mayfield v. Dalton*, 109 F.3d 1423, 1427 (9th Cir. 1997). Among these prerequisites, Rule 23(a)(4) requires that the class representatives adequately represent the absent class members. Grounded in the Due Process Clause of the Constitution, Rule 23(a)(4) demands "undivided loyalties to absent class members." *Broussard v. Meineke Discount Muffler Shops*, 155 F.3d 331, 338 (4th Cir. 1998). This specification of Rule 23, "designed to protect absentees by blocking unwarranted or overbroad class definitions," "demand[s] undiluted, even heightened, attention in the settlement context." *Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997); *accord Pampers*, 724 F.3d at 721 ("The requirements are scrutinized more closely, not less, in cases involving a settlement class"); *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 827 F.3d 223, 235 (2d Cir. 2016) ("*Payment Card*") ("The requirements of Rule 23(a) are applied with added solicitude in the settlement-only context.").

"Adequate representation depends upon an absence of antagonism and a sharing of interests between representatives and absentees." *Radcliffe v. Experian Info Solutions*, 715 F.3d 1157, 1165 (9th Cir. 2013) (internal quotation and alteration omitted). "Serious intra-class conflicts" preclude a finding of representational adequacy. *Amchem*, 521 U.S. at 610 (quoting *Georgeine v. Amchem Prods., Inc.*, 83 F.3d 610, 630 (3d Cir. 1996)). Conflicts may be discerned from the very terms of a settlement. *See Amchem*, 521 U.S. at 619-20 ("altogether proper" to inspect terms of settlement when evaluating adequacy); *accord Radcliffe*, 715 F.3d at 1166 ("[O]ur [23(a)(4)] analysis focuses on the agreement."). The Court cannot tolerate "even the appearance of divided loyalties of counsel." *Radcliffe*, 715 F.3d at 1167 (internal quotation marks omitted).

Both the Ninth Circuit and this Court adhere to the rule that an intraclass conflict as to the most suitable remedy or relief precludes adequate representation of a single class. In *Ellis v. Costco Wholesale Corp.*, for example, the Ninth Circuit described how former employees cannot adequately protect the interests of current employees because they do not share any interest in obtaining injunctive relief. 657 F.3d 970, 986 (9th Cir. 2011). In *Gold v. Lumber Liquidators, Inc.*, this Court rejected a settlement class where the putative representative "no longer has the defective flooring in his home" and thus "no longer share[d] an interest with putative class members whose primary goal is to obtain full replacement of their bamboo flooring." 323 F.R.D. 280, 289 (N.D. Cal. 2017) (citing *Ellis*, 657 F.3d 970); *cf. Doyle v. Chrysler Grp.*, 663 Fed. Appx. 576, 579-80 (9th Cir. 2016)

(unpublished) (no adequate representation where some class members would prefer a reimbursement remedy and others with no out-of-pocket expenses would prefer prospective injunctive relief).

Other circuits likewise hold that an irreconcilable conflict arises when two groups within a class have diverging preferences as to the most appropriate remedy. For example, in *Larson v. AT&T Mobility LLC*, the Third Circuit questioned a unitary class that comprised both current and former cellular service subscribers. 687 F.3d 109, 131-34 (3d Cir. 2012). As former subscribers, the class representatives lacked both the "interest" and the "incentive" to obtain prospective relief for current subscribers, and indeed the proposed settlement obtained no such relief. *Id.* at 131, 133; *see also Broussard*, 155 F.3d at 337-39 (finding abuse of discretion to certify a class consisting of both current and former franchisees); *Payment Card*, 827 F.3d at 231-36 (finding abuse of discretion to lump together both merchants that currently accepted VISA branded credit cards and merchants that formerly did).

Most relevant of all is *Hahn v. Massage Envy Franchising, LLC*, 2016 U.S. Dist. LEXIS 196046 (S.D. Cal. Mar. 30, 2016) (attached as Exhibit E to MEF's Request for Judicial Notice, Dkt. 26-1). There, the Southern District refused to allow the settling parties to kludge together former and current Massage Envy subscribers in a single class. There and here, "the class definition, although not explicitly stated in terms of two sub-classes, comprises two distinct groups—former and current Massage Envy members." *Id.* at *18. And just as in *Hahn*, in light of the settlement terms, and "[d]ue to the fundamental differences between former and current members" the former and current class members require independent representation by both separate representatives and separate counsel. *Id.* at *22. As currently structured, "the proposed settlement class does not meet the adequacy requirement of Rule 23(a)(4)." *Id.*

As counsel of record in *Hahn*, surely both class counsel and defense counsel here are aware of the intraclass remedial conflict. Indeed, defendant earlier in this litigation moved the Court to strike class allegations on the basis of this conflict. Dkt. 26 at 19-21. Denying defendant's motion as premature, this Court reasoned that "the ruling in *Hahn* on which MEF relies was based on specific provisions of the settlement agreement presented to that court rather than on a determination that former and current members of an organization can never represent each other." Dkt. 49 at 11. The intraclass schism present in *Hahn*, between current and former subscribers, has reemerged in the settlement agreement here.

The first proposed *Hahn* settlement disadvantaged current subscribers in favor of former subscribers.

2016 U.S. Dist. LEXIS 196046 at *21. Here, the settlement disadvantages former Massage Envy subscribers in favor of current subscribers.[1] Former members of Massage Envy who cannot, will not or want not to do further business with the defendant receive *no meaningful relief* under the terms of settlement. Neither the supposed injunctive relief nor the coupon relief befits them. There are countless reasons why the million plus former Massage Envy subscribers terminated their membership, but they are united by a common interest: they no longer wish to be Massage Envy members.[2] Yet the settlement provides them no retrospective compensatory monetary relief, and no relief at all unless they do business with defendant in the future.[3] Furthermore, it appears that even if former members wish to redeem settlement vouchers for MEF's services, they are disadvantaged in doing so vis-à-vis current class members because most of MEF's services cost non-members about twice as much as members. Declaration of Jeffrey R. Krinsk ("Krinsk Decl."), Dkt. 121 at ¶ 70. As a result, for former members, the settlement vouchers only go half as far for such services.

More fundamentally, there is certainly no basis for supposing that it is "highly likely" that *these former subscriber* "Settlement Class Members are interested in [MEF's] products and services." Dkt. 122 at 16. Even in *Hahn*, where former members were preferentially entitled to recover 75% of their expired pre-paid massages, only "approximately 4.6 percent" of the former members submitted claims. *Hahn*, 2016 U.S. Dist. LEXIS 196046, at *39. As MEF could report, surely far less than 4.6% were ultimately used within the allowed time period. Disfavored in their own right, *see* Section IV.A below, coupon settlements are entirely untenable when they highlight a remedial intraclass conflict between current and former subscribers of the defendant's service.

When different groups within the class have interests that significantly diverge, subclassing is required to eliminate the conflict, with separate representatives and class counsel for each subclass. *Ortiz*, 527 U.S. at 856; *Payment Card*, 827 F.3d at 233-34; *Hahn*, 2016 U.S. Dist. LEXIS 196046, at *22; Federal Judicial Center,

[1] While Oreshack is a current subscriber, he has standing to challenge the intraclass conflict that disadvantages former members. *Devlin v. Scardelletti*, 536 U.S. 1, 6-7 (2002); *Larson*, 687 F.3d at 131 n.34; *cf. also Stetson v. Grissom*, 821 F.3d 1157, 1163 (9th Cir. 2016).

[2] Maybe their home clinic closed, they relocated to an area without a proximate Massage Envy, they developed a physical condition that was incompatible with massage treatments, they were unsatisfied with the quality of service, or they simply found themselves failing to utilize their membership.

[3] Although under the settlement a former member could possibly extract some partial value from the coupon by reselling it through eBay or similar online marketplace, that places a burden on former members that current members, who may redeem the coupons at their convenience, do not suffer.

MANUAL FOR COMPLEX LITIGATION §§ 21.23, 21.27 (4th ed.). That is, "reclassification with separate counsel," not merely separate named representatives. *Ortiz*, 527 U.S. at 857. Before *Amchem* and *Ortiz* entered the necessary course correction, there was an "endemic problem" of "intra-class tradeoffs" made by "even the well-meaning plaintiffs' attorney" whose role had gradually shifted away from that "of an advocate and adviser for clients" to one "of a philosopher king, dispensing largess among his client subjects." John C. Coffee Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM L. REV. 1343, 1443 (1995). After a unitary settlement class was rejected in *Hahn*, the class was bifurcated into two separately-represented classes of current and former subscribers, the *Zizian* and *Hahn* classes respectively. Representing the *Hahn* class, class counsel consummated a settlement on the former subscribers' behalf providing class members the right to reclaim unused massages. *See Hahn*, Dkt. 396 (S.D. Cal. Jul. 18, 2016).

Given that the *Hahn* redemption period has expired, before this Court considers certifying the proposed settlement-class here, it should require class counsel and/or MEF's counsel to disclose the *Hahn* class's ultimate **redemption rate** of the once-expired massages (the number of massages actually received). This rate is likely only be a fraction of the 4.6% of *Hahn* class members that submitted claims in the first place. Such data would reflect the former subscribers' true interest in receiving prospective coupon relief. *See In re Easysaver Rewards Litig.*, 906 F.3d 747, 756 n.6 (9th Cir. 2018) ("*Easysaver*") ("[T]o the extent the settling parties are correct that class members have a strong interest in receiving these coupons, the coupon redemption rate should reflect that interest."). Moreover, class counsel has attested that the current settlement's claims rate is 3.48%. Krinsk Decl. ¶ 63; However, they do not breakdown the claims rates data by former and current class members. The Court should also request these figures because they indicate whether indeed, former members have less of expressed preference for receiving coupon relief.

Despite the admonition of *Hahn,* class counsel have fallen back into that discredited role of philosopher king. MEF, though initially attuned to the conflict, has now reached a satisfactory global settlement, and is no longer in a position to raise the issue. But "the requirements for certification are not the defendant's to waive; they are intended to protect absent class members." Alexandra D. Lahav, *Symmetry and Class Action Litigation*, 60 UCLA L. REV. 1494, 1506 (2013). Exercising the heightened scrutiny demanded of a settlement-class certification, this Court should follow *Hahn* and deny certification and settlement approval until the plaintiffs propose separate and adequate representation of current and former Massage Envy subscribers.

IV. Even if the class is certifiable, the settlement unfairly favors class counsel at the expense of the class.

As discussed above, this Court should reject the requested class certification. Certification issues can bleed into the corollary 23(e)(2) question of whether the settlement is "fair, reasonable and adequate." For instance, when the terms of settlement manifest inadequate representation of absent class members, it follows that the settlement is often itself unfair. *See, e.g., Payment Card*, 827 F.3d at 236 (examining the settlement for "evidence of prejudice" from inadequate representation). Nonetheless, there are independent reasons that this Court should reject the settlement under 23(e) even if it accepts that the class certification itself is viable.

Namely, the conjunction of attorneys' fees, incentive awards, and no monetary relief for class members signals an unfair, lawyer-driven settlement. The settlement agreement permits plaintiffs to seek, unopposed, an award of attorneys' fees and expenses of $3,300,000 and three incentive awards of $10,000 each. Settlement ¶¶ 56, 61. If any amount less than the full fee is awarded, that amount reverts to defendant for "no apparent reason." *Blueooth*, 654 F.3d at 949. Putative class members are entitled only to coupon relief. Settlement ¶¶ 9-12.

A. Because this is a coupon settlement, it requires heightened scrutiny.

Congress passed the Class Action Fairness Act ("CAFA") to combat the incongruity that "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed, such as where … class counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value." 28 U.S.C. § 1711 note §§ 2(a)(3), (a)(3)(A); *see also Easysaver*, 906 F.3d at 754-55. Such unfairness was prevalent because the use of coupons "masks the relative payment of class counsel as compared to the amount of money actually received by the class members." *Inkjet*, 716 F.3d at 1179 (quoting Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 1049 (2002)). Coupon settlements suffer from additional flaws, including that "'they often do not provide meaningful compensation to class members; they often fail to disgorge ill-gotten gains from the defendant; and they often require class members to do future business with the defendant in order to receive compensation.'" *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1069 (C.D. Cal. 2010) (quoting *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1291, 1302 (S.D. Fla. 2007) and citing other cases); *see also Synfuel Techs. v. DHL Express (USA)*, 463 F.3d 646, 654 (7th Cir. 2006). Coupons also can "serve as a form of advertising for

the defendants, and their effect can be offset (in whole or in part) by raising prices during the period before the coupons expire." *In re Mexico Money Transfer Litig.*, 267 F.3d 743, 748 (7th Cir. 2001).

It is because of "the[se] well-documented problems associated with such settlements [that] Congress voiced its concern over coupon settlements when it amended [CAFA] to call for judicial scrutiny of attorneys' fee awards in coupon cases." *Reed v. Continental Guest Servs. Corp.*, No. 10 Civ. 5642, 2011 WL 1311886, at *3 (S.D.N.Y. Apr. 4, 2011). Because of the inherent dangers of coupon settlements, CAFA requires a district court to apply "heightened judicial scrutiny"[4] and to value the settlement, at least for fee purposes, based "on the value to class members of the coupons that are redeemed," 28 U.S.C. § 1712(a). *See also Inkjet*, 716 F.3d at 1181-86; *Easysaver*, 906 F.3d at 755. The Senate Committee's Report on CAFA confirms these legislative aims:

> [W]here [coupon] settlements are used, the fairness of the settlement should be seriously questioned by the reviewing court where the attorneys' fee demand is disproportionate to the level of tangible, non-speculative benefit to the class members. In adopting [Section 1712(e)'s requirement of a written determination that the settlement is fair, reasonable, and adequate], it is the intent of the Committee to incorporate that line of recent federal court precedents in which proposed settlements have been wholly or partially rejected because the compensation proposed to be paid to the class counsel was disproportionate to the real benefits to be provided to class members.

S. REP. 109-14, at 31 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 32.

While plaintiffs claim that that "this settlement is not a coupon settlement," Dkt. 122 at 12-16, the case law does not support their claim. The parties cannot rely on their characterization of the relief as "vouchers" to evade the effects of CAFA; the legal effect of the relief "is a question of function, not just labeling." *Khatib v. County of Orange*, 639 F.3d 898, 905 (9th Cir. 2011). Numerous courts have rejected similar semantic efforts to avoid the legal conclusion that certain relief constitutes a coupon.[5]

"A coupon may be defined as a certificate or form 'to obtain a discount on merchandise or services,'" and "Webster's also defines coupons as 'a form surrendered in order to obtain an article, service or

[4] *See Inkjet*, 716 F.3d at 1178; *Synfuel*, 463 F.3d at 654; *True*, 749 F. Supp. 2d at 1069; *Figueroa*, 517 F. Supp. 2d at 1308.

[5] *E.g.*, *Inkjet*, 716 F.3d at 1176 ("e-credits" are a "euphemism" for coupons); *Easysaver*, 906 F.3d 747 ("credits"); *Seegert v. Lamps Plus, Inc.*, 377 F. Supp. 3d 1127 (S.D. Cal. 2018) ("vouchers"); *Knapp v. Art.com*, 283 F. Supp. 3d 823 (N.D. Cal. 2017) ("vouchers"); *see also In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 952 (9th Cir. 2015) ("*Online DVD*") (courts should "ferret[] out the deceitful coupon settlement that merely co-opts the term 'gift card' [or here, voucher] to avoid CAFA's requirements").

accommodation.' Coupons are commonly given for merchandise for which no cash payment is expected in exchange." *Dardarian v. Officemax N. Am., Inc.*, No. 11-cv-00947, 2013 WL 12173924, at *2 (N.D. Cal. July 12, 2013) (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1988)). Despite plaintiffs' characterization, this case is not "exceedingly more analogous to *Online DVD*, than [to] *In re Easysaver*." Dkt. 122 at 8. Indeed, *Online DVD* itself supports a finding that the "vouchers" here are in fact coupons.[6] *Online DVD* identified several features that distinguished the gift cards provided under the settlement at issue there from coupons subject to CAFA: they "can be used for any products on walmart.com, are freely transferrable … and do not expire, and do not require consumers to spend their own money." 779 F.3d at 951. The court emphasized that the gift cards allowed class members to purchase, without spending any of their own cash, their "choice of a large number of products from a large retailer" (walmart.com). *Id.* at 952 (expressly confining its holding to walmart.com gift cards "without making a broader pronouncement about every type of gift card that might appear"). What "separates a Walmart gift card from a coupon is not merely the ability to purchase an entire product as opposed to simply reducing the purchase price, but also the ability to purchase one of many different types of products." *Id.* Unexpirable gift cards, as a "fundamentally distinct concept in American life from coupons," operate essentially as cash. *Id.* Moreover, *Online DVD* class members were not forced to do further business with the defendant to realize the benefit because the settlement allowed them to choose cash instead of a gift card. *Id.* As such, the settlement was not similar to those that motivated Congress to enact CAFA by leaving class members with "little or no value." *Id.* at 950.

The vouchers provided under the settlement here differ sharply from the gift cards of *Online DVD*; they are cut from the same CAFA cloth as the credits in *Easysaver*. As in *Easysaver*, MEF is "decidedly not [a] giant retailer[]" and "class members can only use the credits to purchase items from a limited universe of products." 906 F.3d at 757. As in *Easysaver*, class members cannot elect cash instead of a coupon. As in *Easysaver*, the vouchers contain an expiration date. And as in *Easysaver*, the vouchers are not gift cards under applicable law, and thus unlike gift cards, cannot be redeemed for cash.

[6] Although this Court has no authority to depart from *Online DVD*'s test for determining what constitutes a CAFA coupon, Oreshack submits that Judge Friedland's dissenting opinion in *Hendricks v. Ference* is correct: *Online DVD*'s multifactor inquiry is unwieldly and better replaced instead by a rule that treats "any type of discount, credit, gift card, or voucher as a coupon under CAFA." 754 Fed. Appx. 510, 514 (9th Cir. 2018). While Oreshack prevails whether or not the *Online DVD* test is used, he preserves this issue for appeal.

Following *Online DVD* and *Easysaver* respectively, the decisions in *Knapp* and *Seegert* are instructive. *Knapp* involved a settlement providing class members $10 vouchers to Art.com. 283 F. Supp. 3d 823. Although plaintiffs had presented evidence that approximately 100,000 whole products could be obtained with the $10 voucher, this Court refused to liken the vouchers to *Online DVD* gift cards. "Art.com's offerings are not equivalent to "a larger number of products from a large retailer." *Id.* at 837. "Unlike a Walmart gift card where recipients could purchase necessities such as toilet paper or toothpaste, class members here will be forced to purchase a product that they otherwise may not have purchased." *Id.* And in *Seegert*, the settlement provided $18 vouchers, expendable at Lamps Plus retail stores. 377 F. Supp. 3d 1127. Although 5,800 products were available at or below that price point, those products had relatively "narrow confines"—"light bulbs, track lights, and deck lights" for example. *Id.* at 1132. Unlike the countless SKUs available at Walmart.com, Lamps Plus products were "not everyday products required for purchase." *Id.* Without a cash alternative, *Seegert* found that the Lamps Plus vouchers could not be analogized to the *Online DVD* gift cards, and thus plaintiffs could not escape CAFA's restrictions on coupon settlements.

Similarly, plaintiffs here miss the mark when they focus on the fact that Massage Envy locations offer a variety of massage and spa-related products and services, many of which can be obtained for less than the face value of the vouchers. Dkt. 122 at 14-15. These products and services do not at all resemble the household cash-fungible inventory that Walmart.com provides. If anything, the spa-related products available here are even more niche than those available from the coupons in *Easysaver*, *Knapp*, or *Seegert*.[7] *See also Davis v. Cole Haan, Inc.*, No. 11-cv-01826-JSW, 2015 WL 7015328, at *4 (N.D. Cal. Nov. 12, 2015) (disclaiming reading of *Online DVD* that rests on a "narrow distinction" between discounts and whole products and concluding that $20 vouchers to Cole Haan stores constituted a CAFA coupon). *A fortiori*, the settlement vouchers here constitute CAFA coupons.

Although plaintiffs observe a few value-enhancing features of these vouchers (*e.g.* transferability), that does not change the fact that the vouchers remain coupons. *See, e.g., Easysaver*, 907 F.3d at 757 ($20 coupons were transferable, but still subject to CAFA); *Davis*, 2015 WL 7015328 (same). Nor does it matter that plaintiffs

[7] Indeed, the vouchers here are comparable to the e-credits, determined to be CAFA coupons, in *Inkjet*. The *Inkjet* products fell into a narrow range of categories (printers and printer supplies)—just like the spa and massage-related products available here.

have not alleged a defective or subpar service. Regardless of "how closely the relief matche[s] class members' alleged injury" or "the substance of the underlying claim of injury," coupons are still coupons and under CAFA may not be valued at face value. *Easysaver*, 907 F.3d at 756.[8]

In short, the Massage Envy vouchers that expire in sixteen months and can be used only for a narrow range of spa-related items or services fall squarely within CAFA's definition of "coupon."

B. In economic reality, the settlement impermissibly benefits class counsel at the expense of the class.

The burden of proving settlement fairness rests with the moving party. *E.g. Koby*, 846 F.3d at 1079. And because the settlement here precedes class certification, an even higher degree of careful scrutiny is required. *E.g. id.*; *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946-947 (9th Cir. 2011); *Payment Card*, 827 F.3d 223, 235-36. Approval of a pre-certification settlement will occasion appellate review of "the entire settlement, paying special attention to the terms of the agreement containing convincing indications that the incentives favoring pursuit of self-interest rather than the class's interest in fact influenced the outcome of negotiations." *Dennis*, 697 F.3d at 867 (internal quotation omitted).

Where a court confronts a pre-certification settlement, consideration of the eight *Churchill Village*[9] factors "alone is not enough to survive appellate review." *Bluetooth*, 654 F.3d at 946.[10] While it is *necessary* that

[8] Plaintiffs cite to the Ninth Circuit's unpublished split decision in *Hendricks v. Ference*, concluding that vouchers for canned tuna did not constitute CAFA coupons. 754 Fed. Appx. 510 (9th Cir. 2018). But they neglect to note key distinctions with the vouchers in that case. *See Hendricks v. Starkist Co.*, No. 13-cv-00729-HSG, 2016 WL 5462423, at *7 (N.D. Cal. Sept. 29, 2016) ("[L]ike the *Online DVD-Rental* class members, class members here were given a choice between receiving a cash settlement or the vouchers.").

[9] *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004).

[10] The sixth and eighth factors noted by *Churchill Village* (the "reaction of the class" and the "opinion experience and views of counsel") should be severely downplayed, if not dispensed with entirely. Regarding reaction of the class, class members' "silence is a rational response to any proposed settlement even if that settlement is inadequate." Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 73 (2007); *Redman v. Radioshack Corp.*, 768 F.3d 622, 628 (7th Cir. 2014) (calling this argument "naïve"); *Richardson v. L'Oreal USA, Inc.*, 991 F. Supp. 2d. 181, 205 (D.D.C. 2013) (this factor "proves little.").

Likewise, the "experience and views of counsel" factor, is a test that is always passed and therefore, no test at all. *See generally* Brian Wolfman, *Judges! Stop Deferring to Class-Action Lawyers*, 2 U. MICH. J.L. REFORM 80 (2013). "Once the named parties reach a settlement in a purported class action, they are always solidly in favor of their own proposal." *Kakani v. Oracle Corp.*, No. C 06-06493 WHA, 2007 WL 1793774, 2007 U.S. Dist. LEXIS 47515, at *3 (N.D. Cal. Jun. 19, 2007).

a settlement is at "arm's length" without express collusion between the settling parties, it is not *sufficient*. "[T]he Rule 23(e) reasonableness inquiry is designed precisely to capture instances of unfairness not apparent on the face of the negotiations." *Bluetooth*, 654 F.3d at 948 (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 960 (9th Cir. 2003)). Courts "must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests … to infect the negotiations." *Pampers*, 724 F.3d at 718 (quoting *Dennis*, 697 F.3d at 864).

This settlement involves the most common settlement defect—a disproportionate allocation of value between class counsel and the class. Again, this is because the adversarial process does not safeguard the rights of those absent from the table. Because "a defendant is interested only in disposing of the total claim asserted against it…the allocation between the class payment and the attorneys' fees is of little or no interest to the defense…." *Staton*, 327 F.3d at 964 (quoting *GM Trucks*, 55 F.3d at 819-20). Allocational issues cannot be waived away simply by structuring the settlement to provide "separate" attorneys' fees, rather than as a traditional common fund. *See Pampers*, 724 F.3d at 717-18; *Bluetooth*, 654 F.3d at 943. As long as the defendant willingly foots both bills, there is no way to avoid the "truism that there is no such thing as a free lunch." *Staton*, 327 F.3d at 964.

The Ninth Circuit has identified three warning signs of a class action settlement that is inequitable as between class counsel and the class: (1) unreasonable disparity between the class award and the attorneys' negotiated fee award; (2) "clear sailing," in which the defendant agrees not to oppose class counsel's fee request; and (3) a "kicker," such that any unawarded fees revert to the defendant rather than benefiting the class. *Bluetooth*, 654 F.3d at 947. Here, the settlement has an excessive attorneys' fee provision reinforced by a clear-sailing clause and a reversion routing any amount by which the Court reduces the requested fees to MEF rather than to the class, all set against the backdrop of coupon and illusory injunctive relief given a valuation by class counsel that violates CAFA. This settlement structure suggests a design intended to insulate class counsel's fee award with the illusion of class recovery, while simultaneously providing the defendant with the inexpensive release of claims and an end to the litigation. *See Staton*, 327 F.3d at 964 (if "fees are unreasonably high, the likelihood is that the defendant obtained an economically beneficial concession with regard to the merits provisions, in the form of lower monetary payments to class members or less injunctive relief for the class than could otherwise have been obtained."). "Such inequities in treatment make a settlement unfair" for neither

class counsel nor the named representatives are entitled to disregard their "fiduciary responsibilities" and enrich themselves while leaving the class behind. *Pampers*, 724 F.3d at 718 (internal quotation omitted).

1. Disproportionate fees

A class action settlement may not confer preferential treatment upon class counsel to the detriment of class members. When, as here, "counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded," a settlement is unfairly tilted toward class counsel. *Bluetooth*, 654 F.3d at 947; *GMC Pick-Up*, 55 F.3d at 803 ("non-cash relief … is recognized as a prime indicator of suspect settlements"). This settlement provides class counsel with the right to seek unopposed an attorney award of $3.3 million. Settlement § XII.A. For the Court's fairness analysis, the "'ratio that is relevant is the ratio of (1) the fee to (2) the fee plus what the class members received." *Pearson*, 772 F.3d at 781 (quoting *Redman*, 768 F.3d at 630). Class benefits must be examined in terms of "economic reality" not in terms of hypothetical amounts made available. *Allen*, 787 F.3d at 1224 & n.4. For a coupon settlement, the economic reality of class benefit looks at the amount of coupons redeemed, not the amount of coupons distributed to class members. *See Inkjet*, 716 F.3d at 1186 n.18. A settlement that allocates to class counsel well in excess of the Ninth Circuit's 25% benchmark cannot be approved. *See, e.g.*, *Dennis*, 697 F.3d at 868 (38.9% fee would be "clearly excessive"); *Allen*, 787 F.3d at 1224 n.4 (fee award that exceeds class recovery by a factor of 3 is disproportionate); *Pearson*, 772 F.3d at 781 (69% fee is "outlandish"). This is such a settlement.

While plaintiffs claim that their fee request equals 24.16% of the gross settlement or 32.14% of the net settlement, both calculations rely on a faulty denominator. Dkt. 122 at 27. Regardless of whether CAFA's limitations apply, a $10 million face valuation for the voucher relief is unsupportable in "economic reality" given that redemption rates in low-value coupon settlements rarely exceed low single-digits.[11] There is no chance that class members actually will redeem 100% of the $10 million face value of vouchers distributed. Nor is there any chance that class members will redeem the $9.9 million in vouchers necessary to justify the

[11] Moreover, any value from the "injunctive relief" flows to the defendant, not the class. *See* section IV.C below. Indeed, in their fee motion, plaintiffs wisely do not attempt to place a valuation on the purported injunctive relief.

$3.3 million in fees and costs that class counsel seek on a 25% benchmark basis.[12]

Often, evaluating whether a coupon settlement is unfairly skewed toward class counsel will require the court to make estimates from redemption rates in analogous cases.[13] Such precedent shows the redemption rate will almost certainly be in the low single digits. *See, e.g.*, *Galloway v. Kan. City Landsmen, LLC*, 833 F.3d 969, 971 (8th Cir. 2016) (0.045% of distributed certificates were redeemed); Declaration of David Tjen, *Knapp*, No. 3:16-cv-00768-WHO, Dkt. 84-7 (N.D. Cal. Aug. 29, 2018) (declaring that $142,940 worth of vouchers were redeemed; that amounts to only 0.71% of the $20 million face value distributed); *Davis*, 2015 WL 7015328 (2.3% of distributed vouchers were redeemed); James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 GEO. J. LEGAL ETHICS 1443, 1445, 1448 (2005) (typically "redemption rates are tiny," "mirror[ing] the annual corporate issued promotional coupon redemption rates of 1-3%"); Steven B. Hantler & Robert E. Norton, *Coupon Settlements: The Emperor's Clothes of Class Actions*, 18 GEO. J. LEGAL ETHICS 1343, 1347 (2005) (noting one settlement where only 2 of more than 96,000 coupons were redeemed); *cf. also Golba v. Dick's Sporting Goods, Inc.*, 238 Cal. App. 4th 1251, 1261 (Cal. App. 4th Dist. 2015) ("of the 232,000 potential class members, only two had submitted claims for coupons"). Even if the redemption rate is an unusually robust 10%, class counsel will have allocated over 76% of settlement benefit to themselves. Under Circuit precedent, the settlement should be rejected. *E.g.*, *Dennis*, 697 F.3d at 868; *see also Pearson*, 772 F.3d at 781.

Here, however, the parties are in possession of relevant data from the *Hahn* settlement that could shed light on the likely redemption rate here. In *Hahn*, former Massage Envy members were entitled to reclaim 75%

[12] Litigation expenses should be included in the numerator of the percentage-of-recovery calculation because, otherwise, class counsel are incentivized to treat resources as a litigation expense (because they will be reimbursed) and to increase those expenses (inflating the common fund value), knowing that such reimbursable expenses will not be counted against the 25% benchmark. Every dollar class counsel spends is not just a dollar taken from the class, but effectively would allow class counsel to earn a *commission* on those expenses. At a minimum, if the Court is to exclude litigation expenses from the numerator, it also should exclude those same expenses from the denominator. *See, e.g.*, *In re Transpacific Passenger Air Transp. Antitrust Litig.*, No. C 07-05634, 2015 U.S. Dist. LEXIS 67904, at *14-*16 (N.D. Cal. May 26, 2015) (excluding both administrative and litigation expenses before calculating attorneys' fees).

[13] CAFA may allow such *ex ante* predictive judgments when approving a coupon settlement as fair, though it requires deferring any fee award until after the coupons have been redeemed. *Compare Redman*, 768 F.3d at 634 (allowing estimation of redemption rate based upon considered economic judgment at settlement approval stage), *with Inkjet*, 716 F.3d at 1181-83 & 1187 n.19 (requiring actual accounting of coupons redeemed before an attorneys' fee attributable to them may be awarded; further suggesting bifurcating or staggering the fee award).

of their expired massages for use within 180 days. *Hahn*, No. 12-cv-00153-DMS (BGS), 2016 U.S. Dist. LEXIS 196046, at *18 (S.D. Cal. Mar. 30, 2016) (attached as Exhibit E to MEF's Request for Judicial Notice, Dkt. 26-1); *Hahn*, Dkt. 396 (S.D. Cal. Jul. 5, 2016) (granting approval after plaintiffs restructured representation). Though that deadline is by now past, the settling parties have not revealed what portion of the once-expired massages that were reinstated were *actually* redeemed by class members. The parties have not carried their burden of proof and, if they continue to hide this data, the Court should draw the appropriate adverse inference that the redemption rate in *Hahn* belies the value that plaintiffs attribute to the settlement vouchers here. *See Pampers*, 724 F.3d at 719 (reversing settlement approval where parties did not produce germane information within their possession); *see also Koby*, 846 F.3d at 1079 (following *Pampers* and placing onus on settling parties to prove value of settlement relief).[14]

Without doubt, class counsel's proposed $3.3 million award will be disproportionate relative to the value of those settlement vouchers actually redeemed. *Bluetooth*'s first warning sign is apparent.

2. Clear-sailing

As part of the settlement, MEF agreed not to object to or oppose class counsel's fee and expense request of $3,300,000. Settlement ¶ 56. This "clear sailing" provision is the second of *Bluetooth*'s warning signs. 654 F.3d at 947; *see also Redman*, 768 F.3d at 637. Because of its presence in the settlement, the Court "has a heightened duty to peer into the provision and scrutinize closely the relationship between attorneys' fees and benefit to the class, being careful to avoid awarding 'unreasonably high' fees simply because they are uncontested." *Bluetooth*, 654 F.3d at 948 (quoting *Staton*, 327 F.3d at 954).

The reason that clear sailing clauses are problematic in class-action settlements is that "by its very nature," the clause "deprives the court of the advantages of the adversary process." *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 525 (1st Cir. 1991). *Bluetooth* recognized that a court cannot know what class counsel may have bargained away in exchange for a defendant's agreement not to challenge their fee request, thus limiting a court's ability to determine the fairness of an attorneys' fee request. 654 F.3d at 948. The clause thereby lays the groundwork for lawyers to "urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees" and "suggests, strongly," that its associated fee request

[14] As for current Massage Envy members, many like Mr. Oreshack have already stockpiled numerous fifty-minute massages and thus will be less likely to redeem their full vouchers for that reason.

should "be placed under the microscope of judicial scrutiny." *Weinberger*, 925 F.2d at 518, 524-25.

> Provisions for clear sailing clauses "decouple class counsel's financial incentives from those of the class, increasing the risk that the actual distribution will be misallocated between attorney's fees and the plaintiffs' recovery. They potentially undermine the underlying purposes of class actions by providing defendants with a powerful means to enticing class counsel to settle lawsuits in a manner detrimental to the class."

Vought v. Bank of Am., N.A., 901 F. Supp. 2d 1071, 1100 (C.D. Ill. 2012) (quoting *Int'l Precious Metals Corp. v. Waters*, 530 U.S. 1223, 1224 (2000) (O'Connor, J., respecting the denial of certiorari)). Indeed, clear sailing is most suspect when the class is paid in coupons or other non-cash relief. *Redman*, 768 F.3d at 637. Coupons typically mask the real value of the class's relief. In such a situation, a defendant that remains adverse to counsel's fee award is the most likely candidate to illuminate a realistic estimate of the class benefit.

3. Segregated fee fund

The proposed settlement separates the class' relief from class counsel's fee fund such that any reduction in fees will inure to the benefit of MEF, not absent class members. Segregating class counsel's fee from the class relief forms a "constructive common fund," colloquially known as a "reverter" or a "kicker." *See, e.g.*, *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, 2019 WL 387322, 2019 U.S. Dist. LEXIS 15034, at *41-*43 (N.D. Jan. 30, 2019). Plaintiffs tout this as feature of the settlement, suggesting that because of this structure the fees are "in addition to" class relief. Dkt. 122 at 7. Alas, "there is no such thing as a free lunch." *Staton*, 327 F.3d at 964.

Not only is a constructive common fund structure not beneficial as plaintiffs suggest, it is *inferior* to an actual common fund settlement structure for one principal reason—the segregation of parts means that the Court cannot remedy any allocation issues by reducing fee awards. *See Pearson*, 772 F.3d at 786; *Bluetooth*, 654 F.3d at 949. Fee segregation constitutes the third red flag of a lawyer-driven settlement and begets a "strong presumption of…invalidity." *Pearson*, 772 F.3d at 787; *accord Redman*, 768 F.3d at 637 (segregation is a "defect"); *Bluetooth*, 654 F.3d at 949 (segregation "amplifies the danger" that is "already suggested by a clear sailing provision"). "The clear sailing provision reveals the defendant's willingness to pay, but the kicker deprives the class of that full potential benefit if class counsel negotiates too much for its fees." *Bluetooth*, 654 F.3d at 949. With a typical common fund, the district court can reduce the fees requested by plaintiffs' counsel—and when it does so, the class will benefit from the surplus. *See Pearson*, 772 F.3d at 786 (calling this the "simple and

obvious way" to remedy a misallocation); *see also Harris v. Amgem, Inc.*, 2016 WL 7626161, at *9 (C.D. Cal. Nov. 29, 2016) (approving settlement that contemplated an excessive 45% fee award, because it also "provide[d] for a fair method of redistribution of unawarded attorneys' fees should the Court…find[] the suggested attorneys' fees too high."). However, with a constructive common fund structure, if this Court reduces the $3.3 million attorney request to $500,000 it can do nothing to remit additional value to class members. It is "not enough" simply to lower the fee request. *Pearson*, 772 F.3d at 787. The parties have hamstrung the Court, preventing it from returning the constructive common fund to its natural equilibrium.

Thus, fee segregation has the additional self-serving effect of protecting class counsel by deterring scrutiny of the fee request. *Id.* at 786 (calling it a "gimmick for defeating objectors"). Both courts and potential objectors have less incentive to scrutinize a request because the kicker combined with the clear-sailing agreement means that any reduction benefits only the defendant that had already agreed to pay that initial amount. Charles Silver, *Due Process and the Lodestar Method: You Can't Get There From Here*, 74 TUL. L. REV. 1809, 1839 (2000) (such a fee arrangement is "a strategic effort to insulate a fee award from attack"); Lester Brickman, LAWYER BARONS 522-25 (2011) (same; further arguing that reversionary kicker is per se unethical). Because this settlement lacks a true common fund structure that would allow the Court to remedy the disequilibrium, the only solution is denying settlement approval.

C. The supposed injunctive relief constitutes an impermissible release of class members' future contractual rights.

The settlement is also unfair because it imposes an involuntary membership contract reformation upon each class member that does not opt out. The complaint argues that Massage Envy breached class members' contracts because the contracts locked class members into a monthly price, but Massage Envy charged more than the renewal amounts specified in the contracts. Dkt. 60 ¶¶ 2-3. Class members are releasing their claims for these *past* excessive charges. Dkt. 103-1 at 8-9. The release does not include class members' *future* claims, *i.e.*, which would allow class members to bring claims if Massage Envy once again charged more than specified in the contracts. *Id.* The "injunctive relief," however, effectively extinguishes these future claims and permits Massage Envy to get out of these locked-in monthly prices.

Paragraphs 14 and 15 of the Settlement Agreement purport to bind class members who do not opt out to a superseding membership agreement with Massage Envy. *See* Exhibit 5 to Settlement Agreement (new

agreement template), Dkt. 103-1 at 132 ¶¶ 14-15. According to class counsel, this provision is "intended to prevent future injury to the Settlement Class." Krinsk Decl. ¶ 60. Instead, without affirmative consent, these paragraphs foist an entirely new and unauthorized contract upon class members, in the process causing class members to lose their contractual rights to maintain the initial premiums after autorenewal. Under their current contracts, for example, class members' memberships "following the initial term" "will automatically continue on a month-to-month basis at the rate of [$X] per month until [the] membership is cancelled." Dkt. 107 at 3 (quoting named plaintiffs' membership agreements). Under the new proposed membership agreement template, the right to the same continuing premium is removed and replaced with language that memberships will "automatically renew and continue on a month-to-month basis until cancelled by you or terminated by us in accordance with the terms of this Agreement." Dkt. 103-1 at 132. The revised contract continues: "Following the initial term, we will give you at least 45 days' advance written notice of any increase in the monthly payment…" *Id.*[15]

In effect this contract reformation grants MEF an impermissible release of class members' future-accruing claims beyond merely the stated and noticed release of claims that "could have been brought on or prior to the date" of the settlement agreement. Settlement Agreement, § I.EE. "Releasing additional claims may be costly to class members, but it is costless to their lawyer." Howard Erichson, *Aggregation as Disempowerment*, 92 NOTRE DAME L. REV. 859, 893 (2016). When a settlement's agreed-upon release exceeds its permissible scope, both the defendants and class counsel get a benefit at the expense of absent class members. An expanded release makes the terms more valuable to the defendant while simultaneously inducing them to grant an even more sizable award of fees to class counsel. As such, the terms of the release need to be closely policed. A future-looking contractual reformation of this sort presents multiple problems that undermine the fairness of the proposed settlement: (1) a class settlement release may not waive prospective rights of absent class members without their express consent; (2) class members who fail to submit a claim or exclude themselves incur a serious net loss.

As the Court has recognized, to be authorized, all released claims must share "the identical factual

[15] Of course, the dispute between plaintiffs and defendant in this litigation shows that class members' right to continue paying the same premium after autorenewal was not beyond a reasonable doubt. Nonetheless, it is clear that class members currently maintain a colorable claim to that contractual right, and it is equally clear that the superseding template would divest them of any claim to that contractual right.

predicate" underlying the claims of the original action. Dkt. 49 at 8-9 (discussing *Hesse v. Sprint Corp.*, 598 F.3d 581 (9th Cir. 2010)). Future breaches of class members' contracts which "necessarily occur[] at different times" do not share an identical factual predicate with the facts of this case. Dkt. 49 at 9. Class counsel and the named representatives are not authorized to trade these future claims away. *See, e.g., Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157 F. Supp. 2d 561, 577 (E.D. Pa. 2001) ("The release is also too broad because it bars later claims based on future conduct."); NEWBERG ON CLASS ACTIONS (4th ed. 2002) § 12:15 ("[D]efendants may negotiate a release of all claims *up to the date of settlement*, though this date naturally falls after the date the complaint was filed.") (emphasis added); *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 313 (5th Cir. 2007) ("[A] release does not ordinarily preclude claims based on subsequent conduct."). This follows naturally from basic principles of *res judicata*: "A claim arising after the date of an earlier judgment is not barred, even if it arises out of a continuing course of conduct that provided the basis for the earlier claim." *Frank v. United Airlines, Inc.*, 216 F.3d 845, 851 (9th Cir. 2000).[16]

Two cases are especially instructive. In *Authors Guild v. Google Inc.*, the settling parties stipulated that unless individual authors opted out of the settlement, they would release Google against liability for copyright infringement stemming from future acts. 770 F. Supp. 2d 666 (S.D.N.Y. 2011). Judge Chin concluded that this "forward-looking business arrangement" exceeded the permissible scope of a release. *Id.* at 675, 679. "While it is true that in virtually every class action many class members are never heard from, the difference is that in other class actions class members are merely releasing "claims" for damages for purported past aggrievements." *Id.* at 680. The decision noted that if the settlement were restructured to be "opt-in" rather than "opt-out," it would alleviate many of the most apparent concerns. *Id.* at 686.

More recently, in a case alleging cable companies had committed trespass by laying fiber optic cables, the settling parties proposed as part of their settlement to have unconsenting class members transfer property rights to the defendant and in effect immunize the defendant against future claims. *Sample v. Centurylink Comms. LLC*, No. 16-cv-00624, 2018 WL 3997484, 2018 U.S. Dist. LEXIS 141659 (D. Ariz. Aug. 21, 2018). *Sample* found it to be a "close question" whether settlements as a "general matter" may transfer a property right

[16] Moreover, the release of future rights exacerbates the intraclass conflict discussed in Section III above. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.10 (b) (2010) ("A class settlement may not resolve future claims unless the court determines that persons with such claims are represented in a manner that avoids structural conflicts of interest…").

"coextensive with the present trespass to perpetuate that settled, continuing trespass." 2018 U.S. Dist. LEXIS 141659, at *26. Although it recognized "[n]othing in the text of Rule 23 authorizes" "transfer of a property right…merely because the class member did nothing," ultimately and "with hesitation" *Sample* accepted that based on out-of-circuit authority, a transfer of property interest could be allowed as long as it did not exceed the scope of the current and continuing trespass. *Id.* The court, however, emphatically rejected the notion that absent class members could be roped into conferring a property right that goes beyond the scope of the current transgression. *Id.* at 32-33. For this very reason, the proposed settlement here cannot stand. A contract reformation does not merely prospectively ratify the increased fees already being charged to class members, it confers upon MEF franchises a wholly new and unambiguous contractual right to implement even greater fee increases in the future.

Worse yet, a large percentage of the class will lose their prospective contractual rights with ***no compensation at all***. Krinsk Decl. ¶¶ 63-64 (reporting current claims rate of 3.48% and extrapolating to a claims rate of 4.65% by the end of the claims period). In an ordinary settlement, releasing past monetary claims of non-claimants is bad enough; indeed it's "exactly the sort of circumstance that raises legitimate questions about the fairness of a settlement agreement." *Ross v. Lockheed Martin Corp.*, 267 F. Supp. 3d 174, 202 (D.D.C. 2017). Many judges of this District have denied approval of settlements that intend to release non-participants' claims.[17] It's worse here. Non-claimants gain nothing and lose not only the claims at issue in the litigation, but also their future contractual rights. That is unreasonable and provides an independent reason to disapprove the settlement.

V. In the alternative, if the Court approves the settlement, attorneys' fees can be awarded only after the coupon redemption rate is known.

The Court's fiduciary role remains vital to protect the class at the fee-setting stage. "[C]ourts have an independent obligation to ensure the award, like the settlement itself, is reasonable, even if the parties have

[17] *See Myles v. AlliedBarton Sec. Servs., LLC*, 2014 WL 6065602, 2014 U.S. Dist. LEXIS 159790, at *9 (N.D. Cal. Nov. 12, 2014) (Donato, J.) ("Not a tenable or fair approach"); *Fraser v. Asus Computer Int'l*, 2012 WL 6680142, 2012 U.S. Dist. LEXIS 181315, at *7-*10 (N.D. Cal. Dec. 21, 2012) (Alsup, J.) (release should be limited to those who submit claim forms); *Ross v. Trex Co.*, No. C 09-00670 JSW, 2013 U.S. Dist. LEXIS 74720, at *5 (N.D. Cal. May 28, 2013) (White, J.) (same); *Otey v. Crowdflower, Inc.*, No. 12-cv-05524-JST, 2015 U.S. Dist. LEXIS 86712 (N.D. Cal. July 2, 2015) (Tigar, J.) (similar).

already agreed to an amount." *Bluetooth*, 654 F.3d at 941. "Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class action process." Advisory Committee Notes on 2003 Amendments to Rule 23. "That the defendant in form agrees to pay the fees independently of any monetary award or injunctive relief provided to the class in the agreement does not detract from the need carefully to scrutinize the fee award" because "a defendant is interested only in disposing of the total claim asserted against it." *Staton*, 327 F.3d at 964 (internal quotation marks omitted). Thus, "private agreements to structure artificially separate fee and settlement arrangements cannot transform what is in economic reality a [constructive] common fund situation into a statutory fee shifting case." *GMC Pick-Up*, 55 F.3d at 821; *see also Bluetooth*, 654 F.3d at 943.

Plaintiffs are mistaken that the Court can still award lodestar-based fees if it finds the settlement includes coupon relief. *See* Fee Mem. at 11-12. As plaintiffs admit, "CAFA directs courts to apply heightened scrutiny to coupon settlements" and "provid[es] that the 'portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.'" Dkt. 122 at 12 (quoting 28 U.S.C. § 1712(a)). The "shall" language is mandatory; in this Circuit, a court has no discretion to award fees for coupon relief in any manner other than a percentage based on the value of the coupons ultimately redeemed. *Inkjet*, 716 F.3d at 1181. Plaintiffs even admit that this is the rule under Ninth Circuit law. Dkt. 122 at 16 (discussing the "apparent split among federal courts"). Accordingly, this Court should award attorneys' fees only after the voucher redemption period has passed and the value of the redeemed vouchers is known.

Contrary to plaintiffs' argument, it is only that portion of a fee award "not attributable to coupons" that may be awarded under § 1712(b)'s lodestar method. A fee is attributable to the award of coupons where the fee is a "consequence" of the coupon relief, or conversely, where the coupon relief "is the conditional precedent" to the fee award. *Inkjet*, 716 F.3d at 1181. "[I]n a case where the settlement provides only coupon relief" "the 'portion' of the attorneys' fees that are 'attributable to the award of the coupons' is necessarily one hundred percent … [and] any attorney's fee award to class counsel ... shall be based on the value to class members of the coupons that are redeemed." *Id.* at 1182. "§1712(a) *does* exclude the possibility that lodestar fees may be awarded in exchange for coupon relief." *Id.* at 1185 (internal quotation omitted).

The vouchers qualify as coupons for purposes of CAFA. *See* Section IV.A. To evade the limitations of

§ 1712(a), plaintiffs argue unpersuasively that *Easysaver* silently overruled *Inkjet* such that a court can exclusively use the lodestar approach where a settlement involves both coupons and injunctive relief. Dkt. 122 at 17-18. This argument has critical flaws. First, *Easysaver* expressly applied the holding of *Inkjet*, by holding that the district court erred by awarding lodestar-based fees based on a settlement value "that included the full face value of all the … coupons." *Easysaver*, 906 F.3d at 759. Any lodestar-based fee could only be awarded "without reference" to the dollar value of the coupon relief. *Id.* The Ninth Circuit instructed the district court on remand to "recalculate" the fee award "in a manner that treats the … credits as coupons under CAFA." *Id.* at 760. *Easysaver* continued this Circuit's long tradition of following the legal maxim that in all cases fee awards must be attuned to the result actually achieved for the class, *i.e.*, to the money the settlement actually puts in class members' hands. *See, e.g.*, *Bluetooth*, 654 F.3d at 942.

Second, there is no other relief upon which the Court could base any lodestar- or percentage-based fee award until after the redemption rate of the vouchers is known. *See Galloway v. Kansas City Landsmen, LLC*, 2015 WL 13297964, at *5 (W.D. Mo. Feb. 20, 2015), *aff'd* 833 F.3d 969 (8th Cir. 2016) (weighing relative value of coupon and non-coupon relief to assess how much of the fee is attributable to each). As detailed above, the injunctive relief is of negative value to the class and therefore cannot bear the weight of plaintiffs' fee request. *See* Section IV.C. And even if the Court adopted plaintiffs' errant reading of *Easysaver* as overruling *Inkjet*, plaintiffs cannot show that they are entitled to lodestar fees exclusively on the basis of the injunctive relief—the only non-coupon relief in the settlement—because they don't attribute any value to the injunctive relief.

Awarding fees now would violate § 1712 of CAFA, which is "intended to put an end to the 'inequities' that arise when class counsel receive attorneys' fees that are grossly disproportionate to the actual value of the coupon relief obtained for the class." *Inkjet*, 716 F.3d at 1179. If this Court intends to approve the current class certification and settlement, deferring or staggering the fee award will enable the Court to award fees based on redeemed coupons consistent with CAFA and will ensure a fee award that is more appropriately proportionate to the actual class benefit. *E.g.*, *Galloway*, 833 F.3d 969; *Knapp*, 283 F. Supp. 3d 823, 838 (deferring consideration of class counsel's fee motion until the coupon redemption period is completed); *Rougvie v. Ascena Retail Grp., Inc.*, No. 15-cv-00724, 2016 WL 4111320, at *27 (E.D. Pa. July 29, 2016) (same).

VI. Class counsel's lodestar request is excessive.

Under section 1712(c) of CAFA, to avoid double-billing, any supplementary lodestar award for non-coupon relief must be decreased to account for a future redeemed coupon-based percentage award. *Galloway*, 833 F.3d 969 (affirming decision to reduce lodestar by 90% in a mixed coupon/injunctive relief settlement to account for the coupon-based percentage award). Plaintiffs' excessive request ignores that requirement. Even if, *arguendo*, some minor fraction of lodestar were appropriate in recognition of the "injunctive relief," class counsel asks for their lodestar for the entire litigation and a 1.96 multiplier on top of that, without eliminating any time attributable to obtaining the coupon relief. Dkt. 122 at 16-22.

A lodestar approach necessitates "adjust[ing] the amount of any fees award to account for the degree of success class counsel attained," because "[p]laintiffs attorneys don't get paid simply for working; they get paid for obtaining results." *Inkjet*, 716 F.3d at 1186 n.18 (internal citations and quotation marks omitted); *id.* at 1182. Thus, even when applying "the approach of subsection (b)(1)," allowing a lodestar award, "hours can't be given controlling weight in determining what share of the class action settlement pot should go to class counsel." *Redman*, 768 F.3d at 635. Here, "[t]he class is being asked to 'settle,' yet Class Counsel has applied for fees as if it had won the case outright." *Sobel v. Hertz Corp.*, 2011 WL 2559565, at *14 (D. Nev. Jun. 27, 2011). Given the "'only limited success'" class counsel have achieved, "counting all hours expended on the litigation—even those reasonably spent—may produce an 'excessive amount'" that is unreasonable "'in relation to the results obtained.'" *Bluetooth*, 654 F.3d at 942 (quoting *Hensley*, 461 U.S. at 436, 440).

Not only do plaintiffs propose a full lodestar award, they propose a multiplier on top. But "there is a strong presumption that the lodestar is sufficient" without any enhancement multiplier. *Perdue v. Kenny A.*, 559 U.S. 542, 546 (2010). A lodestar enhancement is only justified in "rare and exceptional" circumstances where "specific evidence" demonstrates that an unenhanced "lodestar fee would not have been adequate to attract competent counsel." *Id.* at 554; *accord Easysaver*, 906 F.3d at 760 n.12.[18] Plaintiffs' cursory description of the risks of the litigation and the quality of their representation doesn't meet the standard required for a multiplier. "[T]he novelty and complexity of a case generally may not be used as a ground for an enhancement because

[18] Although *Kenny A.*'s limitation on enhancements was made in the context of interpreting 42 U.S.C. § 1988, there's little justification for claiming that "reasonable" fees in that statute means something different than Rule 23(h)'s direction that "reasonable" fees may be awarded in class actions.

these factors presumably are fully reflected in the number of billable hours recorded by counsel." *Kenny A.*, 559 U.S. at 553. Similarly, a multiplier based on outstanding results requires "exceptional success" beyond the "expectancy of excellent or extraordinary results" already baked into high hourly rates. *In re Washington Pub. Power Supply Sys. Litig.*, 19 F.3d 1291, 1304 (9th Cir. 1994). Yet plaintiffs rely on such factors here, without showing any exceptional factors that would justify nearly doubling their lodestar. More fundamentally, before the redemption period ends, they cannot claim they have achieved any level of success on behalf of class members. *Inkjet*, 716 F.3d at 1186 n.18.[19]

CONCLUSION

The class as currently defined should not be certified, nor should the proposed settlement be approved. If the Court nonetheless grants certification and settlement approval, it should not award fees until after the voucher redemption period.

Dated: September 20, 2019

Respectfully submitted,

/s/ Theodore H. Frank
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Attorneys for Objector Kurt Oreshack

[19] Finally, Plaintiffs attempt to justify their lodestar and hefty multiplier with a percentage crosscheck fails. Dkt. 122 at 26. Such a crosscheck is premature given that at this stage, the class's recovery through redeemed vouchers is unknown. It violates CAFA to base a fee award or even a crosscheck on the unredeemed value of those vouchers. *See* Section V, above.

PROOF OF SERVICE

I hereby certify that on this day I electronically filed the foregoing Objection using the CM/ECF filing system thus effectuating service of such filing on all ECF registered attorneys in this case.

In accordance with the class notice, I also submitted a copy of the objection to the settlement administrator via email at info@MassageFeeSettlement.com

DATED this 20th day of September, 2019.

/s/ Theodore H. Frank
Theodore H. Frank

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Attorneys for Objector Kurt Oreshack

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BAERBEL MCKINNEY-DROBNIS, JOSEPH B. PICCOLA, and CAMILLE BERLESE, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MASSAGE ENVY FRANCHISING, LLC, a Delaware Limited Liability Company,

Defendant.

KURT ORESHACK,

Objector.

Case No. 3:16-cv-6450-MMC

Judge: Hon. Maxine M. Chesney
Courtroom: 7, 19th Floor
Date: November 1, 2019
Time: 9:00 A.M.

DECLARATION OF KURT ORESHACK

I, Kurt Oreshack, declare as follows:

1. I have personal knowledge of the facts set forth herein and, if called as a witness, could and would testify competently thereto.

2. My full name is Kurt Andrew Oreshack. My current address is 15540 Tanner Ridge Rd., San Diego, CA 92127. At the time I opened by Massage Envy membership, I lived at 600 West E St. #603, San Diego, CA 92101.

3. I have been member of Massage Envy since 2009. My monthly fee has increased from $39.99 per month initially to $60 per month in 2019. I am not a director, officer or agent of Massage Envy or any of the released parties. I am not a judge or member of the judicial staff over seeing this case. I am not class counsel, defendant's counsel, nor a staff member of counsel's firms. I understand myself to be a class member in this case.

4. On July 20, 2019, I received email notice of the settlement from the settlement administrator providing Unique ID Code 3F37DC394F and password 797430310. The following day I submitted a claim for a voucher via the settlement website and received Confirmation code 7HB8INZT.

5. I intend to appear through my counsel Ted Frank at the fairness hearing currently scheduled for November 1, 2019.

6. I bring this objection in good faith. I have no intention of settling this objection for any sort of side payment. Unlike many objectors who attempt or threaten to disrupt a settlement unless plaintiffs' attorneys buy them off with a share of attorneys' fees, it is my understanding and belief that CCAF does not engage in *quid pro quo* settlements and will not withdraw an objection or appeal in exchange for payment.

7. Thus, if contrary to CCAF's practice and recommendation, I agree to withdraw my objection or any subsequent appeal for a payment by plaintiffs' attorneys or the defendant(s) paid to me or any person or entity related to me in any way without court approval, I hereby irrevocably waive any and all defenses to a motion seeking disgorgement of any and all funds paid in exchange for dismissing my objection or appeal.

8. The specific grounds of my objection are identified in the memorandum to be filed by my attorney contemporaneously with this declaration.

9. I do not value the settlement vouchers as equivalent to cash relief of the same nominal amount. In my view, the class is affirmatively harmed by the putative injunctive relief that would reform class members' contracts to allow Massage Envy to increase membership premiums upon advance written email notice to the class members.

10. I have not objected to any other class action settlements in the five years prior to June 7, 2019.

11. My objection applies to the entire class.

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

Executed on September 19, 2019, in San Diego, CA.

Kurt Oreshack

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BAERBEL MCKINNEY-DROBNIS, JOSEPH B. PICCOLA, and CAMILLE BERLESE, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MASSAGE ENVY FRANCHISING, LLC, a Delaware Limited Liability Company,

Defendant.

KURT ORESHACK,

Objector.

Case No. 3:16-cv-6450-MMC

Judge: Hon. Maxine M. Chesney
Courtroom: 7, 19th Floor
Date: November 1, 2019
Time: 9:00 A.M.

DECLARATION OF THEODORE H. FRANK

I, Theodore H. Frank, declare as follows:

1. I have personal knowledge of the facts set forth herein and, if called as a witness, could and would testify competently thereto.

2. My business address is Hamilton Lincoln Law Institute, 1609 K St. NW, Suite 300, Washington, DC 20006. My telephone number is (703) 203-3848. My email address is ted.frank@hlli.org.

3. I represent Kurt Oreshack, a class member in this matter.

Center for Class Action Fairness

4. I founded the non-profit Center for Class Action Fairness ("CCAF"), a 501(c)(3) non-profit public-interest law firm based out of Washington, DC, in 2009. In 2015, CCAF merged into the non-profit Competitive Enterprise Institute ("CEI") and became a division within their law and litigation unit. In January 2019, CCAF become part of the Hamilton Lincoln Law Institute, a new non-profit public-interest law firm founded in 2018.

5. CCAF's mission is to litigate on behalf of class members against unfair class action procedures and settlements. *See, e.g.*, *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (praising CCAF's work); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 716-17 (6th Cir. 2013) (describing CCAF's client's objections as "numerous, detailed and substantive") (reversing settlement approval and certification); *Richardson v. L'Oreal USA, Inc.*, 991 F. Supp. 2d 181, 205 (D.D.C. 2013) (describing CCAF's client's objection as "comprehensive and sophisticated" and noting that "[o]ne good objector may be worth many frivolous objections in ascertaining the fairness of a settlement") (rejecting settlement approval and certification.) The Center has won over $200 million for class members and received national acclaim for its work. *See, e.g.*, Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 13, 2013 ("the leading critic of abusive class action settlements"); Roger Parloff, *Should Plaintiffs Lawyers Get 94% of a Class Action Settlement?*, FORTUNE, Dec. 15, 2015 ("the nation's most relentless warrior against class-action fee abuse"); The Editorial Board, *The Anthem Class-Action Con*, WALL ST. J., Feb. 11, 2018 (opining "[t]he U.S. could use more Ted Franks" while covering CCAF's role in exposing "legal looting" in the Anthem data breach MDL).

6. The Center has been successful, winning reversal or remand in over a dozen federal appeals decided to date. *E.g., Frank v. Gaos*, 139 S. Ct. 1041 (2019); *In re Lithium Ion Batteries Antitrust Litig.*, No. 17-17367 (9th Cir. Sept. 16, 2019) (unpublished); *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, -- F.3d --, No.

17-1480 (3d Cir Aug. 6, 2019); *In re EasySaver Rewards Litig.*, 906 F.3d 747 (9th Cir. 2018); *In re Subway Footlong Mktg. Litig.*, 869 F.3d 551 (7th Cir. 2017); *In re Target Corp. Customer Data Sec. Breach Litig.*, 847 F.3d 608 (8th Cir. 2017); *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718 (7th Cir. 2016); *In re EasySaver Rewards Litig.*, 599 Fed. Appx. 274 (9th Cir. 2015) (unpublished); *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060 (8th Cir. 2015); *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014); *Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014); *In re MagSafe Apple Power Adapter Litig.*, 571 Fed. Appx. 560 (9th Cir. 2014) (unpublished); *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013); *In re HP Inkjet Printer Litigation*, 716 F.3d 1173 (9th Cir. 2013); *In re Baby Products Antitrust Litigation*, 708 F.3d 163 (3d Cir. 2013); *Dewey v. Volkswagen*, 681 F.3d 170 (3d Cir. 2012); *Robert F. Booth Trust v. Crowley*, 687 F.3d 314 (7th Cir. 2012); *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011). While, like most experienced litigators, we have not won every appeal we have litigated, CCAF has won the majority of them.

7. CCAF has won more than $200 million for class members by driving the settling parties to reach an improved bargain or by reducing outsized fee awards. Andrea Estes, *Critics hit law firms' bills after class-action lawsuits,* BOSTON GLOBE (Dec. 17, 2016) (more than $100 million at time). *See also, e.g., McDonough v. Toys "R" Us*, 80 F. Supp. 3d 626, 661 (E.D. Pa. 2015) ("CCAF's time was judiciously spent to increase the value of the settlement to class members") (internal quotation omitted); *In re Citigroup Inc. Secs. Litig.*, 965 F. Supp. 2d 369 (S.D.N.Y. 2013) (reducing fees, and thus increasing class recovery, by more than $26 million to account for a "significantly overstated lodestar"); *In re Apple Inc. Sec. Litig.*, No. 5:06-cv-05208-JF, 2011 U.S. Dist. LEXIS 52685 (N.D. Cal. May 17, 2011) (parties nullify objection by eliminating *cy pres* and augmenting class fund by $2.5 million).

Pre-empting *Ad Hominem* Attacks

8. In my experience, class counsel often responds to CCAF objections by making a variety of *ad hominem* attacks, often wildly false. The vast majority of district court judges do not fall for such transparent and abusive tactics. In an effort to anticipate such attacks and to avoid collateral litigation over a right to file a reply, I discuss and refute the most common ones below. If the Court is inclined to disregard the *ad hominem* attacks, it can avoid these collateral disputes entirely.

9. Class counsel often try to tar CCAF as "professional objectors," and then cite court opinions criticizing for-profit attorneys who threaten to disrupt a settlement unless plaintiffs' attorneys buy them off

with a share of attorneys' fees. But this is not the non-profit CCAF's *modus operandi*, so the court opinions class counsel rely upon to tar CCAF are inapposite. *See* Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. Chi. Legal F. 403, 437 n. 150 (public interest groups are not professional objectors); Paul Karlsgodt & Raj Chohan, *Class Action Settlement Objectors: Minor Nuisance or Serious Threat to Approval*, BNA: Class Action Litig. Report (Aug. 12, 2011) (distinguishing CCAF from professional objectors). CCAF refuses to engage in *quid pro quo* settlements, and has never withdrawn an objection in exchange for payment. Instead, it is funded entirely through charitable donations and court-awarded attorneys' fees. The difference between a for-profit "professional objector" and a public-interest objector is a material one. As the federal rules are currently set up, "professional objectors" have an incentive to file objections regardless of the merits of the settlement or the objection. In contrast, a public-interest objector such as myself has to triage dozens of requests for *pro bono* representation and dozens of unfair class action settlements, loses money on every losing objection (and most winning objections) brought, can only raise charitable donations necessary to remain afloat by demonstrating success, and has no interest in wasting limited resources and time on a "baseless objection." CCAF objects to only a small fraction of the number of unfair class action settlements it sees.

10. While one district court called me a "professional objector" in a broader sense, that court stated that it was not meant pejoratively, and awarded CCAF fees for a successful objection and appeal that improved the settlement for the class. *Dewey v. Volkswagen*, 909 F. Supp. 2d 373, 396 n.24 (D.N.J. 2012). Similarly, the Seventh Circuit in *In re Subway Footlong Mktg. Litig.*, 869 F.3d 551 (7th Cir. 2017) referred to me non-pejoratively as a "professional objector" in an opinion agreeing with my objection and reversing a settlement approval and class certification.

11. Indeed, CCAF feels strongly enough about the problem of bad-faith objectors profiting at the expense of the class through extortionate means that it has initiated litigation to require such objectors to disgorge their ill-gotten gains to the class. *See Pearson v. Target Corp.*, No. 17-2275 (7th Cir.); *see generally* Jacob Gershman, *Lawsuits Allege Objector Blackmail in Class Action Litigation*, WALL ST. J., Dec. 7, 2016.

12. Prior to 2016, I had a private practice unrelated to my non-profit work. One of my former clients, Christopher Bandas, is a professional objector who has settled objections and withdrawn appeals for cash payments. I withdrew from representation of Mr. Bandas in 2015 when he undertook steps that interfered with my non-profit work. Mr. Bandas was criticized by the Southern District of New York after I ceased to

represent him, and class counsel in other cases often cites that language and attempts to attribute it to me. Class counsel in multiple cases, using boilerplate language, has tried to make it seem like my paid representation of Mr. Bandas was somehow scandalous, using language like "forced to disclose" and "secret." The sneering is false: my representation of Mr. Bandas was not secret, as I filed declarations in my name on his behalf in multiple cases, noting under oath that I was being paid to perform legal work for him; I filed notices of appearances in cases where he had previously appeared; and my declaration in the *Capital One* case ending the relationship was filed voluntarily at great personal expense to myself, as I had been offered and refused to take a substantial sum of money to accede to a Lieff Cabraser fee award of over $3400/hour. I only worked for Mr. Bandas in cases where I believed there was a meritorious objection to be made, had no role in any negotiations he made to settle appeals, and my pay was flat-rate or by the hour and not tied to his ability to extract settlements. I argued two appeals for Mr. Bandas, and won both of them. There is nothing scandalous about that, unless one believes it is scandalous for an attorney to be paid to perform successful high-quality legal services for a client. CCAF had no attorney-client relationship with Mr. Bandas, and Mr. Bandas never paid CCAF, other than for his share of printing expenses when he was an independent co-appellant representing clients unrelated to CCAF.

13. Firms whose fees we have objected to have previously cited to *City of Livonia Employees' Ret. Sys. v. Wyeth*, No. 07 Civ 10329 (RJS), 2013 WL 4399015 (S.D.N.Y. Aug. 7, 2013), in efforts to tar CCAF. While the *Wyeth* court did criticize our client's objection (after mischaracterizing the nature of that objection), it ultimately agreed with our client that class counsel's fee request was too high, and reduced it by several million dollars to the benefit of shareholder class members.

14. Class counsel frequently cite a nine-year-old case, *Lonardo v. Travelers Indemnity Co.*, 706 F. Supp. 2d 766, 804 (N.D. Ohio 2010), where the district court criticized a policy-based argument by CCAF as supposedly "short on law"; however, CCAF ultimately was successful in the Seventh and Ninth Circuits on that same argument. *See In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011) (agreeing that reversionary clauses are a problematic sign of self-dealing); *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014) (same). Moreover, the court in *Lonardo* stated its belief that "Mr. Frank's goals are policy-oriented as opposed to economic and self-serving" and even awarded CCAF about $40,000 in attorneys' fees for increasing the class benefit by $2 million. *Lonardo*, 706 F. Supp. 2d at 813-17.

15. CCAF has no interest in pursuing "baseless objections," because every objection we bring on behalf of a class member has the opportunity cost of not having time to pursue a meritorious objection in another case. We are confronted with many more opportunities to object (or appeal erroneous settlement approvals) than we have resources to use, and make painful decisions several times a year picking and choosing which cases to pursue, and even which issues to pursue within the case. CCAF turns down the opportunity to represent class members wishing to object to settlements or fees when CCAF believes the underlying settlement or fee request is relatively fair.

16. While I am often accused of being an "ideological objector," the ideology of CCAF's objections is merely the correct application of Rule 23 to ensure the fair treatment of class members. Likewise, I have often seen class counsel assert that I oppose all class actions and am seeking to end them, not improve them. The accusation—aside from being utterly irrelevant to the legal merits of any particular objection—has no basis in reality. I have been writing and speaking about class actions publicly for nearly a decade, including in testimony before state and federal legislative subcommittees, and I have never asked for an end to the class action device, just proposed reforms for ending the abuse of class actions and class-action settlements. That I oppose class action abuse no more means that I oppose class actions than someone who opposes food poisoning opposes food. As a child, I admired Ralph Nader and consumer reporter Marvin Zindler (whose autographed photo was one of my prized childhood possessions), and read every issue of *Consumer Reports* from cover to cover. I have focused my practice on conflicts of interest in class actions because, among other reasons, I saw a need to protect consumers that no one else was filling, and as a way to fulfill my childhood dream of being a consumer advocate. I have frequently confirmed my support for the principles behind class actions in declarations under oath, interviews, essays, and public speeches, including a January 2014 presentation in New York that was broadcast nationally on C-SPAN and in my briefing in *Frank v. Gaos*. On multiple occasions, successful objections brought by CCAF have resulted in new class-action settlements where the defendants pay substantially more money to the plaintiff class without CCAF objecting to the revised settlement. And I was the putative class representative in a federal class action, represented by a prominent plaintiffs' firm. *Frank v. BMOCorp., Inc.*, No. 4:17-cv-870 (E.D. Mo.).

17. Some class counsels have accused us of improper motivation because CCAF has on occasion sought attorneys' fees. While CCAF is funded entirely through charitable donations and court-awarded

attorneys' fees, the possibly of a fee award never factors into the Center's decision to accept a representation or object to an unfair class-action settlement or fee request.

18. CCAF's history in requesting attorneys' fees reflects this approach. Despite having made dozens of successful objections and having won over $200 million on behalf of class members, CCAF has not requested attorneys' fees in the majority of its cases or even in the majority of its appellate victories. CCAF regularly passes up the opportunity to seek fees to which it is legally entitled. In *Classmates*, for example, CCAF withdrew its fee request and instead asked the district court to award money to the class; the court subsequently found that an award of $100,000 "if anything" "would have undercompensated CCAF." *In re Classmates.com Consol. Litig.*, No. 09-cv-0045-RAJ, 2012 WL 3854501, at *11 (W.D. Wash. June 15, 2012). In other cases, CCAF has asked the court for a fraction of the fees to which it would be legally entitled based on the benefit CCAF achieved for the class and asked for any fee award over that fractional amount be returned to the class settlement fund.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on September 20 2019, in Houston, Texas.

/s/ Theodore H. Frank
Theodore H. Frank