SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

FILIP SASKA, TOMÁŠ NADRCHAL, and STEPHEN MICHELMAN, Plaintiffs, v. THE METROPOLITAN MUSEUM OF ART, Defendant,	Index No. 650775/2013 IAS Part 54 (Justice Kornreich)
ANNA ST. JOHN, Objector.	

OBJECTION OF ANNA ST. JOHN TO SETTLEMENT APPROVAL, TO CLASS CERTIFICATION, AND TO REQUEST FOR ATTORNEYS' FEES

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

The theory underlying both this case and this settlement "denigrate[s] the intelligence of ordinary consumers (and thus of the unnamed class members)." *In re Dry Max Pampers Litig.* ("*Pampers*"), 724 F3d 713, 720 (6th Cir 2013).[1] The plaintiffs' basic theory of the case is that members of the public—the subset, no less, of those members who possess the intellectual desire to visit a museum of fine art—have been deceived by a milieu of cashier lines, bold print, and variable font size, and by the "subjective, unclear and undefined" meaning of "recommended." Complaint (NYSCEF No. 1) ¶¶ 56-80. The theory of the proposed settlement is equally absurd: even though members of class cannot understand "recommended," they will grasp the "slightly less-anxiety inducing"[2] replacement language of "suggested" admission price.

Of course, "suggest" is just a synonym of "recommend." *See, e.g.*, Thesaurus.com, http://www.thesaurus.com/browse/recommend. Because there is no material difference between the two words, and no material difference between the pre-settlement and post-settlement signage more generally (both being intelligible), the fundamental injunctive relief contemplated by this settlement is worthless both to future visitors to the Metropolitan Museum of Art ("Museum" or the "Met") and especially to class members who, by definition, visited the Museum in the past.[3]

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[1] Federal precedent that parses analogous provisions of the federal class action rules are relevant because "New York's class action statute (CPLR 901-909) has much in common with Federal rule 23." *In re Colt Indus. S'holder Litig.*, 77 NY2d 185, 194 (1991). "[I]t is well established that our state courts look to Rule 23 of the Federal Rules of Civil Procedure to inform New York's class action law." *Vasquez v. Nat'l Secs. Corp.*, 48 Misc3d 597, 600 (Sup Ct, NY County 2015) *aff'd* 139 AD3d 503 (1st Dept 2016) (quoted in Memorandum & Decision (NYSCEF No. 136) at 17-18).

[2] Hannah Ghorashi, *The Met Will Amend Its Admission Policy to Settle Class Action Lawsuit*, ART NEWS (Feb. 26, 2016), http://www.artnews.com/2016/02/26/the-met-will-amend-its-admission-policy-to-settle-class-action-lawsuit/.

[3] The class as defined in the settlement comprises only individuals who visited the Museum in the past. While there will doubtlessly be some overlap between the populations of *future* Met visitors and *past* Met visitors, a prospective injunctive-relief only class action settlement is not a

Where class counsel and the named representatives anoint themselves as the primary beneficiaries of a proposed class action settlement, the law demands denial of settlement approval and the accompanying class certification. *Pampers*, 724 F3d 713 (settlement unfair; representation inadequate); *Gallego v. Northland Group*, 814 F3d 123, 129-30 (2d Cir 2016) (representation inadequate; class action not superior); *Richardson v. L'Oreal USA, Inc.*, 991 F Supp 2d 181, 203-06 (DDC 2013) (settlement unfair); *Gordon v. Verizon Communs., Inc.*, No. 658034/13, 2014 NY Misc LEXIS 5642 (Sup Ct, NY County Dec. 19, 2014) (same); *LeRose v. PHH US Mortg. Corp*., 170 Misc2d 858 (Sup Ct, Niagara County 1996) (same); *Goldman v. Garofalo*, 96 Misc2d 790, 796 (Sup Ct, Nassau County 1978) (class action not superior "whenever the principal, if not the only, beneficiaries to the class action are to be the attorneys for the plaintiffs and not the individual class members") (quoting *In re Hotel Tel. Charges*, 500 F2d 86, 91 (9th Cir 1974)).

As Judge Posner recently put it, "[t]he type of class action illustrated by this case—the class action that yields fees for class counsel and nothing for the class—is no better than a racket. It must end. No class action settlement that yields zero benefits for the class should be approved, and a class action that seeks only worthless benefits for the class should be dismissed out of hand." *In re Walgreen Co. Stockholder Litig.*, 832 F3d 718, 724 (7th Cir 2016). *Walgreen* and *Gordon* exemplify the common "merger tax" phenomenon: meritless litigation brought in the wake of a corporate merger used to extract attorneys' fees while providing only meaningless injunctive relief to class member shareholders. This settlement is of a piece, the only difference being that class counsel is levying their $350,000 "tax" on a non-profit otherwise tax-exempt institution, and thus indirectly on the general public that the Met is devoted to serving.

The Court should deny settlement approval and the accompanying class certification.

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superior method of adjudicating the controversy of *this class*. *See* § III.B.

ARGUMENT

I. St. John is a class member, a member of the New York bar, and intends to appear at the fairness hearing.

Objector Anna St. John's business address is Competitive Enterprise Institute, 1310 L Street NW, 7th Floor, Washington, DC 20005; her telephone number is (917) 327-2392; her email address is anna.stjohn@cei.org. Affirmation of Anna St. John ¶ 2. St. John visited the Museum in June 2015 and paid for admission to the exhibition halls of the Museum in person. *Id.* at ¶ 4. St. John is therefore a member of the class as defined in the Court's Preliminary Approval Order ("PAO") (NYSCEF No. 136), the Court's Decision and Order ("D&O") (NYSCEF No. 133), and the parties' Amended Settlement Agreement ("Settlement") (NYSCEF No. 116). *See* PAO ¶ 4; D&O 5; Settlement ¶ 1.

St. John, an attorney with the non-profit Competitive Enterprise Institute's Center for Class Action Fairness ("CCAF"), intends to appear on her own behalf at the final approval hearing to discuss the points raised in this Objection and to address any responses that the settling parties may make. She requests fifteen minutes to reply to any responses to her objection and answer any questions the Court may have; she does not plan to call any witnesses but reserves the right to cross-examine any witnesses who testify in support of the certification or settlement. She reserves the right to make use of all documents entered on to the docket. She joins by reference any substantive objections made by other class members not inconsistent with those made here.

CCAF, established in 2009, represents class members *pro bono* in class actions where class counsel employs unfair class action procedures to benefit themselves at the expense of the class. *See e.g., Pearson v. NBTY, Inc.*, 772 F3d 778, 787 (7th Cir 2014) (observing that 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"); *Pampers*, 724 F3d at 716-17 (describing CCAF's client's as objections "numerous, detailed, and substantive"); *Richardson*, 991 F Supp 2d at 205 (describing CCAF's client's objection as "comprehensive and sophisticated" and noting that "[o]ne good objector may be worth many frivolous objectors in ascertaining the

fairness of a settlement"). CCAF has won tens of millions of dollars for class members. *See, e.g., McDonough v. Toys "R" Us,* 80 F Supp 3d 626, 661 (ED Pa 2015) ("CCAF's time was judiciously spent to increase the value of the settlement to class members." (internal quotation omitted)).

II. The Court has a fiduciary duty to the absent members of the class.

In class actions, the Court itself assumes a derivative fiduciary role to "act as the protector of the rights of the absent class members in deciding whether certification as a class action is appropriate and, if so, whether any proposed settlement is fair, reasonable and adequate." *Klein v. Robert's Am. Gourmet Food, Inc.*, 28 A.D.3d 63, 70 (2d Dept 2006) (internal citation and quotation marks omitted). The Court takes on this role because

> [c]lass-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. In contrast, 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. And thus 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.

Pampers, 724 F3d at 715. In other words, "[b]ecause class actions are rife with potential conflicts of interest between class counsel and class members, district judges presiding over such actions are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole." *In re Baby Prods. Antitrust Litig*., 708 F3d 163, 175 (3d Cir 2013).

The Court's oversight role does not end at making sure that the settling parties engaged in arm's length settlement negotiations. "In class-action settlements, the adversarial process—or what the parties here refer to as their 'hard-fought' negotiations—extends only to the amount the defendant will pay, not the manner in which that amount is *allocated* between the class representatives, class counsel, and unnamed class members. For the economic reality is that a settling defendant is concerned only with its total liability, and thus a settlement's allocation

between the class payment and the attorneys' fees is of little or no interest to the defense." *Pampers*, 724 F3d at 717 (internal citation and quotation marks omitted; emphasis in original).

Thus, although it is *necessary* that a settlement is at "arm's length" without express collusion between the settling parties, it is not *sufficient. See Redman v. RadioShack Corp.*, 768 F3d 622, 628 (7th Cir 2014) (calling it "naïve" to base confidence in settlement fairness on arm's length negotiations). Due to the defendant's indifference as to the allocation of the settlement funds, courts must look for "subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *Pampers*, 724 F3d at 718 (internal quotation marks omitted).

The burden resides with the proponent of class certification to "affirmatively demonstrate his compliance with the Rule." *Wal-Mart Stores, Inc. v. Dukes*, 131 S Ct 2541, 2551 (2011). Likewise, "[t]he burden of proving the fairness of the settlement is on the proponents." *Pampers*, 724 F3d at 719. "In reviewing a proposed settlement, a court should not apply any presumption that the settlement is fair and reasonable." Am. Law Institute, *Principles of the Law of Aggregate Litig.* § 3.05 (c) (2010). As the Court is aware, the standard for granting final settlement approval and class certification is far more exacting than that for granting preliminary approval. D&O 18; *see also Richardson*, 991 F Supp 2d at 181 (rejecting at final approval, a prospective injunctive relief settlement that attained preliminarily approval). In this case, that burden is yet heightened because this settlement has been proposed before class certification. D&O at 18 n.14. (quoting *Jiannaras v. Alfant*, 124 AD3d 582, 590 (2d Dept 2015), *aff'd* 27 NY3d 349 (2016)). Delaying certification until settlement poses various problems, and calls for heightened judicial scrutiny of the certification and the accompanying settlement. *See In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F3d 768, 786-800, 805 (3d Cir 1995); *Pampers*, 724 F3d at 721.

In their papers to date, the plaintiffs focus on the six factors for settlement fairness described in *In re NY Stock Exch./Archipelago Merger Litig*., No. 601646/05, 2005 WL 4279476 (Sup Ct, NY County 2005). Mem. ISO Prelim. Approval (NYSCEF No. 65) ("MPA") at 11-17. Similar multi-factor tests like this are employed in federal courts across the country. However,

these factors do not provide an exclusive list of reasons to reject a settlement, and courts routinely deny or reverse settlement approval for reasons outside the multi-factor tests. *E.g.*, *Pampers*, 724 F3d at 718 (looking beyond Sixth Circuit's seven-factor test to find settlement unfair when it constitutes "preferential treatment" for class counsel); *Baby Prods*., 708 F3d at 174 (adding to Third Circuit's nine-factor fairness test, a new consideration: "the degree of direct benefit provided to the class"); *In re Bluetooth Headset Prods. Liab. Litig.* ("*Bluetooth*"), 654 F3d 935, 946 (9th Cir 2011) (consideration of eight-factor test "alone is not enough to survive appellate review"); *Vassalle v. Midland Funding LLC,* 708 F3d 747 (6th Cir 2013) (finding abuse of discretion even though all factors favored final approval); *In re Katrina Canal Breaches Litig.*, 628 F3d 185, 195 (5th Cir 2010) (listed factors are not the sole reasons a settlement should be rejected as unfair, unreasonable or inadequate under Rule 23(e)); *see also LeRose*, 170 Misc2d at 861-62.

III. The proposed settlement-only class certification is not consistent with CPLR 901.

CPLR § 901, grounded in the Due Process Clauses of the state and federal constitutions, conditions class certification upon a demonstration, *inter alia*, that:

- "there are questions of law or fact common to the class which predominate over any questions affecting only individual members," CPLR § 901(a)(2);
- "the representative parties will fairly and adequately protect the interests of the class," CPLR § 901(a)(4); and
- "a class action is superior to other available methods for the fair and efficient adjudication of the controversy," CPLR § 901(a)(5).

With regard to each of these three prerequisites, the settling parties cannot satisfy the "undiluted, even heightened, attention [occasioned] in the settlement context." *Amchem Prods., Inc., v. Windsor*, 521 US 591, 620 (1997).

A. The settlement demonstrates inadequate representation of absent class members by both named plaintiffs and class counsel.

To fairly and adequately represent a class, the class representatives—both counsel and the

named plaintiffs—must manifest "undivided loyalties to absent class members." *Broussard v. Meineke Discount Muffler Shops*, 155 F3d 331, 338 (4th Cir 1998). Class counsel must "prosecute the case in the interest of the class … rather than just in their interest as lawyers who if successful will obtain a share of any judgment or settlement as compensation for their efforts." *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F3d 913, 917 (7th Cir 2011). Likewise, the named representatives may not "leverage" "the class device" for their own benefit. *Murray v. GMAC Mortg. Corp.*, 434 F3d 948, 952 (7th Cir 2006).

In general, class representatives might be inadequate for a multitude of reasons. For example, they may be collusively aligned with the defendant (*e.g.* the seminal case of *Hansberry v. Lee*, 311 US 32 (1940)); they may be beholden agents of class counsel (*e.g.*, *Brissenden v Time Warner Cable of NY City*, 25 Misc3d 1084 (Sup Ct, NY County 2009) (rejecting class representative who was sister-in-law of class counsel)); they may have used class negotiations to leverage a supercompensatory incentive award that leaves them with no vested stake in what the class receives through the settlement (*e.g.*, *Pampers*, 724 F3d at 722); or they may just not care enough about what's going on (*e.g.*, *Berger v. Compaq Computer Corp.*, 257 F3d 475, 482-483 (5th Cir 2001)).

The inadequacy can manifest itself right from the case's inception based upon background facts, but perhaps more commonly, it can reveal itself in the course of the proceedings. This is why the Supreme Court instructs that it is "altogether proper" to inspect the terms of settlement when evaluating whether adequacy is met. *See Amchem*, 521 US at 619-20 (1997); *accord Radcliffe v. Experian Info. Solutions*, 715 F3d 1157, 1166 (9th Cir 2013) ("[O]ur [adequacy] analysis focuses on the agreement."). There is a common thread underlying many species of representative inadequacy: the selection of litigation strategies that do not prioritize actual redress to absent class members.

Here, the prospective injunctive relief-only settlement juxtaposed against a sizable $350,000 clear-sailing attorneys' fee and $1000 incentive awards for the three named plaintiffs, combine to indicate inadequate representation. *See, e.g., Pampers*, 724 F3d at 721-22; *see also*

Gallego, 814 F3d at 129-30; *In re Razorfish, Inc. Sec. Litig.*, 143 F Supp 2d 304, 311 (SDNY 2001) (Rakoff, J.) ("an excessive compensation proposal can cast in doubt the ability of proposed lead counsel to adequately represent the class"). As the Seventh Circuit declared just last year, "A class representative who proposes that high transaction costs (notice and attorneys' fees) be incurred at the class members' expense to obtain no benefit is not adequately protecting the class members' interests." *Walgreen*, 832 F3d at 725 (internal quotation marks and alterations omitted). In fact, this Court has even presaged the Walgreen opinion, recognizing that "when a plaintiff and its counsel have identical incentives, that is, litigation to obtain attorneys' fees, such plaintiffs are improper class representatives because it is the function of the class action representative to act as a check on the attorneys in order to provide an additional assurance that in any settlement or other disposition the interests of the members of the class will take precedence over those of the attorneys." *City Trading Fund v. Nye*, 46 Misc3d 1206(A) (Sup Ct, NY County 2015) (Kornreich, J.), *rev'd on other grounds* 144 AD3d 595 (App. Div. 1st Dept 2016); *see also Gordon*, 2014 N.Y. Misc. LEXIS 5642 (relied on by *City Trading Fund*); *In re Allied Healthcare S'holder Litig.*, 49 Misc3d 1210(A) (Sup Ct, NY County 2015) (relying on *City Trading Fund*).

Though the subject matter of this case involves a consumer transaction rather than a corporate merger, the same class action precepts apply. *E.g. Pampers*, 724 F3d 713; *Pearson*, 772 F3d 778. Seeking utterly immaterial signage alterations is no better than seeking "utterly immaterial" supplemental disclosures on a proxy. *City Trading Fund*, 46 Misc3d 1206(A). If anything, to the extent that the contexts differ, seeking non-compensatory prospective injunctive relief on behalf of a class of consumers is even more dubious than seeking it on behalf of a class of shareholders. At least in shareholder cases, there generally exists an ongoing relationship between most class member shareholders and the corporation such that disclosures could theoretically benefit the class. By contrast, in consumer cases like this one, individuals are class members by virtue of a completed transaction in the past and can only benefit from prospective relief to the extent that they engage in repeat business with the defendant in the future. For example, class representatives Saska and Nadrchal are citizens and residents of the Czech Republic

and visited the museum in Fall 2012 (presumably as tourists or students). Compl. ¶¶ 11-13. It is entirely unclear if they intend to visit the museum again within the next six years. And if not, why are they negotiating relief for the putatively similarly-situated class that would provide no benefit to themselves? The only apparent possibility is the lure of an incentive award approximately equal to the average monthly wage of a worker in the Czech Republic. *Pampers*, 724 F3d at 722; Wikipedia, *List of European Countries by Average Wage*, https://en.wikipedia.org/wiki/List_of_European_countries_by_average_wage (citing the Czech Statistical Office of a gross monthly wage of $27,297 CZK).

When a class is defined with reference to discrete activity in the past, federal courts regularly find injunctive certifications under Federal Rule of Civil Procedure 23(b)(2) untenable because injunctive relief would not benefit the class as a whole. Injunctive class certification is futile when class members are "victims of a completed harm with no reference to ongoing injury or risk of future injury" and the class definition "ensure[s] that every member would be entitled to damages, but not that every member would have standing to seek injunctive relief." *Hecht v. United Collection Bureau*, 691 F3d 218, 223-24 (2d Cir 2012); *see also Bolin v. Sears, Roebuck & Co.,* 231 F3d 970, 978 (5th Cir 2000); *Felix v. Northstar Location Servs*., 290 FRD 397, 406 (WDNY 2013) (denying (b)(2) certification where class was defined as those who had "received [telephone] calls in the past"); *Haggart v. Endogastric Solutions, Inc*., Civ. No. 10-346, 2012 US Dist. LEXIS 89767, at *20 (WD Pa Jun. 28, 2012) ("Even more essentially fatal to his motion for certification under (b)(2) is that Plaintiff only seeks to enjoin Defendant from making representations to future potential EsophyX procedure patients; *i.e.*, to individuals *who are not members of the class* as defined." (emphasis in original)); *Cholakyan v. Mercedes-Benz USA, LLC*, 281 FRD 534, 559 (CD Cal 2012) (denying class certification where declaratory and injunctive relief would not benefit former vehicle owners).

It is notable that the only class members potentially benefitted by prospective alterations to the Met's signage are those who are likely to feel the least injured by the Met's alleged misconduct, and are thus willing to visit the Met again in the future. *See Klein*, 28 A.D.3d at 71.

This Court should not be satisfied that "'a reasonable plaintiff, based on…economic calculus, would have sued solely for [injunctive relief], not merely that a lawyer could have been found who would have located a plaintiff and brought a class action in the hope of a fee.'" *In re St. Jude Med., Inc*., 425 F3d 1116, 1122 (8th Cir 2005) (quoting *In re Rezulin Prods. Liab. Litig.,* 210 FRD 61, 73 (SDNY 2002)).

Commentators have also recognized the problem of mandatory injunctive relief settlement classes that remit no benefit to class members. *See e.g.*, Brian Wolfman & Alan B. Morrison, *What the Shutts Opt-Out Right Is and What It Ought to Be*, 74 UMKC L. REV. 729, 740 (2006) (applying their critique to all cases "where the class includes former customers who will not benefit from injunctive relief unless they choose to do business with the defendant in the future"); Erin L. Sheley & Theodore H. Frank, *Prospective Injunctive Relief and Class Settlements*, 39 HARV. J. L. & PUB. POL'Y 769, 832 (2016) ("[T]here should be a presumption against approval of such settlements or awarding fees for such relief outside of the actions against public institutions originally contemplated by Rule 23(b)(2)."); Howard Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. --, -- (forthcoming 2017), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2761912 (discussing the warning sign of "spurious injunctive relief").

Class representatives are fiduciaries. But their principal is not some free-floating abstract entity, existing only to permit class counsel to operate as a private attorney general for the public at large. Their principal is the collection of unique individuals who satisfy the class definition. Thus, "[t]he plaintiff-class, as an entity, [is] not Lead Counsel's client in this case. Rather, Lead Counsel continue[s] to have responsibilities to each individual member of the class even when negotiating the settlement." *Piambino v. Bailey*, 757 F2d 1112, 1144 (11th Cir 1985) (internal quotation omitted). By proposing a prospective injunctive settlement on behalf of a class of past purchasers, the plaintiffs and class counsel have lost sight of their representative duties. Class members are unequivocally worse off than members of the non-class members of the general public, as everyone gets the same prospective relief yet non-class members release no claims at

all. Representatives are not adequate if they endorse a settlement where class counsel and the named representatives capture the entire $353,000 (for attorneys' fees and class plaintiffs' incentive fees) that the defendant is willing to put on the table.

B. The settlement is not superior to other methods of fair and efficient adjudication of the controversy.

CPLR § 901(a)(5) requires that a court find, before certifying a class, "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Where "the principal, if not the only, beneficiaries to a class action are to be the attorneys for the plaintiffs, and not the individual class members, [then] a costly and time consuming class action is not the superior method for resolving the dispute." *LeRose*, 170 Misc2d at 861 (quoting 82 NY Jur 2d, Parties, § 258, at 273); *accord Goldman*, 96 Misc2d at 796 (same); *Gallego*, 814 F3d 123, 129 (2d Cir 2016) (no superiority where "intended result of the settlement was mass indifference, a few profiteers, and a quick fee to clever lawyers." (internal quotation marks omitted)).

The proposal here fares poorly even by comparison to *LeRose* or *Gallego*. In *LeRose*, the proposed settlement would have provided class members with $125,000, just under $1 per eligible loan, while providing the attorneys with a $150,000 fee. 170 Misc2d at 861. In *Gallego*, the proposed settlement would have divided $16,500 among whichever of the 100,000 class members submitted claims, while providing the attorneys with a $35,000 fee. 814 F3d at 125-26. Here, the proposed settlement provides no compensatory value for class members whatsoever, while providing the attorneys with the right to seek $350,000 unopposed.

If it is infeasible to distribute a majority of the $353,000 available from this settlement to class members via a claims process or other remunerative mechanism, then the class action is not an efficient and superior means of adjudicating this controversy. As such, the proper conclusion is to refuse class certification. *See, e.g., Supler v. FKAACS, Inc.*, No. 5-11-CV-00229-FL, 2012 US Dist. LEXIS 159210, at *10-*11 (EDNC Nov. 6, 2012) (because "benefits to putative class members … are attenuated and insignificant…, class certification does not…promote judicial

efficiency." (internal quotation marks omitted)); *see also Foley v. Buckley's Great Steaks, Inc*., No. 14-cv-063, 2015 US Dist. LEXIS 46477, at *24 (DNH Apr. 9, 2015) (finding no superiority because, *inter alia*, proposed settlement was "substantially lawyer-driven"); *Smith v. Georgia Energy USA, LLC*, No. CV 208-020, 2014 US Dist. LEXIS 166367, at *7 (SD Ga Dec. 1, 2014) (decertifying class where defendants' financial insolvency made clear no benefit could inure to class members).

Plaintiffs may respond that their intent was to vindicate the public good rather than obtain monetary damages. As discussed in the immediately preceding section, this aim is incompatible with their fiduciary duties. But even if it were compatible, a private class action is not the superior method of vindicating the public good and deterring future violations. Rather, a state or city enforcement action is the superior method of vindicating prospective interests. *Goldman*, 96 Misc2d at 796. This is even more true under the facts of this case where plaintiffs asserted claims as a third-party beneficiary of a contract between the city and the Met. Complaint at ¶¶ 26-30. As the Court found when dismissing this claim, "the City, which has always known that the Museum has been charging an admission fee, has never objected to such practice." *Saska v. Metro. Museum of Art*, 42 Misc3d 548, 560 (Sup Ct, NY County 2013). On appeal from that decision, the city even attempted to file an amicus brief in support of the Met. Exhibit 8 to Reply Affirmation of Bruce R. Kelly (NYSCEF No. 106). Simply put, this class proceeding does not serve either the public or the class's interests: "at best, [it] would undermine the ability of the Museum to provide free access on five days (including Sunday afternoon) and two evenings per week. At worst, it might well push the Museum to charge for exhibitions, which might include a substantial percentage, if not the majority, of the art on exhibit. A large part of the Museum's operating funding would be cut and the objective of educating the public and encouraging commerce undermined." *Saska*, 42 Misc3d at 557-58.

C. Individual questions predominate over questions of law or fact common to the case.

CPLR § 901(a)(2) conditions class certification upon a finding that "there are questions of law or fact common to the class which predominate over any questions affecting only individual members." Most cases alleging consumer fraud claims based on a misrepresentation or deception necessitate inquiries into whether any given member relied on the defendant's alleged misrepresentation or deception in entering into the transaction. In such cases, individual questions predominate over common questions and a class may not be certified. *E.g. Harnish v. Widener Univ. Sch. Of Law*, 833 F3d 298, 309-310 (3d Cir 2016) ("reliance is nearly always an individualized question, requiring case-by-case determinations of what effect, if any, the misrepresentation had on plaintiffs' decision-making").

Plaintiffs might seek refuge here in the fact their false advertising claim under N.Y. Gen. Bus. Law § 349 does not hinge on establishing class-wide reliance. *Brissenden*, 25 Misc3d at 1089. *Brissenden* also demonstrates, however, exactly why their § 349 claim is still too individualized for class treatment. *Brissenden* involved allegations that a cable company charged its basic-cable-only subscribers for unnecessary converter boxes and remote controls without proper timely notification that such devices were optional. *Id.* at 1085. Despite the fact that § 349 relieves plaintiffs of having to prove class-wide reliance, it does not relieve them from having to prove class-wide injury. *Id.* at 1089; *accord Klein*, 28 A.D.3d at 71 ("the class cannot be so broad as to include individuals who have not been harmed by the defendants' allegedly wrongful conduct"). *Brissenden* determined that even assuming the defendant's notices were legally deficient, plaintiffs could not state a class-wide injury because the class included individuals who, even in a world containing full and perfect disclosures, would have preferred to purchase the additional at equipment. 25 Misc3d at 1090. Analogously, the plaintiffs here cannot state a class-wide injury because even in a world with perfect disclosures, many class members would have still preferred to pay the admission price that they did in lieu of free entry. *See* Mem. ISO Prelim. Approval at 12-13; St. John Decl. ¶ 4.

IV. Even if the class were certifiable, this settlement is not fair

This Court should reject the settlement on the various grounds that demonstrate that the underlying class cannot be certified as requested. *See supra* § III. These arguments interrelate with the ultimate CLPR § 908 question of whether the settlement is "fair, reasonable and adequate." For instance, if an injunctive-relief-only class action settlement is not the superior method of adjudicating the controversy, any settlement that offers only injunctive relief will be *per se* unreasonable and unfair. Similarly, when the terms of settlement manifest inadequate representation of absent class members, it follows that the settlement is unfair. Nonetheless, there are several independent reasons why this Court should reject the settlement under § 908 even if it accepts that the class itself is viable.

In order to approve a settlement, courts must scrutinize the agreement to ensure it is not a "selfish" product of the acute and built-in conflict of interest between class counsel and the class. *Pearson*, 772 F3d at 787; *accord Pampers*, 724 F3d at 718 (settlement unfair if it affords "preferential treatment" to class counsel); *Bluetooth*, 654 F3d 935 (delineating three telltale signs of a lawyer-driven settlement). "[N]on-cash relief…is recognized as a prime indicator of suspect settlements." *GMC Pick-Up Truck Fuel Tank Prods.*, 55 F3d at 803.

Mutual self-interest of class counsel and defendants leads to the most common settlement defects—those of allocation. This is because "the adversarial process—or 'hard-fought' negotiations—extends only to the amount the defendant will pay, not the manner in which that amount is *allocated* between the class representatives, class counsel, and unnamed class members." *Pampers*, 724 F3d at 717 (emphasis in original). "[A]n economically rational defendant will be indifferent to the allocation of dollars between class members and class counsel … [c]aring only about his total liability." *Pearson*, 772 F3d at 786; *accord City Trading Fund*, 46 Misc3d 1206(A) n.21 (observing that "plaintiffs' counsel wants the largest possible fee and defendants are indifferent to how much plaintiffs get paid"). Not unexpectedly, then, the foremost settlement deficiency here relates to the issue of allocation: class counsel and the named representatives are seizing the entirety of the available cash proceeds, thus leaving class members with zero recovery.

A. The ensemble of attorneys' fees and incentive award provisions signal a self-dealing settlement.

The settlement agreement permits class counsel to seek, unopposed, an award of fees, costs, and class representative awards totaling up to $353,000. Settlement ¶¶ 16-17. Putative class members are entitled only to injunctive programmatic relief that appears to offer little improvement over the status quo ante. *Id.* ¶15. As in *Pampers*, the signs of an unfair deal that affords preferential treatment to class counsel are "not particularly subtle." 724 F3d at 718.

Federal courts have identified three "red flags" that indicate when a settlement is unfairly tilted in the direction of class counsel. The first, and most blatant, warning sign is "when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded." *Bluetooth*, 654 F3d at 947; *see also Richardson*, 991 F Supp 2d at 204[4] (denying approval of settlement that allocated nearly $1 million to attorneys; $1000 to each class representative, and only prospective labeling changes for the class members); *Grok Lines Inc. v. Paschall Truck Lines, Inc.*, No. 14 C 08033, 2015 US Dist. LEXIS 124812, at *21 (N.D. Ill. Sept. 18, 2015) ("$98,500 for the attorneys and $0 for the class members" does not "strike the right balance").

"[T]he ratio that is relevant is the ratio of (1) the fee to (2) the fee plus what the class members received." *Pearson*, 772 F3d at 781 (internal quotation marks omitted). Here, the putative class members receive only meaningless injunctive relief while the settlement agreement permits class counsel and the named representatives to seek, unopposed, awards amounting to $353,000.

"[E]specially in consumer class actions … the presumption should…be that attorneys' fees awarded to class counsel should not exceed a third or at most a half of the total amount of money going to class members and their counsel." *Pearson*, 778 F3d at 782. A proportionate attorney

[4] Plaintiffs cite the *Richardson* preliminary approval order in support of proposition that a settlement can be approved without providing monetary relief to class members. MPA at 13 n.2 Given *Richardson*'s ultimate disposition, the case undermines their contention at the final approval stage.

award hews to a percentage "consistent with statistical trends in class action fee awards," with 25% often used as a benchmark. *See Fiala v. Metro Life Ins. Co.*, 27 Misc3d 599, 611 (Sup Ct, NY County 2010) (finding attorneys' fees 21% of the recovery obtained to be "consistent with statistical trends in class action fee awards as reflected in a recent empirical study"). Conversely, an award that vastly exceeds this percentage is disproportionate and renders the settlement unfair. *See, e.g., Pampers*, 724 F3d 713 (vacating settlement where fees cannibalized $2.7 million of the $3.1 million constructive common fund value); *Bluetooth*, 654 F3d at 945 (vacating approval where fees amounted to more than 83% of the constructive common fund); *Pearson*, 772 F3d at 781 (69% fee is "outlandish"); *In re Excess Value Ins. Coverage Litig.*, 598 F Supp 2d 380, 390 (SDNY 2005) (it's "anomalous and unacceptable for counsel to fare better than the Class").[5] To reach the appropriate ratio here, the class benefit would have to be valued at more than $1 million. Because the burden of proving the quantum of benefit lies with the proponents of the settlement, *Pampers*, 724 F3d at 719, the parties here must demonstrably show that the settlement secures an adequate advantage for the class.

But, as a matter of common sense, the injunctive relief that this settlement offers is not worth anywhere near $1 million. For a period of six years from the effective date, the defendant will agree to (1) alter its main entrance, kiosk and online ticket signage in a certain manner (allowing for "substantially similar" revisions), to (2) train staff regarding the pay as you wish policy, to (3) forbear from evaluating staff based upon sales amounts, and to (4) issue a press release if they ever enact mandatory admission fees. Settlement ¶ 15(a)-(h).

As touted by the settling parties, the pièce de résistance of the medley of injunctive relief is the signage alterations. *See* Def.'s Mem. ISO Mot. for Prelim. Approval of Class Settlement

[5] Plaintiffs would like to justify their award based on the fact that it equates to less than their claimed lodestar. MPA at 8. But even when a court uses the lodestar approach to determine fees, "the degree of a plaintiff's success is the most critical factor in determining the reasonableness of the fee award." *Allied Healthcare*, 49 Misc3d 1210(A). *See* Section V.

(NYSCEF No. 77) at 13-14. But, the simple truth is that the initial sign was not deceptive, evidenced by the fact that only approximately 40% of visitors paid the recommended prices. *Id.* at 14. Substituting "suggested" and "the amount you pay is up to you" in place of "recommended" is not an incremental gain for museum visitors. "[A] settlement agreement that on paper appears to be a dam holding back a flood is superfluous if there is nothing to hold back." *Grok Lines*, 2015 US Dist. LEXIS 124812, at *10.

Two cases epitomize this type of illusory injunctive relief. In *Pampers*, the plaintiffs alleged that defendant's new dry-max diaper technology caused serious bouts of diaper rash. 724 F3d 713. At settlement, the defendant agreed to add language to diaper boxes and their website providing rudimentary information on diaper rash. *Id.* at 719-20 The Sixth Circuit, reversing settlement approval, found that because the information was already "within the ken of ordinary consumers" it could not be credited as the counterweight to the $2.7 million fee sought in the case without "denigrat[ing] the intelligence" of absent class members. *Id.* at 720. Just so in this case. To credit the signage alterations as valuable class relief is to say that ordinary consumers could not understand the pre-litigation "recommended" language.

In *Pearson*, the plaintiffs alleged that the defendant made representations that its glucosamine effectively rebuilt and supports cartilage, amounting to consumer fraud. 772 F3d at 779. As part of a global settlement, the defendant agreed to replace certain labeling language with other essentially equivalent language. *Id.* at 785-86 (*e.g.* the defendant agreed to say "contains a key building block of cartilage" instead of "support[s] renewal of cartilage"; "helps protect [or support] cartilage" instead of "rebuilds" "repairs" or "renews" cartilage). In the absence of any persuasive evidence, the district court valued these semantic changes at zero. *Id.* at 786. The Seventh Circuit affirmed without reservation, bemoaning the "substantively empty" "purely cosmetic" labeling changes, introduced without a credible and admissible expert report attesting to their value. *Id.* at 785-86. At least here there have been no disingenuous attempts using pseudo-scientific "expert" valuation, which "quite rightly" count for nothing. *Pearson*, 772 F3d at 786; *see generally In re Oracle Secs. Litig.*, 132 FRD 538, 544-45 (ND Cal 1990) (referring to

injunctive relief "'expert valued' at some fictitious figure" coupled with "arrangements to pay plaintiffs' lawyers their fees" to be the "classic manifestation" of the class-action agency problem).

However, even if the parties were to proffer a credible quantification of the value to the public at large of the injunctive relief, a $1 million *class* valuation still could not stand as a matter of law, simply because "The fairness of the settlement must be evaluated primarily based on how it *compensates class members*—not on whether it provides relief to other people, much less on whether it interferes with the defendant's marketing plans." *Pampers*, 724 F3d at 720 (internal quotation marks omitted; emphasis in original). "[F]uture purchasers are not members of the class, defined as it is as consumers who have purchased [the product]." *Pearson*, 772 F3d at 786. These are proper recognitions of the principle that the class is composed of people who interacted with defendants *in the past*; while the prospective injunctive relief can only benefit those who interact with defendants *in the future*.[6]

Illusory non-class injunctive relief simply does not justify a $350,000 award to class counsel, nor $3,000 to the named plaintiffs. The first warning sign of a lawyer-driven deal is apparent.

A second telltale indication of preferential treatment is the presence of a "clear-sailing" clause (whereby defendant consents not to challenge the award of fees to plaintiffs' counsel). This is also present here. Settlement ¶ 16. "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.'" *Vought v. Bank of Am.*, 901 F Supp 2d 1071, 1100 (CD Ill 2012) (quoting *Int'l Precious Metals Corp. v. Waters*, 530 US 1223, 1224 (2000) (O'Connor, J., respecting the denial of certiorari)). It indicates that the class attorneys

[6] Note that this is *not* an argument that injunctive relief is *never* a benefit to the class. There are settlements where class members receive appropriate injunctive relief that redresses their past injuries. *See, e.g.*, *Hanlon v. Chrysler Corp.*, 150 F3d 1011 (9th Cir 1998) (class members received "a redesigned improved replacement latch to be installed free of charge").

have negotiated "red-carpet treatment" to protect their fee award while urging class settlement "at a low figure or less-than-optimal basis." *Pampers*, 724 F3d at 718 (quoting *Weinberger v. Great N. Nekoosa Corp.*, 925 F2d 518, 524 (1st Cir 1991)).[7] As such, a clear-sailing clause is a "questionable feature" that "at least in a case…involving a non-cash settlement award to the class…should be subjected to intense critical scrutiny." *Redman*, 768 F3d at 637; *see also Weinberger*, 925 F2d at 525; *accord Bluetooth*, 654 F3d at 949; William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 TUL. L. REV. 813, 816 (2003) (courts should "adopt a per se rule that rejects all settlements that include clear sailing provisions.").

A third telltale indication of preferential treatment is the presence of a "kicker" clause (*i.e.*, class counsel's fee fund is segregated from the class benefit so that any unawarded fees revert to the defendant rather than going to benefit the class). This too is present here. Settlement ¶ 16. A segregated fee structure is an inferior settlement structure for one principal reason: the segregation of parts means that the Court cannot remedy any allocation issues by reducing fee awards and/or named representative payments. *See Pearson*, 772 F3d at 786; *Bluetooth*, 654 F3d at 949 ("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.").

Fee segregation thus has the self-serving effect of protecting class counsel by deterring scrutiny of the fee request. *See Pearson*, 772 F3d at 786-87 (calling it a "gimmick for defeating objectors" that begets a "strong presumption of invalidity"). A court and potential objectors have

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[7] Exhibits to the settling parties' affidavits, particularly the Met's counteroffer, indicate that fees were only negotiated after settlement on class relief. *See* Exhibit 2 to Celli Reply Affirmation (NYSCEF No. 91). But even if class benefits and fees were negotiated separately, that does nothing to allay the inherent conflict when representatives negotiate for their own compensation unless "fee negotiations [are] postponed until the settlement was judicially approved." *In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortg. Litig.*, 418 F3d 277, 308 (3d Cir 2005); *Pearson*, 772 F3d at 786-87; *Richardson*, 991 F Supp 2d at 204. That has not occurred here.

less incentive to scrutinize a request because the kicker combined with the clear-sailing agreement means that any reversion benefits only the defendant that had already agreed to pay that initial amount. Charles Silver, *Due Process and the Lodestar Method*, 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).

Given the disproportionate, segregated, and unopposed fees that have been negotiated, this settlement must fall. When injunctive relief "may be largely or even entirely worthless" "even a modest award of attorneys' fees...is excessive." *Walgreen*, 832 F3d at 721. Even were the fees reduced by 2/3, the settlement would still be too lopsided to approve. *See Crawford v. Equifax Payment Servs.*, 201 F3d 877, 882 (7th Cir 2000) ($78,000 - $0 ratio unsupportable); *Grok Lines*, 2015 US Dist. LEXIS 124812 ($98,000- $0 ratio unacceptable).

B. A lopsided attorney-driven settlement is not acceptable merely because class members' damages claims are preserved.

One might be tempted to think that because absent class members are only releasing injunctive claims, any allocational unfairness can be forgiven. Not so. It is the compromising of class members' injunctive claims which is generating the $353,000, the only concrete value attendant to this settlement. "The settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members." *Klier v. Elf Atochem N. Am., Inc*., 658 F3d 468, 474 (5th Cir 2011).

Grok Lines is directly on point. There, as here, the proposed settlement preserved absent class members' ability to pursue all monetary claims. 2015 US Dist. LEXIS 124812, at *5. Yet, Judge Chang found it unacceptable that class counsel simply "abandoned pursuit of a monetary recovery for the class" in favor of an injunctive relief only settlement, while simultaneously seeking clear-sailing fees of almost $100,000. 2015 US Dist. LEXIS 124812, at *28. Similarly,

Saska's initial complaint here seeks monetary damages for the violation of Gen. Bus. Law § 349[8] and then abandons those claims to settle the case.

New York precedent extends beyond *Grok Lines. Avena v. Ford Motor Co.* involved a putative settlement of a class action that proposed to release ***no*** claims of absent class members at all, monetary or injunctive. 85 AD2d 149 (1st Dept 1982). The settling parties contended that because absent class members were preserving all of their claims, there was no need to send class members notice or review the compromise and dismissal for fairness. But the Appellate Division disagreed, holding that the necessity of notice and review followed from the existence of the class representatives' fiduciary duties. Though the individual plaintiffs' recovery, and lawyers' fee was "in absolute terms…a modest amount" the settlement assured the fiduciaries of these results. *Id*. at 154. Meanwhile, "the other members of the class, [were] left to struggle for themselves." *Id*. Responding to the argument that the class members were not damaged by any possible breach of fiduciary duty, the court, quoting Judge Cardozo, observed that "only by…uncompromising rigidity has the rule of undivided loyalty been maintained against disintegrating erosion." *Id.* at 155. In other words, if the duty to maximize a principal's benefits has been breached, it doesn't matter if the principal is or is not affirmatively harmed by the fiduciary's transaction.

V. If the Court approves the certification and settlement, it should decline to grant the $350,000 attorneys' award requested.

For several reasons, the settlement is substantively unfair and the certification is untenable (*see supra* §§ III-IV). Nevertheless, if this Court disagrees with each of those propositions, it should still deem unreasonable the $350,000 attorneys' fee that plaintiffs will request.

As a fiduciary for the class, the Court maintains a duty of keen oversight of all settlement proceedings, especially fee awards. *Flemming v. Barnwell Nursing Home & Health Facilities, Inc.*, 56 AD3d 162, 165 (3d Dept 2008) ("When reviewing a fee application in a class action, the court

[8] Complaint ¶ 34.

acts as a fiduciary and must protect the rights of absent class members."); *GM Trucks*, 55 F3d 768, 819-20 (requiring "a thorough judicial review of fee applications . . . in all class action settlements"). Judicial involvement is singularly important since it is to be expected that class members with small individual stakes in the outcome will not file objections. *Id.* at 812.

Here, the attorneys' fee request of $350,000 is excessive in relation to the results obtained. A court has discretion to determine a reasonable attorneys' fee award using the percentage-of-recovery, lodestar, or other approach. *Fiala*, 27 Misc3d at 610. Regardless of the approach used, "the degree of a plaintiff's success is the most critical factor in determining the reasonableness of the fee award." *Allied Healthcare*, 49 Misc3d 1210(A). This reflects the principle that "[a]n attorney who works incredibly hard, but obtains nothing for the class, is not entitled to fees calculated by any method. For although class counsel's hard work on an action is presumably a necessary condition to obtaining attorney's fees, it is never a sufficient condition. Plaintiffs attorneys don't get paid simply for working; they get paid for obtaining results." *In re HP Inkjet Printer Litig.*, 716 F3d 1173, 1182 (9th Cir 2013). Otherwise, "th[e] practice of compensating class counsel no matter how meaningless the result is, creates the impression with most objective observers that these actions are brought merely for the purpose of generating legal fees." *Allied Healthcare*, 49 Misc3d 1210(A).

Thus, where the benefit of a settlement to the class is low or near-valueless, courts will significantly reduce the attorneys' fee award or deny fees entirely. *See, e.g.*, *In re Magazine Antitrust Litig.*, 00 Civ. 4889 (RCC), 2004 US Dist. LEXIS 1845, at *12 (SDNY Feb. 5, 2004) (denying fee entirely based on lack of value of non-monetary class relief) (constructive common fund); *City Trading Fund*, 46 Misc3d 1206(A) ("Even if the court did not think the supplemental disclosures were worth much, if they were legally material, the court, as guardian as the best interests of the class, would have withheld any criticism of plaintiffs' counsel until the final approval stage, when the court, as guardian of the best interests of the class, would have limited the attorneys' fees award to an amount commensurate with the value of the disclosures."); *Matakov v Kel-Tech Constr. Inc*., 84 AD3d 677, 678 (1st Dept 2011) (remanding a lodestar based fee award

"in light of the fact that the fee far exceeded plaintiffs' recovery").

Given the low value of the settlement benefits to the class, *see* Section IV, use of the percentage-of-recovery method would result in a sharp reduction to the fee request, no matter what percentage the court determines is appropriate. Under plaintiffs' lodestar analysis, plaintiffs fare no better. Indeed, appropriate use of the lodestar calibrates the award downward, not upward, where the degree of success achieved is disproportionately small. *See Bluetooth*, 654 F3d at 942-44 (citing *Hensley v. Eckerhart*, 461 US 424, 434-36 (1983)). Even a modest request relative to lodestar cannot justify a misallocated settlement. *See Baby Prods.*, 708 F3d at 180 n.14 (lodestar multiplier of .37 not "outcome determinative"); *HP Inkjet*, 716 F3d at 1177 (same with multiplier of .32); *cf. also Matakov*, 84 AD3d at 678 (remanding a fee that amounted to 51% of accrued lodestar "in light of the fact that the fee far exceeded plaintiffs' recovery"). As one district court described the unsuitability of applying lodestar methodology to settlement fee awards: "Class Counsel has requested for itself an uncontested cash award … based on lodestar, rather than on the value of the class recovery, with only a modest discount from the claimed lodestar amount. In other words, the 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.*, No. 3:06-cv-00545, 2011 US Dist. LEXIS 68984, at *44 (D Nev Jun. 27, 2011).

Further, "[th]e burden of showing the reasonableness of the fee lies with the claimant, and the determination of what constitutes a reasonable fee involves extensive consideration of the nature and value of the services rendered by the plaintiffs' attorneys." *Klein*, 28 A.D.3d at 75 (internal citation, quotation marks, and alterations omitted). "Although [class counsel] is not required to tender contemporaneously-maintained time records, the court will usually, and especially in a matter involving a large fee, be presented with an objective and detailed breakdown by the attorney of the time and labor expended, together with other factors he or she feels supports the fee requested." *Id.* (internal quotation marks omitted). Thus, "the valuation process requires definite information, not only as to the way in which the time was spent (discovery, oral argument, negotiation, etc.), but also as to the experience and standing of the various lawyers performing

each task (senior partner, junior partner, associate, etc.)." *Id.* (internal quotation marks and alterations omitted). Consequently, *Klein* rebuffed a fee award based upon "brief affirmations" containing "only brief and general descriptions of the work performed by the firm as a whole." *Id*.

Here, class counsel have not met their burden. They have not provided adequate evidence of the settlement's value to the class, nor have they provided sufficient information about the attorneys working on the case, their hourly rate, or the number of hours they billed working on discrete tasks in the litigation. St. John reserves the right to supplement this objection when and if class counsel provides support for their fee request.

CONCLUSION

For the foregoing reasons, St. John respectfully requests that the Court deny class certification, deny settlement approval, and deny attorneys' fees.

Dated: January 27, 2017

Respectfully submitted,

/s/ Anna St. John

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CERTIFICATE OF SERVICE

I hereby certify that on this day I filed the foregoing with the Clerk of the Court via NYSCEF thus effectuating service on all counsel who are registered as electronic filers in this case. Additionally, in accordance with the Preliminary Approval Order, I caused to be served true and correct copies upon the following attorneys via U.S. mail at the addresses below:

Emery Celli Brinckerhoff & Abady LLP
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DATED: January 27, 2017

/s/ Anna St. John
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