UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

KYLE CANNON, LEWIS LYONS, AND DIANNE LYONS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS, v. ASHBURN CORPORATION, ET AL., DEFENDANTS.	Civil Action No. 16-1452 (RMB)(AMD) Judge Renee Marie Bumb Date: March 19, 2018 Time: 10:00 a.m. Courtroom: 3D

OBJECTION OF RYAN RADIA

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Introduction

Plaintiffs ask this Court to approve a coupon settlement in which class counsel will receive more than 90% of the benefit. Although the plaintiffs suggest that the settlement provides $10.8 million to class members, the Court should see that calculation as the fiction that it is. $10.8 million is the total potential value of the settlement if every class member claims his or her credits and then redeems those coupons. Federal Rule of Civil Procedure 23 and Third Circuit case law require the Court to disregard this fiction and to look instead to the reality that the coupons are unlikely to have such a high redemption rate. In fact, when the Court appraises what the real settlement benefit is, the value amounts to less than $2 million, and class counsel will receive more than $1.7 million of that. In effect, this settlement would make the class attorneys the "foremost beneficiaries" of the settlement, an outcome that the Third Circuit has deemed impermissible. *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 179 (3d Cir. 2013) ("*Baby Prods.*").

Objector Ryan Radia asks that, in light of the foregoing, the Court reject this coupon settlement. The Class Action Fairness Act ("CAFA"), a federal law that is conspicuously absent from plaintiffs' papers, requires the Court to employ heightened scrutiny in evaluating a coupon settlement like this one. When the Court applies that heightened scrutiny, it becomes clear that this settlement benefits the lawyers, not the absent class members. The Court should not allow such an outcome.

Argument

I. Objector Ryan Radia is a class member and intends to appear through counsel at the fairness hearing.

In late December, objector Ryan Radia received email notice of the proposed settlement in this action. Declaration of Ryan Radia at ¶6. Radia's business mailing address is 1310 L Street NW, 7th Floor, Washington DC 20005; his phone number is (202) 331-2281. *Id.* at ¶2. During the class period, Radia resided in the United States and purchased wine from WTSO.com, including, *inter alia*, a 2008 bottle of Louis Boillot Pommard 1er Cru Les Chanlins. *Id.* at ¶3. Under paragraph 15(c) of the preliminary approval order (Dkt. 44), Radia's signature is provided at the end of this objection.

Radia's attorneys of non-profit Competitive Enterprise Institute's Center for Class Action Fairness ("CCAF") are representing him *pro bono*, and, through local counsel Joshua Wolson, will appear at the Fairness Hearing, scheduled for March 19, 2018. Radia reserves the right to make use of all documents entered on to the docket. He also reserves the right to cross-examine any witnesses who testify at the hearing in support of final approval. Radia objects to the extent class counsel uses expert witnesses in a reply brief to support their fee application after the objection deadline. Such a procedure is unfair under Rule 23(h) and inconsistent with the rule of *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988 (9th Cir. 2010); *accord In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 447 (3d Cir. 2016) (agreeing with *Mercury*). Any such new evidentiary submissions should be stricken. He joins by reference any substantive objections made by other class members not inconsistent with those made here.

CCAF 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 F.3d 778, 787 (7th Cir. 2014) (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"). CCAF has "develop[ed] the expertise to spot problematic settlement provision and attorneys' fees." Elizabeth Chamblee Burch, *Publicly Funded Objectors*, THEORETICAL INQUIRIES IN LAW, at 9 & n.35 (forthcoming), *available at* https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2923785.

Since it was founded in 2009,[1] CCAF has "recouped more than $100 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); *see, 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"). Because settlement proponents often employ *ad hominem* attacks in attempting to discredit objections, it is perhaps relevant to distinguish CCAF's mission from the agenda of those who are bad-faith objectors. Bad-faith objectors threaten to disrupt a settlement unless plaintiffs' attorneys buy them off with a share of the attorneys' fees. This is not CCAF's *modus operandi*. CCAF refuses to engage

[1] In 2015, CCAF merged with the non-profit Competitive Enterprise Institute ("CEI") and became a program within CEI's law and litigation division.

in *quid pro quo* settlements and does not extort attorneys; it has never withdrawn an objection in exchange for payment.[2] Instead, it is funded entirely through charitable donations and court-awarded attorneys' fees. Nonetheless, to preempt any possibility of an unjustifiable accusation of objecting in bad faith and seeking to extort class counsel, Radia would stipulate to an injunction prohibiting himself from accepting compensation in exchange for the settlement of this objection. Radia Decl. ¶9; *see generally* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623 (2009) (suggesting inalienability of objections as best practice).

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

"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. 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 F.3d at 715. "Because 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

[2] Indeed, it has even attempted to claw back money that bad-faith objectors have extracted. *See, e.g.*, *Rougvie v. Ascena Retail Group*, 2017 WL 2624544 (E.D. Pa. Jun. 16, 2017).

a whole." *Baby Prods.*, 708 F.3d at 175 (internal quotation omitted); *accord In re GMC Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995) ("*GM Trucks*"). As such, the Court itself assumes a derivative "fiduciary"[3] role to "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished." *GM Trucks*, 55 F.3d at 785 (internal quotation omitted).

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 F.3d at 717-18 (quoting, *inter alia*, *GM Trucks*).

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 F.3d 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-interest and that of certain class members to

[3] *In re NFL Players Concussion Injury Litig.*, 775 F.3d 570, 581 (3d Cir. 2014).

infect the negotiations." *Pampers*, 724 F.3d at 718 (internal quotation omitted). "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). "The burden of proving the fairness of the settlement is on the proponents." *Pampers*, 724 F.3d at 718; *accord GM Trucks*, 55 F.3d at 785. In this case, that burden is yet heightened because this settlement has been proposed before class certification. Delaying certification until settlement poses various problems, *see GM Trucks*, 55 F.3d at 786-800, and calls for heightened judicial scrutiny of the certification and the accompanying settlement. *Id.* at 807; *Pampers,* 724 F.3d at 721.

In their memorandum in support of preliminary approval ("MPA") (Dkt. 38-1), the plaintiffs focus on the nine factors for settlement fairness described in *Girsh v. Jepson*, 521 F.2d 153, 156-57 (3d Cir. 1975). MPA 7-12. Like the factor test of other circuits, the *Girsh* test is not exhaustive. "[B]ecause of a 'sea-change in the nature of class actions' …district courts should also consider other potentially relevant and appropriate factors." *In re AT&T Corp.*, 455 F.3d 160, 165 (3d Cir. 2006). Non-*Girsh* factors can be dispositive. For example, in *Baby Products*, the Third Circuit reversed even though there was no dispute that the district court correctly applied the *Girsh* factors. Nevertheless, the court abused its discretion by failing to investigate the number of claims that class members had submitted and to ensure that the benefits provided by the settlement were fairly allocated to the class. 708 F.3d at 174-75.

So, the Court's first step must be "affirmatively seek[ing] out" the necessary claims data to ascertain class benefit. *Id.* at 175. This information is critical to the vital second step of the analysis: ensuring that class members and not their counsel are the

"foremost beneficiaries" of the settlement. *Id.* at 179. Appeals courts will reverse when a settlement accords "preferential treatment" to class counsel and/or to the class representatives at the expense of absent class members. *See Pampers*, 724 F.3d at 718; *Pearson*, 772 F.3d at 781-83; *Redman*, 768 F.3d 622; *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011).

Preferential treatment to class counsel is the gist of Radia's objection here. He does not argue that WTSO must actually pay the $10.8 million "made available"; but if the parties agree to reversion provisions that will lead to WTSO paying roughly $2 million (the $1.7 million in fees plus (if lucky) a few hundred thousand in redeemed coupons), the parties cannot pretend that the settlement was actually worth $10.8 million. Class counsel may not appropriate an excessive amount of the real settlement value for itself.

III. This coupon settlement is subject to the Class Action Fairness Act.

The settlement provides that each class member who submits a claim will receive "credits" of between $0.20 and $2.00 that can be used to discount of "Redemption Wines" that WTSO makes available through their website. Settlement, Dkt. 43-1, §§ IV.A-B. Despite the parties' terminology, the credits are coupons subject to the Class Action Fairness Act of 2005 ("CAFA"), though one would not know it from plaintiffs' papers. Neither their preliminary approval motion (Dkt. 38-1) nor their motion for attorneys' fees (Dkt. 47) even alludes to 28 U.S.C. § 1712, the section of CAFA governing coupon settlements. CAFA was enacted specifically to address situations like this case—where shoddy coupon settlements are used as a cover for the payment of disproportionate attorneys' fees to class counsel in exchange for a cheap release of

claims for defendants. *See In re HP Inkjet Printer Litig.*, 716 F.3d 1173 (9th Cir. 2013) ("*Inkjet*"). As such, the Court has a duty to closely scrutinize the actual value the settlement provides to class members in determining the fairness of the settlement.

A. The WTSO.com credits are coupons under CAFA.

Because the plaintiffs fail to address CAFA in their papers we do not know whether they consider the settlement "credits" to be CAFA coupon relief. But we do know that the parties cannot rely on their characterization of the relief as "credits" 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) (interpreting "jail" where statute was silent). "Courts should not countenance an attempt to dilute [a statute] by giving effect to a mere change in nomenclature." *Frontier Development LLC v. Craig Test Boring Co., Inc.*, 2017 WL 4082676, at *4 (D.N.J. Sept. 15, 2017) (construing state law; internal quotation omitted). Numerous courts have rejected similar semantic efforts to avoid the legal conclusion that certain relief constitutes a coupon. *E.g.*, *Inkjet*, 716 F.3d at 1176 ("e-credits" are a "euphemism" for coupons); *Rougvie*, 2016 WL 4111320, at *27 ("vouchers"); *Redman*, 768 F.3d at 635 ("vouchers"); *Sobel v. Hertz Corp.*, 2011 WL 2559565, at *11-*12 (D. Nev. June 27, 2011) ("certificates"). "[A] non-cash voucher with no value to class members unless they transact additional business with [the defendant] is a coupon under the Act." *Rougvie*, 2016 WL 4111320, at *27.

Dictionary definitions confirm. A coupon is "a code or detachable part of a ticket, card, or advertisement that entitles the holder to a certain benefit, such as a cash refund or a gift." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed., Houghton Mifflin Harcourt Publishing Company 2018), *available at*

http://ahdictionary.com/word/search.html?q=coupon. "A coupon may be defined as a certificate or form 'to obtain a discount on merchandise or services,'" and also "as 'a form surrendered in order to obtain an article, service or accommodation.'" *Dardarian v. Officemax N. Am., Inc.*, 2013 WL 12173924, at *2 (N.D. Cal. July 12, 2013) (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1988)).

To see this clearly, just compare the WTSO credits in this case with two recent class settlements involving e-commerce coupon-ish relief for class members. (1) In *In re Online DVD Antitrust Litigation*, the Ninth Circuit determined that gift cards to Walmart.com did not constitute CAFA coupons. 779 F.3d 934 (9th Cir. 2015). The court identified several features that distinguished the gift cards 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." *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.

Following *Online DVD*, the Northern District of California determined that $10 vouchers to Art.com do constitute coupons for CAFA purposes. *Knapp v. Art.com*, No. 3:16-cv-00768-WHO, Dkt. 82 (N.D. Cal. Aug. 22, 2017). This was so even though Art.com carried 100,000 items that could be obtained through redemption of the voucher without any additional out-of-pocket expenditure.

The credits provided under the settlement here fare poorly by comparison to the relief offered in both *Online DVD* and *Knapp*. Unlike in *Online DVD*, class members here cannot elect cash instead of a coupon. The credits are valid for only 12 months from the date of issuance, Settlement § 4.B, and no whole product can be obtained through the redemption of credits. Indeed, a maximum $2.00 discount can be applied to the purchase of each bottle of wine. *Id.* They are not gift cards under applicable law nor can they be used to purchase gift cards. Class members are only permitted to use credits toward the purchase of wines that WTSO classifies as "Redemption Wines." Settlement § 4.C. Lastly, the credits are "non-transferable." Settlement § 4.G. In short, and as the below comparison chart shows, the Walmart.com gift cards and the Art.com vouchers are more cash-like than the credits here along almost every dimension:

	WTSO	*Online DVD*	*Art.com*
Face Value	$0.20- $2.00	$12	$10
Expiration Date	12 months after issuance	None	18 months after issuance
Limitation on the value used in	Maximum $2.00 / bottle	None	None

conjunction with each purchase			
Usable in conjunction with other coupons	Undisclosed	Yes	Undisclosed
Crackable (*i.e.* value can be retained over multiple purchases)	Yes	Yes	Yes
Transferable	No	Yes	Yes
Redeemable for cash	No	Yes, when under certain thresholds governed by state law	No
Elected by class members in lieu of cash	No	Yes	No
Automatic distribution or must be claimed	Must be claimed	Must be claimed	Automatic
Permits purchase of other gift cards	No	Yes	No
Protected under state and federal regulation of "gift cards"	No	Yes	No
Duplicative of deals freely available outside the settlement	No	No	Undisclosed
Number of items that can be purchased in whole	Zero	Over 800,000[4]	Approximately 100,000[5]
Types of items available	Wine	Innumerable	Posters, celebrity and sports photos, art

[4] *Knapp v. Art.com*, Declaration of Anna St. John, Dkt. 74-2 ¶ 7.

[5] *Knapp v. Art.com*, Declaration of Gary Takemoto, Dkt. 54 ¶ 5.

			prints, calendars and wall stickers[6]
Number of items that can be purchased in part	At least 700 of the "current offers" on the WTSO.com website, and at least 6 million bottles available for purchase as "current offers"[7]	Over 38 million[8]	Undisclosed

There can be no debate as to whether the credits in this case are CAFA coupons.

B. Coupon settlements are disfavored and subject to heightened scrutiny.

Congress passed CAFA to combat its findings 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). 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

[6] *Id.*

[7] Settlement § 4.C.

[8] Walmart, Form 10-K for fiscal year ended January 31, 2017, at 9 ("Walmart.com … offers access to over 38 million SKUs.").

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). 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).

Indeed, in Judge Becker's seminal *GM Trucks* opinion, this Circuit recognized the ills of coupon settlements well before CAFA was passed. 55 F.3d at 803 ("Non-cash relief… is recognized as a prime indicator of suspect settlements."); *id.* at 810 (observing that the $9.5 million attorneys' fee seemed "unusually large in light of the fact that the settlement itself offered no cash outlay to the class."). In 2005 a decade after *GM Trucks* and because of "the well-documented problems associated with such settlements[,] 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); *accord Rougvie v. Ascena Retail Grp., Inc.*, 2016 WL 4111320, at *27 (E.D. Pa. July 29, 2016). Among the varied remedial measures of CAFA, 28 U.S.C. § 1712 sets forth special rules for fee calculation and settlement valuation where "a proposed settlement in a class action provides for a recovery of coupons to a class member." 28 U.S.C. § 1712(a). Because of the inherent dangers of coupon settlements, CAFA requires a district court

to apply "heightened judicial scrutiny"[9] and to value the coupons, 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; § VI.A *infra* (explaining how fees must be awarded under coupon settlements). 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.

IV. The proposed settlement would unfairly allow class counsel to obtain a disproportionate amount of the settlement proceeds.

Fundamentally, there are two possible lenses through which to view this "claims-made" settlement.[10] The first, preferred by settling parties when attempting to

[9] *See, e.g., Inkjet*, 716 F.3d at 1178; *Figueroa*, 517 F. Supp. 2d at 1308.

[10] A "claims-made" settlement is one under which class members must submit a claims form to obtain relief. The abuse of claims-made settlements to inflate attorneys' fees and deflate defendants' obligations to class members has been the subject of substantial criticism. *E.g.* Barbara J. Rothstein & Thomas E. Willging, Fed. Jud. Center, *Managing Class Action Litigation: A Pocket Guide for Judges* 30 (2010), *available at www.fjc.gov/public/pdf.nsf/lookup/ClassGd3.pdf/$file/ClassGd3.pdf*; *Pearson*, 772 F.3d at 787

maximize attorneys' fees while minimizing defendant expense, looks at a hypothetical world where every credit *might be* claimed, and every credit *might be* redeemed, exhausted, however unlikely. From this perspective, one sees a $10.8 million value provided by WTSO, and suddenly class counsel's unopposed $1.7 million attorney award only amounts to only 13.6% of the constructive common fund. *See* Class Counsel's Brief in Support of Application for Award of Attorneys' Fees (Dkt. 47) ("Fee Brief") 1, 7. On this view, it is of no consequence how many coupons are claimed by class members or how many of the coupons issued are ultimately redeemed. This approach exalts fiction over reality, even though cases—especially class action cases that determine the rights

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(7th Cir. 2014) (reversing an attorney-centric "selfish" arrangement where a needless claims process was employed instead of distributing checks to the known class members). A claims-made settlement that results in silent class members releasing their claims for no compensation is "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).

Here, given that WTSO possesses all the necessary information to distribute credits without the submission of the "verification form," it seems probable that the form is being employed for no reason other to depress class recovery yet still allowing the plaintiffs to tout the $10.8 million that they "made available" to class members. But regardless of whether there is a legitimate reason to condition class member recovery on the submission of a claims form, the parties must not be permitted to create the illusion of class benefit with respect to money that will revert to the defendants, either because the credits are not claimed or because the credits are not redeemed. Class counsel "cannot claim surprise" for the foreseeable result of their negotiation. *Rougvie*, 2016 WL 4111320, at *28. In *Rougvie*, where the class members had the option of electing a cash payment, the claims rate was still only 3.3%, and the anticipated redemption rate of the coupons was less than 3%. *Id.* at *1. Because of the unavailability of cash and the restrictions on the coupons' redemption, both rates will likely be lower than that here.

of thousands or millions of consumers—"are better decided on reality than on fiction." *Pampers*, 724 F.3d at 721 (internal quotation omitted).

The better view is to judge a settlement by what the class *actually* receives, by the value the class *actually* obtains. In *Baby Products*, the Third Circuit agreed, disavowing the hypothetical, bird's-eye method of settlement review, requiring instead an acute appraisal: the "inquiry needs to be, as much as possible, practical and not abstract. If the parties have not on their own initiative supplied the information needed to make the necessary findings, the court should affirmatively seek out such information. Making these findings may also require a court to withhold final approval of a settlement until the actual distribution of funds can be estimated with reasonable accuracy." 708 F.3d at 174 (internal quotation omitted). An accurate appraisal is even more essential in cases involving coupon settlements like this because "Congress require[s] courts to base attorneys' fees… 'on the value to class members of the coupons that are redeemed' rather than on the face value of the coupons." *Id.* at 179 n.13 (quoting 28 U.S.C § 1712).

In this case, the settlement sets the claims deadline 30 days after the fairness hearing (Settlement § 4.D), and, as of the date of this filing, the parties have not yet submitted an interim report on the settlement's claims data into the record. This will not do. If they do not voluntarily submit such information, the Court is obliged to compel it of them. *Baby Prods.*, 708 F.3d at 174. To approve a settlement without an accounting of settlement funds is reversible error under Third Circuit law. *Id.* at 174-75; *GM Trucks*, 55 F.3d at 822 ("At the very least, the district court on remand needs to

make some reasonable assessment of the settlement's value and determine the precise percentage represented by the attorneys' fees.").

This claims data will demonstrate that the $10.8 million credit valuation is illusory and will enable the Court to differentiate real value from illusory value, a task that matters because, in analyzing the fairness of a proposed settlement under Rule 23(e) and the reasonableness of fees under Rule 23(h), district courts "need to consider the level of direct benefit provided to the class" to ensure that the class members rather than their counsel are the "foremost beneficiaries" of the settlement. *Baby Prods.*, 708 F.3d at 170, 179. Affording "preferential treatment" to the named plaintiffs or to class counsel is impermissible. *Pampers*, 724 F.3d at 718 (internal quotation omitted); *see also Bluetooth*, 654 F.3d at 947 (red flag for class counsel to receive a "disproportionate distribution of the settlement"). "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). District courts must be "vigilant and realistic," nixing "selfish deal[s]" that "disserve" the class. *Pearson*, 772 F.3d at 787.

A. Class counsel seeks a disproportionate share of the settlement.

Because adversarial negotiation does not ensure that class relief is appropriately "commensurate with [the] fee award," *Pampers*, 724 F.3d at 720, the most common settlement defect is one of allocation. "[I]f the '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.'" *Id.* at 718 (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003)). 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; *GM Trucks*, 55 F.3d at 819-21; *contra* Fee Brief 3-5. Nor can class counsel "allay" the conflict through by waiting to negotiate fees until after settlement on class relief was reached: "the Task Force recommended that fee negotiations be postponed until the settlement [is] judicially approved, not merely until the date the parties allege to have reached an agreement." *In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortg. Litig.*, 418 F.3d 277, 308 (3d Cir. 2005) (quoting *GM Trucks*, 55 F.3d at 804). Indeed, paying the attorney from a cash fund and then providing the class separate "[n]on-cash relief… is recognized as a prime indicator of suspect settlements." *GM Trucks*, 55 F.3d at 803. When, as here, "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.

This settlement provides class counsel with the right to seek unopposed by WTSO an attorney award of $1.7 million. Settlement § VIII. 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). A proportionate attorney award adheres to the 25% of the fund benchmark established in the Ninth Circuit and followed by courts of this Circuit.[11]

[11] *See e.g., Bluetooth*, 654 F.3d at 942; *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 361 (3d Cir. 2010) (Weis, J., concurring and dissenting) (25% benchmark is "a beginning point for determining whether a particular fee is reasonable" although "[t]oo often that

Looking behind the fictive $10.8 million valuation, the only demonstrable benefit to class members is the redemption value of the coupons actually used by class members. 28 U.S.C. § 1712; *Baby Prods.*, 708 F.3d at 179 n.13. To reach a balanced 25% ratio, class members would have to redeem $5.1 million worth of settlement credits. But that is preposterous given the hypothetical maximum of $10.8 million, based upon 100% claims and redemption rates. If instead we use the actual 3.3% claims rate from *Rougvie*, and the more realistic 3% redemption rate, the class benefit would be a miniscule **$10,692**. Let's say that the settlement garners an extraordinary[12] 10% claims rate and 10% redemption rate. In that event the class benefit would amount to **$108,000** and class counsel's $1.7 million would amount to **94%** of the constructive common fund. Even if one thought that, despite the fact that class members can only redeem $2

is the end of the discussion"); *Brown v. Rita's Water Ice Franchise Co. LLC*, 242 F. Supp. 3d 356, 367 (E.D. Pa. 2017) (surveying empirical studies and finding that "[f]ees in small, low-risk consumer class actions are typically closer to 25%" rather than the 33% sought); *Erie County Retirees Ass'n. v. County of Erie,* 192 F. Supp. 2d 369, 381 (W.D. Pa. 2002) ("the 25% benchmark is often appropriate … to prevent a windfall to counsel."); *Seidman v. Am. Mobile Sys.,* 965 F. Supp. 612, 622 (E.D. Pa. 1997); *Lachance v. Harrington*, 965 F. Supp. 630, 648 (E.D. Pa. 1997); *see generally* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 833 (2010) (analyzing 688 class action settlements in 2006 and 2007 and finding a mean of 25% and a median of 25.4% for the award of attorneys' fees "with almost no awards more than 35 percent").

[12] As the Third Circuit has credited *in the context of a cash settlement*, "consumer claims filing rates rarely exceed seven percent, even with the most extensive notice campaigns." *Sullivan v. DB Investments, Inc*, 667 F.3d 273, 329 n.60 (3d Cir. 2011) (*en banc*) (internal quotation omitted).

of credit for each bottle of wine, somehow 50% of the credits claimed would be redeemed, the class benefit would still be a meager $540,000.

Thus, with the most generous assumptions, class counsel is seeking 75% of the settlement value demonstrated so far in this case, unjustifiably appointing themselves the foremost beneficiary of the settlement. This far exceeds the 38.9% that the Ninth Circuit calls "clearly excessive." *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012); *see also Karvaly v. eBay Inc.*, 245 F.R.D. 71, 86 n.29 (E.D.N.Y. 2007) (declaring that 43% of the common fund as a fee "would clearly be excessive").

Plaintiffs will likely respond that the $10.8 million value that was "made available" to class members, but was never claimed or redeemed and will instead revert to WTSO should be considered part of the settlement value. Not so. *Baby Prods.*, 708 F.3d at 179 n.13; *Pearson*, 772 F.3d at 781-82; *Fitzgerald v. Gann Law Books*, No. 11-cv-04287(KM)(SCM), Dkt. 100, 2014 U.S. Dist. LEXIS 174567, at *41 (D.N.J. Dec. 17, 2014) (true settlement value does not include relief "which will effectively revert to the defendant, not accrue to the class members.").

Second, they may assert that WTSO's payment of notice and administration costs constitutes class value. Again, as a matter of law, this view is mistaken. *Redman*, 768 F.3d 622, 630 ("administrative costs should not have been included in calculating the division of the spoils between class counsel and class members. Those costs are part of the settlement but not part of the value received from the settlement by the members of the class"); *Pearson*, 778 F.3d at 781 (same). Excluding amounts that revert to the defendants and amounts that are paid to the administrator is a natural corollary to *Baby Products*'s reasoning. Just as the class is "not indifferent" as between money that goes to

them and money that goes to third-party *cy pres* beneficiaries, they are likewise not indifferent as between money that goes to them and money that reverts to the defendants or goes to third-party settlement administration companies. *Baby Prods.*, 708 F.3d at 178; *Lachance v. Harrington*, 965 F. Supp. 630, 648 (E.D. Pa. 1997) (explaining the importance of incentivizing counsel to maximize the class's recovery). "[C]lass counsel should not be [indifferent] either"; if they are only paid on the amount of the benefit received, they will be encouraged to minimize costs and maximize benefit. *Baby Products*, 708 F.3d at 178. "[I]ncentives to minimize expenses and to allocate resources properly go much farther toward cost efficiency than can *post hoc* judicial review" *In re Wells Fargo Sec. Litig*, 157 F.R.D. 467, 471 (N.D. Cal. 1994).

Plaintiffs would prefer that this Court attribute to the coupons, both claimed and unclaimed alike, their full face value (approximately $10.8 million). Federal law, specifically the Class Action Fairness Act ("CAFA"), prohibits the plaintiffs' proposed valuation methodology. *See* 28 U.S.C. § 1712; *accord Baby Prods.*, 708 F.3d at 179 n.13; *Inkjet*, 716 F.3d 1173. Section 1712 instructs that the value of the coupons is not the face value of those distributed; rather it is the value of those *actually redeemed* by class members. The primary problem with coupons is that they "mask[] the relative payment of the class counsel as compared to the amount of money actually received by the class members." *Inkjet*, 716 F.3d at 1179 (internal quotation omitted). "[C]ourts aim to tether the value of an attorneys' fees award to the value of the class recovery… Where both the class and its attorneys are paid in cash, this task is fairly effortless… But where class counsel is paid in cash, and the class is paid in some other way, for example, with

coupons, comparing the value of the fees with the value of the recovery is substantially more difficult." *Id.* at 1178-79.

Coupons are often riddled with restrictions that prevent class members from realizing their full face value. The "credits" here are no different: they expire within a year of distribution; they can only be used to reduce any given bottle of wine by $2.00; they cannot be transferred; they cannot be used to purchase gift cards; nor cashed out. Burdens like this are a principal reason that "CAFA requires greater scrutiny of coupon settlements." *Inkjet*, 716 F.3d at 1178 (quoting S. Rep. No. 109-14, at 27).

While it is unknown exactly how many credits will be claimed or redeemed, precedent shows claims rates will almost certainly be in the low single digits. *See, e.g.*, *Redman*, 768 F.3d at 628 (less than 1% claims rate for $10 voucher to RadioShack); *Davis v. Cole Haan, Inc.*, 2013 WL 5718452, *2 (N.D. Cal. Oct. 21, 2013) (less than 1% claims rate for $20 off voucher to shoe store); *Rouse v. Hennepin County*, 2106 WL 3211814 (D. Minn. Jun. 9, 2016) ("189 out of approximately 283,000 class members requested vouchers" good for $17.50 off various municipal services); *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 in consumer settlements offering cash relief, claims rates are notoriously low. *See, e.g.*, *Pearson*, 772 F.3d at 782; *In re Carrier iQ Inc. Consumer Privacy Litig.*, No. 12-md-02330-EMC, 2016 WL 4474366, at *4 (N.D. Cal. Aug. 25, 2016) (prominent settlement administrator found a median claims rate of 0.023% in settlements with publication-only notice).

Likewise, coupon redemption rates are typically miniscule. *Galloway v. Kan. City Landsmen, LLC*, 833 F.3d 969, 971 (8th Cir. 2016) (0.045% of distributed certificates

were redeemed); *Davis*, 2015 WL 7015328, at *2 (N.D. Cal. Nov. 12, 2015) (2.3% of distributed vouchers were redeemed); *Dardarian v. OfficeMax N. Am., Inc.*, 2014 WL 7463317, at *3 (N.D. Cal. Dec. 30, 2014) (reflecting upon a redemption rate of sub-7% of the face value of $5 and $10 vouchers distributed to class members); 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). Redemption rates "may be particularly low in cases involving low value coupons." *Sobel v. Hertz Corp.*, 2011 WL 2559565, at *11 (D. Nev. Jun. 27, 2011) ($100 discount "certificate" for car rental).

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).

Plaintiffs appear to rely on the settlement's "injunctive relief" to carry weight in the justifying settlement approval and class counsel's accompanying fee request. Fee Brief 7 n.2, 12. This is misguided for multiple reasons. First, the settlement contains no injunctive relief. *See* Settlement § IV (describing the consideration that the settlement

provides, omitting any mention of injunctive relief). Plaintiffs must be attempting to credit themselves for WTSO's voluntary business decision to amend its advertising (substituting "Comparable Price" for "Original Price"), a decision reached months before the first settlement negotiations occurred. *See* Settlement 2 (reciting case history). Again, the settlement doesn't codify this practice nor enjoin defendant from resuming to its old form of advertising. It simply is silent on the matter.

Second, even if the settlement had codified the preexisting business practice, that codification wouldn't count as *settlement* value. Injunctions are "of no real value" where they "do[] not obligate [the defendant] to do anything it was not already doing." *Koby v. ARS Nat'l Servs., Inc*, 846 F.3d 1071, 1080 (9th Cir. 2017); *see also Hofmann v. Dutch LLC*, 2017 WL 840646, at *7 (S.D. Cal. Mar. 2, 2017) (refusing to credit injunctive relief when defendant had voluntarily revised its labeling before the settlement). Voluntary pre-settlement changes, later duplicated in settlement, do not count as a compensable class benefit. *See Pampers*, 724 F.3d at 719; *Staton*, 327 F.3d at 961; *Vought v. Bank of Am.*, 901 F. Supp. 2d 1071, 1090 (C.D. Ill. 2012) (voluntary remedial measures independent of the settlement "should not be considered part of the benefit for forfeiting the right to sue"). It is "the *incremental* benefits" from the settlement that matter, "not the total benefits" from the litigation. *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282 (7th Cir. 2002) (emphasis in original).

Third, and more generally, prospective changes in advertising practice will not benefit class members who, by definition, are past purchasers allegedly already misled by WTSO's previous conduct. *See, e.g.*, *Koby*, 846 F.3d at 1079 (observing "an obvious mismatch between the injunctive relief provided and the definition of the proposed

class"). Changes to future advertising cannot compensate for past harm. Yet, "[t]he 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 F.3d at 720 (emphasis in original; internal quotation marks omitted)). "[F]uture purchasers are not members of the class, defined as it is as consumers who have purchased [the product]." *Pearson*, 772 F.3d at 786.[13]

It may be true that "every square centimeter" of WTSO's website space is "extremely valuable" to defendant, but it is "egocentrism" to presume that that the same space is equally valuable to class members. *Pampers*, 724 F.3d at 720. Illusory non-class injunctive relief simply does not justify a $1.7 award to class counsel. The first warning sign of a lawyer-driven deal is apparent: class counsel is attempting to seize an excessive portion of the settlement proceeds.

[13] Commentators have also recognized the problem of fictive injunctive relief that remits no benefit to class members. *See e.g.*, 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. 859, 872-78 (2016) (discussing the warning sign of "spurious injunctive relief").

B. The parties' use of a "clear-sailing agreement" in the settlement demonstrates that they are protecting counsel's fees at the expense of a benefit to the class.

In addition to a discrepancy between fees and class benefit, the settlement contains a second telltale indication of an unfair deal: a "clear sailing" agreement. *See Redman*, 768 F.3d at 637; *Bluetooth*, 654 F.3d at 947. A clear sailing clause stipulates that attorney awards will not be contested by the defendants. *See* Settlement § VIII.B. "Such a clause by its very nature deprives the court of the advantages of the adversary process." *Weinberger v. Great Northern Nekoosa Corp.,* 925 F.2d 518, 525 (1st Cir. 1991). The clause 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 should go "under the microscope of judicial scrutiny." *Id.* at 518, 524-25. Clear-sailing clauses are especially problematic in settlements "involving a non-cash settlement award to the class" and "should be subjected to intense critical scrutiny." *Redman,* 768 F.3d at 637.

"Provisions for clear sailing clauses…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*, 901 F. Supp. 2d at 1100 (quoting *Int'l Precious Metals Corp. v. Waters*, 530 U.S. 1223, 1224 (2000) (O'Connor, J., respecting the denial of certiorari)); *accord* 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."). "[T]he defendant won't agree to a clear-sailing clause without compensation—namely a reduction in the part of the settlement that goes to

the class members, as that is the only reduction class counsel are likely to consider." *Redman*, 768 F.3d at 637. While the Third Circuit has eschewed a *per se* rule prohibiting clear-sailing clauses, it has emphasized that such clauses "deserve careful scrutiny in any class action settlement." *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 447 (3d Cir. 2016).

Clear-sailing is the second indication of an imbalanced lawyer-driven deal.

C. The parties' use of a segregated fee fund further indicates self-regard.

The proposed settlement separates the class' relief from class counsel's fee fund such that any reduction in fees will inure to the benefit for WTSO, not absent class members. The settlement agreement effectuates this by capping class members' claims and stipulating that excess portions of the settlement fund will revert to the Defendants. Settlement ¶¶40-41. Plaintiffs tout this as feature of the settlement, suggesting that because of this structure the fees do not reduce class recovery. Alas, "there is no such thing as a free lunch." *Staton*, 327 F.3d at 964.

Segregating class counsel's fee from the class's relief forms a "constructive common fund," colloquially known as a "kicker." *See, e.g.*, *Pearson,* 772 F.3d at 786; *GM Trucks*, 55 F.3d at 820-21 (A severable fee structure "is, for practical purposes, a constructive common fund"). Not only is a constructive common fund structure not beneficial as plaintiffs suggest, it is downright 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). However, with a constructive common fund structure, if this Court reduces the $1.7 million fee 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. *Id.* 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 reversion 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).

This Court's decision in *Fitzgerald v. Gann Law Books*, No. 11-cv-04287(KM)(SCM), Dkt. 100, 2014 U.S. Dist. LEXIS 174567, at *41 (D.N.J. Dec. 17, 2014) illuminates well why a common fund structure is superior. There, the parties negotiated a $1 million attorney fee, excessive in relation to class member recovery of $180,000. Judge McNulty found this untenable, but the settlement was salvageable because of a provision that distributed excess amounts of the cash fund *pro rata* to non-claimant class members. This ensured that "a low response rate does not inure to the benefit of the defendant or class counsel." *Id.* at *48. By decreasing class counsel's proposed fee from $1 million to almost $400,000, Judge McNulty was able to augment the class's residual distribution by a reciprocal $600,000, and bring the settlement back into proportion without sacrificing funds that the defendant was willing to pay. *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."). Unfortunately, this settlement lacks a similar provision that would allow the Court to save the agreement. The only solution is denying settlement approval.

V. Plaintiffs have failed to prove that the named representatives and class counsel are adequate representatives for the class.

Rule 23(a)(4), constitutionally grounded in the Due Process Clause, conditions class certification upon a demonstration that "the representative parties will fairly and adequately protect the interests of the class." 23(g)(4) imparts an equivalent duty on class counsel, most weighty "when the class members are consumers, who ordinarily

lack both the monetary stake and the sophistication in legal and commercial matters that would motivate and enable them to monitor the efforts of class counsel on their behalf." *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 917 (7th Cir. 2011). Together these provisions demand that the representatives manifest "undivided loyalties to absent class members." *Broussard v. Meineke Discount Muffler Shops*, 155 F.3d 331, 338 (4th Cir. 1998). Class counsel must "prosecute the case in the interest of the class . . . rather than just in their interests as lawyers who if successful will obtain a share of any judgment or settlement as compensation for their efforts"[14] and the named representatives may not "leverage" "the class device" for their own benefit. *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006).

As a bedrock principle, the specifications of (a)(4) "demand undiluted, even heightened, attention in the settlement context." *Amchem Prods., Inc., v. Windsor*, 521 U.S. 591, 620 (1997); *Pampers*, 724 F.3d at 721; *accord Neale v. Volvo Cars of N. Am. LLC*, 795 F.3d 353, 362 n.4 (3d Cir. 2015). Inadequacy can manifest itself right from the case's inception, but perhaps more commonly, it can reveal itself in the course of the proceedings. Therefore, it is not surprising that conflicts can sometimes be discerned from "the very terms of the settlement." *GM Trucks*, 55 F.3d at 801.

Here, several facts evidence inadequate representation. First, there exists a prototypical 23(a)(4) defect: proceeding with class representatives who are laboring under a conflict of interest due to a preexisting business relationship, here an attorney-client relationship, with a member of class counsel's team. *See, e.g.*, *In re Southwest Airlines*

[14] *Creative Montessori*, 662 F.3d at 917.

Drink Voucher Litig., 799 F.3d 701, 714 (7th Cir. 2015) (rejecting, as inadequate, class representative who co-counseled with class counsel in another unrelated matter); *London v. Wal–Mart Stores, Inc.*, 340 F.3d 1246, 1255 (11th Cir. 2003) (rejecting, as inadequate, class representative who was former stockbroker of class counsel); *Langendorf v. Skinnygirl Cocktails, LLC*, 306 F.R.D. 574, 581 (N.D. Ill. 2014) (rejecting, as inadequate, class representative whose father had acted as co-counsel with class counsel on several previous occasions).

In this case, class representatives Lewis Lyons and Kyle Cannon are associates at a Memphis TN law firm, Glassman, Wyatt, Tuttle and Cox, P.C. ("GWTC"). *See* http://gwtclaw.com/team/kyle-cannon/ (last visited Feb. 7, 2018); http://gwtclaw.com/team/lewis-lyons/ (last visited Feb. 7, 2018). GWTC has an attorney-client relationship with the another Memphis firm (Apperson Crump PLC), having directly represented Apperson Crump in defending against a malpractice suit. *See Braxton v. Apperson, Crump & Maxwell, PLLC*, No. 2:12-cv-02761, Dkt. 79 (W.D. Tenn. Aug. 13, 2013), *vacated in part* No. 13-6219, Dkt. 40 (6th Cir. Mar. 11, 2015), *cert den'd* 136 S. Ct. 817 (2016). Although Apperson Crump is not formally designated as settlement "class counsel," everything indicates that they have been and continue to be involved in some undisclosed capacity. The complaint (Dkt. 1) lists Apperson Crump attorney J. Mark Benfield in the signature block. Complaint at 28. The settlement itself carves out, alongside designated class counsel, "Apperson Crump, PLC, or any partner, member, shareholder or employee of Apperson Crump, PLC" from eligibility to claim settlement coupons). Settlement § 4.E. If Apperson Crump are to be allocated any share of the attorneys' fees in this case, as a finder's fee, for work on this matter, or otherwise,

then the class representatives cannot be adequate independent representatives. An attorney-client relationship creates an inherent conflict of interest, one that cannot be assuaged by class representatives' subjective awareness of their duties. *See Radcliffe v. Experian Info Solutions*, 715 F.3d 1157, 1166 (9th Cir. 2013). "Class representatives need to be capable of saying no if they believe counsel are failing to act in the best interests of the class." *Southwest*, 799 F.3d at 714.

Compounding the conflict itself is the class notice's failure to disclose it. *Southwest*, 799 F.3d at 714. Given Class Counsel's attempt to proceed with categorically improper representatives, and failure to disclose the conflict to the class or the Court, there can be no confidence that either class counsel is adequate, or that the other class representatives are independent of counsel.[15] *See Radcliffe*, 715 F.3d at 1167 (class counsel's "fiduciary duty" breached by not "reporting potential conflict issues to the district court."); *Better v. YRC Worldwide Inc.*, 2016 WL 1056972, at *20 (D. Kan. Mar.

[15] The third class representative Dianne Lyons appears to be the mother or another relation of Lewis Lyons. As a familial relation, Mr. Lyons' conflict should also be imputed to Ms. Lyons. *Cf. Eubank v. Pella Corp.*, 753 F.3d 718, 721-22 (7th Cir. 2014) (rejecting class representative who was father-in-law of class counsel); *Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1155 (8th Cir. 1999) ("a close familial bond between a class counsel and a class representative… is a clear danger….").

Nothing is disclosed about the final representative, David Samuels, newly added for the purposes of endorsing the proposed settlement. The operative complaint says nothing about Mr. Samuels or the basis of his claims. Mr. Samuels is not even listed as a party on the docket. 23(a)(4) does not permit perfunctory representation at the last minute to ratify class counsel's preferred settlement. Plaintiffs' have not borne their burden of showing that Mr. Daniels is an adequate representative.

14, 2016) (class counsel inadequate where they permitted the case to proceed with inadequate named representatives).

Second, the proposed settlement indicates inadequate representation. Beyond the subjective question of whether it is class counsel or the named representatives steering the action, both have now signed off on a settlement that objectively confers the vast majority of settlement benefit, and all of the cash, upon class counsel. *See supra* § IV. An "extremely expedited settlement of questionable value accompanied by an enormous legal fee" casts doubt on the adequacy of counsel's representation. *GM Trucks*, 55 F.3d at 801-803; *In re Razorfish, Inc. Sec. Litig.*, 143 F. Supp. 2d 304, 311 (S.D.N.Y. 2001) ("an excessive compensation proposal can cast in doubt the ability of proposed lead counsel to adequately represent the class."). "If, as it appears, [class counsel] was indeed motivated by a desire to grab attorney's fees instead of a desire to secure the best settlement possible for the class, it violated its ethical duty to the class." *Tech. Training Assocs., Inc. v. Buccaneers Ltd. P'ship.*, 874 F.3d 692, 694 (11th Cir. 2017).

Plaintiffs have failed to demonstrate that the class representation is adequate.

VI. If the Court does not deny settlement approval and class certification, it should limit counsel's fee award to 25% of the true constructive common fund.

If the Court overrules Radia's preceding objections, and reaches the question of what counsel award is reasonable under Rule 23(h), Radia asks the Court to reduce the award from the $1.7 million sought. As a fiduciary for the class, the Court maintains a duty of keen oversight of all settlement proceedings, especially fee awards. *GM Trucks*, 55 F.3d 768, 819-20 (requiring "a thorough judicial review of fee applications . . . in all

class action settlements"). Contrary to plaintiffs' belief, the oversight role is not "greatly reduced" because the "fees are paid independent of the award." *Compare* Fee Brief 3, *with GM Trucks*, 55 F.3d at 819-20. "That the defendant in form agrees to pay the fees independently of any money award or injunctive relief provided to the class in the agreement does not detract from the need to carefully scrutinize the fee award." *Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003). Nor is arms-length negotiation a substitute for judicial oversight. "Judicial deference to the results of private negotiations is undoubtedly appropriate for many settlements, but not for class action settlements, including their attorney fee terms." *Rougvie*, 2016 WL 4111320, at *25; *contra* Fee Brief 6. Judicial involvement is singularly important since class members with small individual stakes in the outcome cannot be expected to file objections. *GM Trucks*, 55 F.3d at 812.

A. Percentage-based awards should be based upon actual value conferred, not upon fictitious 100% claims and redemption rate.

To minimize the likelihood of unreasonable fee awards, this Circuit recognizes that the percentage-of-recovery ("PoR") fee methodology is the generally superior method to use. *In re Cendant Corp. Litig.*, 264 F.3d 201, 256 (3d Cir. 2001) (citing *Court Awarded Attorney Fees: Report of the Third Circuit Task Force*, 108 F.R.D. 237, 256 (1985)); *GM Trucks*, 55 F.3d at 821 ("[T]he court should probably use the percentage of recovery rather than the lodestar method as the primary determinant."); *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 734 (3d Cir. 2001)."[P]rivate agreements to structure artificially separate fee and settlement arrangements cannot transform what is in economic reality a common fund situation into a statutory fee shifting case." *GM Trucks*, 55 F.3d at 821.

A fee award needs to be attuned to the result actually achieved for the class, to the money the settlement actually puts in class members' hands. *See, e.g., Baby Prods.*, 708 F.3d at 179. Absent class members will only be protected if class counsel negotiates for a result that maximizes payment to the class, not one that inflates an artificial baseline from which to draw a large fee. In all cases a fee award needs to be attuned to the result actually achieved for the class, to the money the settlement actually puts in class members' hands. *See, e.g.*, *Bluetooth*, 654 F.3d at 942.

But because the only actual settlement relief here is coupon relief (*see* §§ III-IV, *supra*), CAFA dictates how those fees must be awarded. 28 U.S.C §1712(a). Section 1712 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. Thus, under §1712(a), "the portion of any attorney's fee award to class counsel that is attributable to the award of coupons shall be based on the value to class members of the coupons that are redeemed." *Id.* at 1181 (quoting §1712(a)). The 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. *Id.* "[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. The "shall" language is mandatory; a court has no discretion to award fees for the coupon relief in any manner other than a percentage based on the value of those coupons ultimately redeemed. *Id.* at 1181; *accord Rougvie*,

2016 WL 4111320, at *27 (holding that CAFA "mandates" percentage-based fees for coupon relief). "§ 1712(a) *does* exclude the possibility that lodestar fees may be awarded in exchange for coupon relief." *Inkjet*, 716 F.3d at 1185 (emphasis in original; internal quotation omitted).

In their fee motion, plaintiffs seek only the use of a lodestar-crosscheck, and so, by implication, request a base percentage-method. Fee Brief 11-12. To evade the limitations of § 1712(a), plaintiffs may about face and try take refuge in § 1712(b) and (c), subsections which allow for a lodestar-based fee award when the coupons are not used as a predicate for the fee award (*i.e.* when other non-coupon relief justifies a fee award). In *Rougvie*, $10 million of cash relief justified an ancillary lodestar award. 2016 WL 4111320, at *1-*2. But, as detailed above, there is no cash nor injunctive relief to act as a hook for a lodestar-based award.[16]

[16] Again, even if the settlement had replicated WTSO's preexisting advertising changes, that wouldn't be the *meaningful* success necessary to ground a lodestar-based fee. In cases where a settlement provides both injunctive relief and coupon relief, class counsel may not seek lodestar for entire litigation, without eliminating any time attributable to obtaining the coupon relief. A lodestar approach necessitates "adjust[ing] the amount of any fees award to account for the degree of success class counsel attained," because "Plaintiffs 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. Under CAFA, to avoid double-billing, any supplementary lodestar award for non-coupon relief must be decreased to account for the percentage-based coupon 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).

Alternatively, they might advocate for lodestar under the approach of two courts that have departed from *Inkjet*'s and *Rougvie*'s interpretation of § 1712. *Galloway*, 833 F.3d 969; *Southwest*, 799 F.3d 701. Each concluded that § 1712(a) does not mandate use of the percentage-of-recovery method, rather it allows the district court to elect the percentage or lodestar method at its discretion. 799 F.3d at 707-10; 833 F.3d at 974-75. Although there is little dispute that § 1712 is a "poorly worded and confusing statute"[17] *Inkjet*'s reading of the muddle is preferable because it better accounts for the purposes of CAFA. Unlike, for example, civil-rights fee-shifting under 42 U.S.C. § 1988, CAFA is meant to discourage a litigation practice (i.e. coupon settlements), and "shortchange efforts to seek [that] relief." *Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989). Allowing lodestar fee awards in exchange for obtaining coupon relief is backward: it treats CAFA as a fee-shifting statute that aims to encourage the use of coupon relief. Although the Third Circuit has not specifically weighed in on this inter-circuit dispute, it has suggested that the Ninth Circuit's mandatory reading of § 1712 is correct. *See Baby Prods.*, 708 F.3d at 179 n.13.[18] That indication is in line with the Third Circuit's historical practice of refusing to allow the lodestar-crosscheck to "trump" or "displace" the

[17] *Galloway*, 833 F.3d at 974.

[18] Significantly, the approaches taken by the courts in *Southwest* and *Galloway* offer plaintiffs no succor here. In *Southwest*, the district court reduced counsel's unopposed $3 million fee request to $1.649 million, and counsel's appeal of this award was rejected. 799 F.3d at 713-14. *Galloway* is even worse for plaintiffs. There, the district court reduced counsel's unopposed $147,717 request to $17,438. 833 F.3d at 971, 973. Not only did the Eighth Circuit affirm this award, it held that "any award greater than $17,438.45 would be unreasonable in light of class counsel's limited success in obtaining value for the class." *Id.* at 975.

primary reliance on the percentage of common fund method." *In re Rite Aid Corp. Secs. Litig.*, 396 F.3d 294, 307 (3d Cir. 2005) ("trump"); *In re AT&T Corp. Secs. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006) ("displace").

As explained in Section III.B, the credits here qualify as coupons for purposes of CAFA and so attorneys' fees for those coupons should be awarded as a percentage of those redeemed. When class benefit will only be achieved over time, it is appropriate for a court to award delay, defer or stagger fees until the full benefit is known. *Baby Prods.*, 708 F.3d at 179; *Inkjet*, 716 F.3d 1173, 1187 n.19. Consistent with CAFA, this will enable the Court to award fees on the basis of the coupons redeemed and ensure a fee award that is more appropriately proportionate to the actual class benefit. *E.g.*, *Galloway*, 833 F.3d 969 (affirming award of fees made after redemption period); *Rougvie*, 2016 WL 4111320, at *25-*30 (deferring fee award until after redemption period); *Davis*, 2015 WL 7015328 (awarding ⅓ of the value of the coupons actually redeemed); *Dardarian*, 2013 WL 12173924, at *3 ("[T]he Court does not expect it can issue a fee award until the merchandise vouchers have been redeemed...").

Even before 28 U.S.C. § 1712(a) mandated this method of valuing coupons, delaying and staggering fee awards was an accepted best practice. *See Inkjet*, 716 F.3d at 1186 n.19 (citing cases); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 292 F. Supp. 2d 184, 189-90 (D. Me. 2003) (deferring "award of attorney fees until experience shows how many vouchers are exercised and thus how valuable the settlement really is"); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375, 380 (D. Mass. 1997) (staging the fee award based on actual value created for the class); *Bowling v. Pfizer, Inc.*, 922 F. Supp. 1261, 1283-84 (S.D. Ohio 1996) (same), *aff'd* 102 F.3d

777 (6th Cir. 1996); Notes of Advisory Committee on 2003 Amendments to Rule 23(h) ("[I]t may be appropriate to defer some portion of the fee award until actual payouts to class members are known."). Staggering the fee properly incentivizes class counsel to bestow maximum value upon class members.

Inkjet and *Rougvie* confirmed that coupon valuations based on clairvoyance violate §1712(a). This Court should defer the fee request until after the redemption period is complete.

B. If the Court employs the lodestar method, it should not award a multiplier greater than one.

In advocating for a multiplier of 2.1, plaintiffs rely on cases employing the lodestar merely as a crosscheck of a percentage of recovery award. Fee Brief 12.[19] It would be improper to import those crosscheck multipliers in a base lodestar analysis, where "there is a strong presumption that the lodestar is sufficient." *See Perdue v. Kenny A.*, 559 U.S. 542, 546 (2010); *Dungee v. Davison Design & Development Inc.*, 674 Fed. Appx. 153, 157 n.4 (3d Cir. 2017) (crosscheck multipliers are "irrelevant" to base lodestar multipliers); *In re Johnson & Johnson Derivative Litig.*, 2013 WL 6163858, at *10 (D.N.J. Nov. 25 2013) (crosscheck multipliers inapt for base lodestar method).

Kenny A. allocates "the burden of proving that an enhancement is necessary [to] the fee applicant." *Id.* at 553. It holds that a lodestar enhancement for performance is justified only in "rare and exceptional" circumstances where "specific evidence"

[19] *Saini v. BMW of N. Am, LLC*, 2015 WL 2448846 (D.N.J. May 21, 2015), awarded a 1.13 multiplier under base lodestar methodology. The case does not distinguish between base lodestar and lodestar crosscheck contexts, but the cases it cites that awarded multipliers were each lodestar crosschecks. *Id.* at *16.

demonstrates that an unenhanced "lodestar fee would not have been adequate to attract competent counsel." *Id.* at 554. Multipliers should be reserved for the rare and exceptional case; they are certainly misplaced when class counsel may already fares better than their clients. *In re Sears, Roebuck and Co. Front-Loading Washer Prods. Liab. Litig.*, 867 F.3d 791 (7th Cir. 2017) (reversing 1.75 multiplier); *In re Hyundai and Kia Fuel Economy Litig.*, ---F.3d---, 2018 WL 505343, at *15 (9th Cir. Jan. 23, 2018) (questioning 1.55 and 1.22 multipliers "particularly given objectors' concerns that the settlement confers only modest benefits to the class").

Regardless of the method the Court uses, and even where CAFA doesn't apply, a "fundamental focus" in awarding any fees is on the "result *actually* achieved for class members." Committee Notes to Fed. R. Civ. P. 23(h) (emphasis added). "[U]nder the lodestar method, the district court must adjust the amount of any fees award to account for the degree of success class counsel attained." *Inkjet*, 716 F.3d at 1186 n.18 (internal quotation omitted). It is wrong for class counsel to ask the class to settle, yet "appl[y] for fees as if it had won the case outright." *Sobel*, 2011 WL 2559565, at *14.

When class counsel wins only coupons, claimed by few clients and redeemed by even fewer, even a full lodestar award would be unreasonable, let alone an award of 2.1 times lodestar. In *Galloway*, where the class had obtained a benefit of $8,000 in redeemed coupons, and "routine and non-controversial" injunctive relief, the district court reduced class counsel's lodestar by 90% and awarded no multiplier. 833 F.3d at 973. The Eight Circuit affirmed, holding that counsel's limited success meant that any greater award would be unreasonable. *Id.* at 975. In light of these authorities, class counsel's request for a 2.1 multiplier on their full lodestar is excessive.

Conclusion

The Court should reject class certification and deny approval of the proposed settlement. Barring that, it should reduce the fee award.

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Respectfully submitted,

/s/ Joshua Wolson

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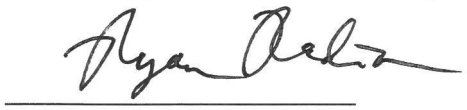
I am the objector and I endorse my attorney's arguments in this objection.



Ryan Radia
Objector

Proof of Service

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

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