No. 16-_____

IN THE

Supreme Court of the United States

JOSHUA BLACKMAN,

Petitioner,

v.

AMBER GASCHO, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Sixth Circuit Court of Appeals affirmed a district court's approval of a class-action settlement whose value was calculated based on the value of payments to over 600,000 potential claimants, even though only 50,000 claims would *actually* be paid. So-called "claims-made" settlements are deliberately structured in this fashion because over ninety percent of the claimants will never make the claim. As a result, class counsel aggrandized for themselves *sixty percent* of the total cash recovery created by this settlement. Judge Posner has explained that this sort of windfall, calculated based on funds that would never be paid out to the class members, was premised on a "fiction." The panel, over a dissent from Judge Clay, expressly disagreed with the Seventh Circuit, further splintering a deep circuit split.

The questions presented are:

1. Whether it is permissible to approve a "claims-made" settlement by calculating its value based on the value of payments to *all* potential claimants, rather than *only* payments to actual claimants, under Federal Rule of Civil Procedure 23(e)(2).

2. Whether it is permissible to approve a settlement that intentionally provides a disproportionate allocation of its pecuniary benefit to class counsel, under Federal Rule of Civil Procedure 23(e)(2).

PARTIES TO THE PROCEEDING

Petitioner Joshua Blackman was an objector in the district court proceedings and appellant in the court of appeals proceedings.

Respondents Amber Gascho, Ashley Buckemeyer, Michael Hogan, Edward Lundberg, Terry Troutman, Anthony Meyer, Rita Rose, Julia Cay, Albert Tartaglia, Michael Bell, Matt Volkerding, and Patrick Cary were named plaintiffs in the district court proceedings and appellees in the court of appeals proceedings.

Respondent Global Fitness Holdings, LLC, was the defendant in the district court proceedings and appellee in the court of appeals proceedings.

Respondents Robert J. Zik, April Zik, and James Michael Hearon were objectors in the district court proceedings and appellants in the court of appeals proceedings.

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INTRODUCTION

This case presents an ideal vehicle to address a deep circuit split between the Sixth, Seventh, and Ninth Circuits that implicates decisions in tension from the Second, Third, and Eleventh Circuits. The decision below concerns an endemic affront to class action fairness: class counsel artificially inflating their fees by asking courts to account for hypothetical claims that they know the defendant will never pay.

With "claims-made" consumer class action settlements, a defendant will pay only the class members who successfully jump through the hoops of correctly filing claims, while strategically obtaining a release of claims from the entire class. Fisher, *Banner Ads Are A Joke In The Real World, But Not In Class-Action Land*, FORBES (Sep. 15, 2016). In this case, for example, postcards were mailed to nearly all of the 601,494 class members. App. 8a. Had every class member filed a claim, the total *available benefit* would have been $15.5 million. App. 11a. However, this figure is completely illusory. Counsel knew the response rates from these direct mailings "rarely exceed seven percent," *Sullivan v. DB Investments*, 667 F.3d 273, 329 n.60 (3d Cir. 2011) (en banc), and that this approach was designed to ensure that over ninety percent of the class receives nothing. App. 58a. Indeed, the claims administrator testified below that out of 601,494 mailed postcards, "55,600 claims were made in total, and 49,808 claims were approved." App. 9a. As a result, the *actual benefit* the defendant would pay to the class was only

$1.6 million, roughly ten percent of the available benefit. *Id.*

Yet, the district court decided to "split the difference" and selected the "midpoint" between the actual and available benefits, totaling $8.5 million. App. 11a. The judgment was far from Solomonic, as it bisected a baby that did not exist. As a result, class counsel received $2.4 million, while the class received only $1.6 million. According to Judge Posner, such a payout of sixty percent of the actual benefit to class counsel is premised on a "fiction," and should be restricted to at most one third or one half the money actually going to the class. *Pearson v. NBTY, Inc.*, 772 F.3d 778, 782 (7th Cir. 2014) (Posner, J.). The grossly skewed windfall in this case reflects a disquieting trend where courts approve settlements that provide a disproportionate allocation of its pecuniary benefit to class counsel.

Class actions play a vital role in the judicial system. Often, they are the only way plaintiffs can be compensated and defendants held to account for serious misdeeds that widely distribute their harms. Moreover, as with many cases, some class actions need to be settled, sparing both sides the costs and uncertainties of litigation. But as this Court has recognized, class-action *settlements* create special problems for our adversary system because, in that non-adversary context, class counsel will not always have all of their clients' best interests at heart. *See, e.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 852 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619-20 (1997).

Class counsel and defendants are faced with an inescapable dilemma: they both have an incentive to bargain effectively over the *size* of the settlement, but critically lack similar incentives to decide how to divvy it up. Specifically, once a settlement amount is reached, defendants likely don't care how much of the fund is allocated to counsel's own fees. The defendant cares only about its bottom line, and will take any deal that drives the total payout down. Indeed, a defendant will gladly allocate more towards counsel's fees to avoid further costly litigation.

But class counsel have a perverse incentive to seek the largest possible portion for themselves. Tragically, attorneys often negotiate for bargains that are far worse for the class, so long as their share is sufficiently increased. Everyone present at the bargaining table wins by favoring fees over class recovery; everyone, except for the absent class members. Judge Posner recently highlighted the unfairness of this preordained Potemkin settlement: "From the selfish standpoint of class counsel and the defendant, . . . the optimal settlement is one modest in overall amount but heavily tilted toward attorneys' fees." *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014). Such tacit collusion, readily obtainable even through arm's length bargaining, is hugely problematic because our adversary system – and the valuable role class actions play within it – both depend upon *unconflicted* counsel's zealous advocacy for their clients. This duty is especially critical where (as here) those clients do not even get to personally choose their own counsel.

Rule 23(e)'s mandate of class-action fairness requires courts to determine the reasonableness of settlements to absent class members before approval. But those decisions must constitute more than simple "appraisals of the chancellor's foot kind . . . dependent upon the court's gestalt judgment or overarching impression." *Amchem*, 521 U.S. at 621. Instead, the vitality of class-action suits is contingent on *how* courts scrutinize such settlements. Courts must determine, with rigor, whether the incentives of class counsel align with those of the vulnerable, absent class members whose claims they purport to settle away.

According to the majority opinion below, it was acceptable for the district court to assume that the $0 paid to over 90% of the class was "worth" $7 million (50% of what would have been paid if those class members had actually been paid), even though the parties knew that the defendant was at no risk of ever paying that money. App. 40a. The Sixth Circuit also refused to criticize the use of so-called "clear-sailing" provisions and "kicker" clauses, again deepening the split with *Pearson* and other decisions that reject the use of these self-dealing "gimmicks." App. 69a-72a; *Pearson*, 772 F.3d at 786.

There is a clear conflict among the Courts of Appeals on whether a court can approve a settlement where such a disproportionate share of the overall relief flows to class counsel. *Compare, e.g.*, *Pearson*, 772 F.3d at 787; *Allen v. Bedolla*, 787 F.3d 1218, 1224 n.4 (9th Cir. 2015); *and In re Baby Prods. Litig.*, 708 F.3d 163, 169-70 (3d Cir. 2013) *with* App. 2a *and Poertner v.*

Gillette Co., 618 Fed. Appx. 624, 626 (11th Cir. 2015) ($5,680,000 to the attorneys, $345,000 to the class). Most notably, the Seventh Circuit has repeatedly held that the attorney award must be a fraction of the amount *actually realized* by the class, a test this settlement would flunk. *See Pearson*, 772 F.3d at 781; *Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014). This divide is in need of immediate clarification because, as this example vividly shows, the "class action math" in some circuits now allows the "fee collected by the plaintiffs' attorneys [to] outsize the benefit paid to consumers, an outcome that is increasingly more common. . . ." Gershman, *Value of Beck's Beer Settlement a Case Study in Class Action Math*, WALL ST. J. (Oct. 22, 2015) (noting circuit split); *see also* Parloff, *Should Plaintiffs Lawyers Get 94% of A Class Action Settlement?*, FORTUNE (Dec. 15, 2015) (same); 5 William B. Rubenstein, NEWBERG ON CLASS ACTIONS § 15.70 (5th ed. 2014) (same).

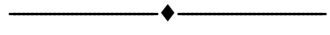
This case, moreover, is a strong vehicle for resolution of this conflict. The Sixth Circuit majority opinion, over a dissent from Judge Clay, expressly rejected the Seventh Circuit's test. App. 34a. Because nationwide class-action settlements are incomparably easy to forum shop, the predictable result of the Sixth Circuit's far-more-permissive standard and its perverse incentives for class counsel is that more and more dubious settlements will flow into its courts at the expense of consumers.

If class actions are to serve their real purpose, the Court needs to intercede. Settlement proponents will

inevitably complain that these cases are factbound because every settlement is different, but the disagreement is real: Different courts use different *rules* that either succeed or fail in aligning class counsel's incentives with those of their clients. Permitting results like this one simply ensures that class counsel, when they plan the venue and structure of their cases, can head for favorable fora and avoid any real incentive to maximize recovery for the people class actions are meant to protect. Because of this unresolved split, the *same* suit filed in Illinois, rather than in Ohio, would have yielded a significantly smaller payout for counsel and greater payout for the class.

While settlement proponents frequently raise the specter of a zero class recovery if settlements like these are rejected, all judicial experience is to the contrary: Rejecting a settlement like this one most frequently results in a *better* settlement rather than no settlement at all. *Cf.* Frankel, *By restricting charity deals, appeals courts improve class actions*, REUTERS (Jan. 12, 2015); Fisher, *Banner Ads*, *supra*. To the extent that class actions are really about the class members whose claims are released, they will plainly benefit from more searching judicial scrutiny at the fairness hearing that ensures that settlements are judged on fact, rather than fiction.

This court should grant certiorari to resolve this circuit split, and ensure a consistent application of Federal Rule of Civil Procedure 23(e)(2).



PETITION FOR CERTIORARI

Petitioner Joshua Blackman respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's opinion (App. 2a) is available at 822 F.3d 269. The opinion of the Southern District of Ohio (App. 76a) and the report and recommendation of its magistrate (App. 91a) are unpublished.

JURISDICTION

The judgment below was entered June 20, 2016. This Court has jurisdiction under 28 U.S.C. §1254(1).

PROVISIONS INVOLVED

Rule 23(e)(2) provides, with respect to a proposed settlement, that:

> If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

STATEMENT OF THE CASE

I. The Recognized Incentive Problems Of Class-Action Settlements

"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." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013).

The potential for conflict in class-action settlements is structural and acute because every dollar reserved to the class is a dollar defendants cannot pay class counsel. Defendants care only about minimizing the total payment amount and are indifferent to its allocation, and so a court must ensure that counsel is not self-dealing at the class's expense. *Supra* pp. 2-3; *Redman*, 768 F.3d at 629; *Pearson*, 772 F.3d at 786-87; *Eubank*, 753 F.3d at 720; *Pampers*, 724 F.3d at 718; *In re Bluetooth Headset Litig.*, 654 F.3d 935, 948-49 (9th Cir. 2011). The problem with such settlements, however, is that class counsel have perfected various tools that obscure how funds are taken away from the class's recovery. Such deals can very subtly trade benefits to

defendants in exchange for a greater share of attorneys' fees. These tools primarily function by inflating the settlement's apparent relief. Absent rigorous doctrinal tests designed to weed out such settlements, courts have affirmed grossly skewed fee requests and disproportionate settlements.

To illustrate this anomalous result, imagine a lawyer submitted for approval a straightforward cash settlement paying him $2.4 million and paying 600,000 class members a total of $1.6 million – as this settlement ultimately did. It is hard to believe any appellate court would approve that deal. *See, e.g.*, *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012) (counsel receiving even 38.9% of settlement benefit is "clearly excessive"); *Redman*, 768 F.3d at 630 (rejecting settlement where 55% of the defendant's payout went to attorney's fees). Accordingly, to have any chance of surviving review, the deal must be structured to obfuscate the likelihood of this result. This is accomplished by larding the analysis with hypothetical class recoveries that ultimately have no value to the class, but are cheap or even costless for defendants to provide and so easy to include in the deal.

Chief among the means to this end is a "claims-made" structure where defendants agree to make a large amount of money *available*, in theory at least, but only pay out on the claims that class members actually file. In consumer-fraud actions, for example, it can be difficult to identify exactly who bought the product and so should share in the class recovery. Incentivizing counsel to actually seek these absent members

out can help ameliorate the problem. (Of course, in this case, even though all class members were identifiable from the defendant's records, the settling parties *still* resorted to the frequently invoked claims-made alternative to direct payments.) With such settlements, the defendant agrees to make available an amount – often a small amount – to all of the many people who might make a no-proof claim (say, $5 each for 10 million possible claimants), and to simply publish this fact in a newspaper or the like.

The predictable result is that most class members go totally uncompensated because they don't file a claim. *See, e.g.*, *Pearson*, 772 F.3d at 782 (citing authorities); *In re Carrier iQ, Inc., Consumer Privacy Litig.*, No. 12-md-02330, 2016 U.S. Dist. LEXIS 114235, at *28 (N.D. Cal. Aug. 25, 2016) (citing an analysis by well-respected claims administrator that found a median claims rate of .023% in publication notice cases); Shepherd, *An Empirical Study of No-Injury Class Actions* (2016); Frankel, *A Smoking Gun in Debate over Consumer Class Actions?*, REUTERS (May 9, 2014) (noting that median claims rate in consumer cases with publication notice is "1 claim per 4,350 class members"); Fisher, *Odds of a Payoff in Consumer Class Action? Less Than a Straight Flush*, FORBES (May 8, 2014). And when we say "predictable," we mean that third-party services offer to forecast the cost of a class-action settlement with actuarial certainty and assume 100% of the risk should payouts be higher. Frank, *Settlement Insurance Shows Need for Court Skepticism in Class*

Actions, OpenMarket blog (Aug. 31, 2016). "Among defense counsel, low participation rates under claims-made class action settlements are both common knowledge and a selling point: class members recover – and a defendant pays – much less when class members opt in than when a defendant disburses funds directly to class members." App. 63a-64a. But under this structure, counsel can boast they made $50 million "available" and thereby seek to justify a multi-million dollar fee award, even though class members will receive less than 1% of that amount.

Some circuits (like the Sixth and the Eleventh) have become favorite destinations of class counsel because they endorse such bloated calculations based on *available* funds. Other circuits (like the Third, the Seventh, and the Ninth) reject this inflationary approach, focusing instead on the amount the class *actually* recovers. *See, e.g.*, Wright & Miller, 7B Fed. Prac. & Proc. §1803.1 & nn.43-44 (3d ed. 2015) (collecting cases on both sides of this split "in settlements in which it is agreed that unclaimed funds will revert to defendant").

Exacerbating this problem is that settling parties also use a variety of legal "gimmicks" to limit scrutiny of class-action settlements. Two important examples are "clear-sailing" clauses (where the defendant agrees not to challenge the fee) and "kicker" clauses (where any reduction in the fee award reverts to defendants rather than the class). Working in tandem, these provisions limit the incentive and ability of *any* party to complain about class counsel's fees. They can also nudge district courts away from reducing abusive

awards, on the theory that – as between class counsel and the defendants – it is at least better for counsel to get the money.

Buried below the surface, however, is that such an arrangement is neither organic nor necessary. If defendants are willing to pay the extra money to counsel, there is no doubt a way to structure the settlement to provide it to class members instead. Accordingly, while several courts treat these selfish clauses as red flags even when negotiated at arm's length, *see, e.g.*, *Redman*, 768 F.3d at 628, 637; *Pearson*, 772 F.3d at 786-87; *Bluetooth*, 654 F.3d at 947-49, others let them slide. App. 46a-47a, 69a-72a. Such deference frequently inhibits challenges to abusive settlements from succeeding or being brought at all.

All class-action settlements create problems for our adversary system: a district court faces parties who (1) want to settle, (2) have almost all the financial interest, (3) have all the information, and (4) are allied to abandon the litigation, and prevent third-party objectors from prolonging it. It is easy enough to reflexively view objectors as only flies in the ointment, and accept without any skepticism the range of possible deals presented by the active parties. That deference makes the "gimmicks" discussed above all the more dangerous. Simply put, the inflation of settlement value for the sake of a fee award is – for structural reasons – already too easy because of the lack of adversary presentation. *See, e.g.*, *Eubank*, 753 F.3d at 719-20. And yet, settling parties have developed a variety of mechanisms to make it easier still.

This settlement was a perfect storm of class-action abuse. It combined all three of these tools at once to ensure that class counsel received the majority of the litigation value of the settlement, at the expense of the clients to whom they owed a fiduciary duty. As explained below, it included: (1) a claims-made process that valued the settlement at $15.5 million (App. 11a) but realized barely a tenth of that value; (2) a clear-sailing provision, guaranteeing that the fee would not be challenged; and (3) a kicker clause, ensuring class members had no chance to share in a reduction of the outsized fee request even if they succeeded in persuading a court to reduce it. App. 67a-72a. Rather than scrutinize these red flags, the Sixth Circuit's highly permissive precedent, which is out of sync with several other circuits, allowed this deal to sail through. These factors make this petition an ideal vehicle for review.

II. Factual And Procedural Background

Five sets of plaintiffs filed competing class actions against Global Fitness Holdings, LLC, formerly doing business as Urban Active, over gym membership contract charges, with some seeking punitive damages. App. 91a-96a. One class action attempted a global settlement in Kentucky state court in 2012; two sets of plaintiffs in competing class actions successfully objected, with the state court rejecting the settlement because only 0.6% of the class would receive relief. App. 6a.

Respondent Amber Gascho negotiated her own settlement in her federal class action in 2013. Though her original complaint was on behalf of a class of Ohio consumers, the settlement was a global settlement covering all Urban Active customers who signed contracts for gym membership or personal training during a six-year class period. App. 5a-7a, 91a-92a.

Under the settlement, class members could file claims for between $5 and $75, depending on their membership in subclasses. App. 7a-8a. If total claims amounted to less than $1.3 million, claimants would share in a *pro rata* increase to the $1.3 million floor. *Ibid.*

The settlement permitted class counsel to apply for $2.39 million in attorney's fees and costs, and contained a "clear-sailing" clause: an agreement from Global not to oppose any application for that sum or less. The agreement also included a "kicker" clause: an agreement that in the event the court awarded less than $2.39 million for costs and fees, Global Fitness, rather than the class, would receive the difference. App. 6a.

The settlement provided for individualized notice by postcard and e-mail; over 90 percent of the postcard notices were successfully delivered to an address associated with a class member. App. 8a. Class members made about 55,600 claims; after about ten percent of the claims were rejected, the remaining 49,808 class members would be entitled to $1,593,240 in payments, an average of about $32 a class member. App. 9a.

Petitioner and class member Joshua Blackman, now a law professor, signed up for a gym membership at the Urban Active gym in Louisville, Kentucky, while clerking for the U.S. Court of Appeals for the Sixth Circuit. *Gascho*, No. 11-cv-436, Doc. 122-1, ¶¶ 3-6 (S.D. Ohio Dec. 27, 2013). Blackman objected, as did three class members who had brought a competing class action in Kentucky state court. App. 9a-10a. (The defendant initially argued Blackman was not a member of the class, but conceded at the fairness hearing that he was a class member; the magistrate overruled a motion to strike Blackman's objection, and respondents did not object to that decision or pursue it on appeal. App. 106a-107a, 79a-80a.) Blackman was represented by the non-profit Center for Class Action Fairness (now part of the Competitive Enterprise Institute), which has successfully challenged similar settlements in other circuits that likewise provided class counsel substantially more compensation than their clients. *See, e.g.*, *Pearson*, 772 F.3d at 787; Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES (Aug. 13, 2013) (calling Blackman's attorney "[t]he leading critic of abusive class-action settlements"). The Center's objections have improved recoveries to class members by tens of millions of dollars. *See, e.g.*, *McDonough v. Toys "R" Us, Inc.*, 80 F. Supp. 3d 626 (E.D. Pa. 2015); *In re Citigroup Sec. Litig.*, 965 F. Supp. 2d 369 (S.D.N.Y. 2013). The Center's participation in these cases is often essential because, absent its issue-driven advocacy, there is frequently no one with the adequate incentives or resources to fully contest potential abuses in cases aggregating low-value claims. *See infra* pp. 30-31.

Blackman did not in any way protest defendants' evident willingness to settle the case for (what he correctly anticipated) would be under $4 million, but instead objected that the settlement's allocation was structured to primarily benefit counsel at the class's expense. Given the "claims-made" structure, the parties' self-serving valuation of the settlement assuming a 100% claims rate was obviously fictional – there was no prospect that every class member would file a claim. Moreover, the settlement provision for a $1.3 million floor suggested that the parties anticipated less than a 10% payout. Instead, the fee award was almost certain to be a majority of the actual recovery, making the settlement *per se* unfair. Blackman contended that, given direct notice was made in this case, it would have been possible to directly distribute the settlement fund *pro rata* to the entire class. App. 84a, 152a. Blackman further objected that the clear-sailing and kicker clauses were a breach of class counsel's fiduciary duty. App. 83a.

In response, the parties argued that the amount class members actually receive is irrelevant to the valuation of the settlement pie as a whole, and that the settlement was "worth" $15.5 million, the total payout if all of the class members filed claims. App. 11a, 26a. The settlement's claims administrator testified that claims rates in claims-made settlements are generally less than 12%, so there was nothing unacceptable about the 8.2% claims rate in this case. App. 12a, 58a. This admission not only illustrates that this case's

claims rate was par for the course, but also demonstrates that the parties *knew* this low rate would be realized when they represented to the court that the settlement was worth $15.5 million. Put differently, the settling parties essentially conceded that an honest, *ex ante* assessment of the likely value of the settlement to class members was substantially less than the $2.4 million in attorneys' fees they negotiated for class counsel, and *an order of magnitude less* than what they told the court.

Nevertheless, the magistrate still recommended approving the settlement and full fee request without any modification. App. 172a-173a. The magistrate, without any appellate precedent to support his methodology, split the difference between class counsel's $15.5 million valuation and Blackman's position that only the actual $1.6 million payout counted. The magistrate held that the settlement should be valued as the midpoint between the two, at $8,546,835. App. 11a. This effectively values the unclaimed money as "worth" 50 cents on the dollar. Only by using the fictional $8.5 million valuation could the $2.4 million attorney fee award be considered a "reasonable ratio of 21%"; the magistrate also justified the award as less than lodestar. App. 11a-12a. But under the magistrate's methodology, the settlement would still be "worth" three times what the attorneys received, even if the class never received a penny. The magistrate held that the reasonableness of the settlement and fee made objections to the clear-sailing and kicker clauses irrelevant to settlement fairness. *Id*. Blackman timely

objected to the report and recommendation, but the district court adopted the magistrate's conclusions; Blackman timely appealed to the Sixth Circuit. App. 76a, 89a, 11a.

III. The Divided Decision Below

The Sixth Circuit, over a dissent from Judge Clay, affirmed the district court's judgment, and expressly rejected Judge Posner's decision to the contrary. App. 33a-34a. Most importantly, the court found that there was no problem with structuring the settlement to provide so little to class members because "devaluing the available relief if it goes unclaimed could in many cases unduly penalize class counsel." App. 31a. The panel, however, did not discuss the perverse incentives created by such a permissive rule that Judge Posner warned about. The majority's reasoning was based on the deterrent value of consumer class actions, without any mention of class counsel's fiduciary duty to class members.

In particular, the majority believed it was bound by this Court's decision in *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980). App. 33a. In the context of a contested fee between a plaintiff and a defendant, *Boeing* affirmed a district court's discretion to consider the potential awards available rather than the actual claims made. Judge Posner's decision in *Pearson* found *Boeing* inapposite for a claims-made settlement where there was no actual common fund and class counsel had negotiated its own fee.

The court below acknowledged that its decision conflicted with the *Pearson* decision, but held that Judge Posner's distinction was "unconvincing." App. 34a. *Strong v. BellSouth Telecomm., Inc.*, 137 F.3d 844, 851-52 (5th Cir. 1998), like *Pearson*, refused to apply *Boeing* in a case without a common fund. But the majority reconciled its decision with *Strong* by holding that it simply permitted a district court to exercise discretion to consider the actual results of the settlement where class counsel sought more than its lodestar. App. 32a-33a.

The majority rejected Blackman's argument that the way to evaluate "the validity of a claims process is," as Judge Posner reasoned, "to rely solely on the amount the claims process will *actually* pay to the class," again ignoring the incentives that that would create, because a district court could exercise discretion to prevent gaming the system. App. 38a-40a.

The court also dismissed Blackman's concern that the combination of the clear-sailing and kicker unfairly insulates the fee request from scrutiny by depriving objectors appellate standing to challenge a fee request. This concern was heightened because of the district court's finding that the relief to the class was "substantial" and the fee request was appropriate. App. 44a-47a.

Judge Clay dissented. App. 54a-75a.

> Because the class recovery was dwarfed by the fee award class counsel ultimately received – a fee award negotiated behind closed

> doors – the settlement and fee award represent an unconscionable elevation of the interests of class counsel over those of the class that should be rejected.

App. 57a.

> The problem is not, as the majority seems to think, with settlement procedures that are intented to discourage claims. Even without overt efforts on the part of defense counsel to thwart claims, opt-in claims procedures naturally depress response rates to single-digit percentages for the very predictable reason that class members simply are not sufficiently incentivized to bother to opt in.

App. 64a. The dissent would have applied *Pearson* as a "simple, common-sense rule," rather than one "premised on the faulty and fictional premise that counsel should be given credit for compensation that the class did not receive – in other words, for millions of dollars that would never leave Defendant's coffers." App. 63a-69a. Additionally, Judge Clay agreed with Judge Posner that *Boeing* did not preclude *Pearson's* reality check, especially given the Advisory Committee notes to the 2003 amendments to Rule 23, which created Rule 23(h). App. 66a. The dissent further noted that the majority opinion failed to consider at all class counsel's fiduciary duty to their clients, in light of the fact that the attorneys deliberately structured the settlement to provide themselves preferential treatment. App. 68a-72a. The benefits of class actions emphasized by the majority were not enough to override this duty:

"Class counsel are fiduciaries of the class, not of the public at large, and should not be able to justify a poor result for their clients because of the nobility of their mission." App. 74a.

The Sixth Circuit denied Blackman's and other appellants' petition for rehearing and rehearing *en banc* on June 20, 2016. App. 175a. Judge Clay would have granted rehearing for the reasons stated in his dissent. App. 176a.

REASONS FOR GRANTING THE PETITION

The decision below presents an ideal and timely opportunity for the Court to resolve a deep circuit split concerning the appropriate standard of review for class-action settlements in light of *Boeing*'s rule counting unclaimed benefits. The conflict is unmistakable: The Seventh Circuit has repeatedly held that the proper settlement valuation to calculate an attorney fee request is the amount class members *actually* recover, *Pearson*, 772 F.3d at 781; *Redman*, 768 F.3d at 630; the Sixth Circuit here rejected that exact rule for a "case by case" evaluation that gives district courts unfettered discretion to approve settlements that are deliberately structured to primarily benefit the attorneys. App. 31a, 35a. The Fifth Circuit, like the Seventh, would have rejected the application of *Boeing* to evaluate the fairness of a settlement that does not actually create a common fund. *Strong*; App. 63a-64a.

This problem is recurring and amenable to forum shopping, and further dubious settlements will continue to find their way to the Sixth Circuit for approval unless this Court intervenes. This case's clean and undisputed facts make it a perfect opportunity to do so, and the Court should take it.

I. The Decision Below Squarely Conflicts With How The Seventh Circuit Evaluates The Attorney Share Of Class-Action Awards.

The most fundamental error in the Sixth Circuit's decision is that it permits class counsel to make itself the primary monetary beneficiary of a class-action settlement. On this point, the Sixth Circuit is now in admitted conflict with decisions of the Seventh Circuit. That conflict is twofold: First, the Seventh Circuit values the "settlement pie" in a different manner for purposes of assessing the size of the attorneys' slice. Second, the conflict is outcome-determinative in the sense that this settlement would never have been approved in the Seventh Circuit.

First, as to the legal rule, the Seventh Circuit has now repeatedly held that 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 (alteration in original) (quoting *Redman*, 768 F.3d at 630). This comparison "gives class counsel an incentive to design the claims process in such a way as will maximize the settlement benefits actually received by the

class, rather than to connive with the defendant in formulating claims-filing procedures that discourage filing and so reduce the benefit to the class." *Id*. Conversely, "[w]hen the parties to a class action expect that the reasonableness of the attorneys' fees allowed to class counsel will be judged against the potential rather than actual or at least reasonably foreseeable benefits to the class, class counsel lack any incentive to push back against the defendant's creating a burdensome claims process in order to minimize the number of claims." *Id.* at 783.

What the Seventh Circuit recognizes, and the Sixth Circuit ignores, is that the legal rule must be structured to align class counsel's interests with their clients' to the greatest extent possible. Evaluating the fee award based on the money that class members *actually receive* puts those incentives in exactly the right place – class counsel will work very hard to get the settlement into their clients' hands, and derive no benefit from a hypothetical valuation that does not actually come to pass. By contrast, when the settlement pie can be filled with "potential rather than actual" benefits, class counsel retains all its problematic incentives with respect to seeking actual payouts to the class. *See id.* at 783, 787 (quoting *Eubank*, 753 F.3d at 720). This is true even under the midpoint "compromise" in this case, because giving a fictional value to half of the potential claims will swamp the actual value of a claims-made settlement where the parties knew that less than 10% of the class would make a claim.

The Ninth Circuit's stance on evaluating settlement divisions approaches the Seventh Circuit's. In *Allen v. Bedolla*, the court evaluated a settlement that provided for a fee award of $1,125,000 with clear sailing and a kicker, though an 8% claims rate meant that the class would receive less than $374,000. 787 F.3d 1218, 1224 n.4 (9th Cir. 2015). The Ninth Circuit held that even though the $1.125 million was only 25% of the gross fund established by the settlement, "when examined in terms of 'economic reality,' the award exceeds the maximum possible amount of class recovery by a factor of three." *Id*. Because the district court had not addressed the problematic disproportion, the Ninth Circuit vacated the settlement approval.

The Third Circuit adopts a position in between the Sixth and the Seventh. In *Baby Products*, the court considered a settlement that awarded $14 million to the attorneys, but less than $3 million of a $35.5 million common fund to class members, with much of the remainder to be distributed to *cy pres* recipients. 708 F.3d at 169-70. Without adopting the Seventh Circuit's bright-line rule, *Baby Products* held that class counsel must demonstrate that they sufficiently prioritized direct recovery lest they become the "foremost beneficiaries of the settlement." *Id.* at 179. Though the Sixth Circuit purported to follow *Baby Products*, App. 30a, the admission of the parties that they chose a structure that would pay only a tiny fraction of the class and make class counsel the "foremost beneficiaries of the settlement" is the opposite of prioritizing direct recovery.

The claim that potential class benefits should be treated as identical to – or even be averaged with – actual class receipts leads to absurd results. Imagine two possible settlements of the fictional class action *Coyote v. Acme Products*:

***Acme* Settlement One**	***Acme* Settlement Two**
Acme Products hand-delivers a $6 check to each of one million class members who purchased their mail-order rocket roller skates. Acme pays $6 million to the class and $2 million to class counsel.	A simple claim form is provided for one million class members. Class members with valid claim forms receive $15. As the majority below acknowledges is typical and expected (App. 26a-27a), only 8% of the class submits claim forms, and Acme pays them a total of $1,200,000, and pays $3,000,000 to class counsel.

The defendant prefers Settlement Two; it pays much less. Class counsel prefers Settlement Two; it receives much more. However, Settlement Two leaves 92% of the class worse off. Further, non-claiming class members will, on average, be less educated and less wealthy than claiming class members, raising wealth redistribution and inequality issues. Ben-Shahar, *Arbitration and Access to Justice: Economic Analysis* (2013); Frank, *Class Actions, Arbitration, and Consumer Rights*, 16 LEGAL POLICY REPORT 1, 6 (2013).

Remarkably, under the Sixth Circuit's precedent, a district court can decide that Settlement Two is preferable because it is "worth" $8.1 million to the class (the midpoint between $1.2 million actual claims and $15 million potential claims), and is a "better" settlement than Settlement One, which "only" pays out $6 million. Given the panel's decision, why would class counsel even bother attempting to win more for the class? The perverse incentives are obvious, as Judge Posner recognized, 772 F.3d at 781, but the majority disregards them.

The Circuits have also split concerning the application of *Boeing*. That case arose from a dispute between class counsel and a defendant over the amount of attorneys' fees to be awarded in a litigated judgment. 444 U.S. at 475-77. The Seventh Circuit recognized that *Boeing* is not applicable where "[t]here is no [common] fund . . . and no litigated judgment, and there was no reasonable expectation in advance of the deadline for filing claims that more members of the class would submit claims than did." *Pearson*, 772 F.3d at 782. Indeed, *Boeing* expressly left unresolved the question of how to address attorney's fees where the class's recovery is not "fixed." 444 U.S. at 480 n.5. The Sixth Circuit counters that Judge Posner's distinction was "unconvincing." App. 34a. However, the majority also failed to account for the fact that *Boeing* did not involve a claims-made procedure combined with a self-serving clear-sailing agreement and kicker provisions.

The Sixth Circuit claims that the Second and Eleventh Circuits require a strict rule of counting only potential recovery. App. 28a-29a. But both decisions are decisions about contested *attorney's fee awards*, and not decisions about settlement fairness where class members are complaining about attorneys' self-dealing. *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423 (2d Cir. 2007); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291 (11th Cir. 1999). In *Masters*, the settlement permitted additional distribution of unclaimed money to the class, and the unclaimed moneys eventually went to *cy pres* at the judge's discretion. 473 F.3d at 435. *Masters* did not involve a challenge to Rule 23(e) settlement fairness with respect to the attorney's fee allocation, but rather addressed plaintiffs' challenge to the district court's fee order refusing their full fee request. *Id.* at 437. Perhaps, as *Pearson* holds, 772 F.3d at 784, *cy pres* should not be counted as a settlement benefit; but a defendant's payment of part of an actual common fund to charity is absolutely distinguishable from the scenario we have here where the unclaimed money returns to the defendant's pocket. *Masters* conflicts with *Pearson* in that *Pearson* does not consider *cy pres* a class benefit, a question not at issue here. However, there is no conflict with *Pearson* on whether to apply *Boeing* to the issue of Rule 23(e) allocational fairness.

The Sixth Circuit majority thought it significant that class counsel received less than their lodestar, rather than seeking more than lodestar, but this fact would not matter in other circuits. Counsel in *Baby*

Products received only a fraction of their lodestar. 708 F.3d at 180 n.14 (lodestar multiplier of 0.37 not "outcome determinative"); *see also In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1177 (9th Cir. 2013) (reversing settlement approval with below-lodestar fee); *id.* at 1182 (lodestar is a necessary, but not a sufficient condition for fees, because class counsel doesn't "get paid simply for working; they get paid for obtaining results"); *Bluetooth*, 654 F.3d 935, 943 (reversing settlement approval notwithstanding district court's finding that the lodestar "substantially exceed[ed]" the fee requested and awarded).

The analysis above demonstrates that the Sixth Circuit has created real conflicts in terms of the legal standards that other circuits would use to evaluate the settlement here. But perhaps the best proof of this divide is that the Seventh Circuit would have rejected *this exact settlement* because it chose to distribute money through a claims-made process that rewarded class counsel with the majority of the proceeds. 772 F.3d at 781; App. 33a, 63a-69a. Consideration of the unclaimed money as a benefit and approval of the "selfish" settlement would be reversible error in the Seventh Circuit. That is the definition of a square circuit split.

Finally, the suitability of this vehicle is highlighted by a fact pattern that was not present in other recently rejected settlements. Remarkably, proponents of the settlement simultaneously estimated the deal's value at $15.5 million, and submitted *their own* testimony indicating that due to a predictably low-response rate (5% to 8%), the class would realize substantially

less than $2 million. This was far less than class counsel's requested fee. It is doubtful that other circuits would permit such a Janus-faced representation. *See, e.g.*, *Baby Prods.*, 708 F.3d at 179 (in evaluating the attorney's relative share of an award, the district court "should begin by determining *with reasonable accuracy* the distribution of funds that *will result* from the claims process") (emphasis added).

II. This Is An Ideal Petition For Review Of A Recurring Question, With A Vehicle That Is Unlikely To Recur.

For at least five reasons, the disagreements discussed above merit immediate resolution in this case.

1. The vast amount of commentary about claims-made settlements and their controversies demonstrates that the issues at stake are important and likely to recur. A leading hornbook has called attention to the split: "until the full Supreme Court resolves this issue, it is likely that this 'percentage of what' problem will continue to face increased attention from the courts and commentators." 5 William B. Rubenstein, NEWBERG ON CLASS ACTIONS § 15.70 (5th ed. 2014). Respected commentators – including both those who tend to support and criticize class actions – have recognized that the issues raised in this case are critical, and are becoming "increasingly more common in class action suits." Gershman (noting circuit split); Fisher, *Banner Ads*, *supra* (noting ability of settling parties to ensure

less than 1% of class makes claim); David Segal, *A Little Walmart Gift Card for You, a Big Payout for Lawyers*, N.Y. TIMES (Jan. 30, 2016) (discussing *Poertner*); Parloff, *supra*; Alison Frankel, *By Restricting Charity Deals, Appeals Courts Improve Class Actions*, REUTERS (Jan. 12, 2015); Daniel Fisher, *Judge Tosses Glucosamine Settlement, Citing* FORBES, FORBES (Nov. 20, 2014); Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* (2013); *cf. also* Greene, *Here's Why Plaintiffs Lawyers Deserve Those Fat Fees*, AM. LAW. (Feb. 9, 2016) (supporting *Poertner*, but calling for Court to resolve circuit split). Much of the dismay centers around the claims counsel make about settlement value – and the awards they ask for as a result – when they *know* that the class will ultimately realize much less than the attorneys themselves.

This commentary raises two points that warrant further review. First, it makes clear that the issue is recurring – coming up in more and more settlements that use the same "class action math." Second, it makes clear that analyses from across the spectrum are beginning to lose faith in the fairness of the class-action mechanism and the benefits it actually provides to absent class members. *Cf. also Lafitte v. Robert Half Int'l, Inc.*, ___ P.3d ___, 2016 Cal. LEXIS 6387 (Cal. Aug. 11, 2016) (Liu, J., concurring) ("Public confidence in the fairness of attorney compensation in class actions is vital to the proper enforcement of substantive law."). Several more years of abuse in several circuits will only further erode the public trust in class actions and

the federal courts. *Cf.* 28 U.S.C. § 1711 *note* § 2(a)(3) (Congress expressing need for federal legislation because of problem where "Class members often receive little or no benefit from class actions" while "counsel are awarded large fees"); U.S. Chamber of Commerce, *et al.*, Letter to Monica Jackson re Notice of Proposed Rulemaking on Arbitration Agreements (Docket ID No. CFPB-2016-0020) at 42 (Aug. 22, 2016) (citing the disproportionate results in *this case* as a justification for limiting consumer access to class actions).

2. Review is especially warranted because large class-action settlements – being both nationwide and non-adversarial – can be easily forum shopped. Nothing stops settling parties from relocating a suit to Ohio for a breezier review. The Sixth Circuit has abdicated its duty to scrutinize class attorneys' fiduciary duties to the class in the speculative interests of "deterrence." *Compare* App. 37a *with* App. 74a.

This forum-shopping effect is not hypothetical. District courts in the Eleventh Circuit, based on *Waters* and *Poertner*, have assumed that *Boeing* makes consideration of actual recovery irrelevant. Unsurprisingly, ever more troubling settlements are finding their way to Alabama, Florida, and Georgia, where courts are rubber-stamping them at an alarming rate. There have been at least *thirteen* similar claims-made settlements approved in Eleventh Circuit courts since 2014 without regard to the proportionality of recovery.[1] The

[1] *See, e.g.*, *Carter v. Forjas Taurus SA*, No. 13-CV-24583-PAS, 2016 U.S. Dist. LEXIS 96054 (S.D. Fla. Jul. 22, 2016) (approving

Sixth Circuit's belief, App. 39a-40a, that district courts will exercise discretion to investigate whether the parties are "gaming the system" is belied by the actual practice of many district courts ignoring the question of whether any class members are recovering anything at all.

Deferring the resolution of this question until still more courts line up on one side or the other would inflict substantial costs on judicial economy and class-action fairness. Forum shopping will make such vehicles unusually rare, as class-action attorneys will avoid Judge Posner's rule at all costs, and instead file in the laxer Sixth or Eleventh Circuits. This gamesmanship will limit the extent to which other circuits will consider these issues at all.

3. Nor is the Court likely to get a vehicle much better than this one. This case is rare in that it contains record evidence regarding the likelihood that claims will actually be made. Class counsel have jealously guarded that data in the past. The split here is also unusually square: The settlement could only be approved by ignoring the test that *Pearson* requires, and the split appellate decision turned on whether

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claims-made settlement and $9 million fee without claim-rate or actual recovery information, citing *Boeing* and *Poertner*); *Montoya v. PNC Bank*, No. 14-CV-20474, 2016 WL 1529902 (S.D. Fla. Apr. 13, 2016) (similar, $4.75m fee); *Marty v. Anheuser-Busch Cos.*, No. 13-cv-23656-JJO, 2015 WL 6391185 (S.D. Fla. Oct. 22, 2015) (similar, $3.6m fee); *Lee v. Ocwen Loan Servicing, LLC*, No. 14-cv-60649-Goodman, 2015 WL 5449813 (S.D. Fla. Sept. 14, 2015) (similar, $10m fee); *see also* Gershman (discussing *Marty* and *Poertner*).

judges agreed with *Pearson*. There are no components of *cy pres* or injunctive relief to confuse the issue, and no claim that class counsel was surprised by the low claims rate. The Court is unlikely to get another opportunity that is as equally stark and well-structured to clarify this difficult area of the law. Petitioner and his co-counsel designed this case from the outset to ensure a clean avenue of review.

4. Review is especially warranted here because these cases *result* from a breakdown in the adversary system, which makes it difficult to count on future vehicles. Neither of the original litigants – who have the overriding stake – will bring a petition like this because both support the settlement. And not only can class counsel work with defendants to find favorable forums, they can also together discourage review with clear-sailing and kicker clauses designed to disincentivize objections. Many claims-made settlements have even lower claims rates because publication-only notice doesn't reach class members in the first place, and even then, the value of making a claim may not be worth the time. Actually appearing in such cases to make an objection – and litigating it all the way to the Supreme Court – is a money-losing proposition that no rational lawyer takes. The identity of the petitioner and his co-counsel, combined with the unambiguous settlement terms, make this vehicle strikingly unique and indeed unprecedented.

Even when class members do come forward with meritorious objections, counsel with millions at stake

can evade scrutiny by paying them to dismiss their appeals, *cf. Safeco v. AIG*, 710 F.3d 754 (7th Cir. 2013), and the incentive to do so only increases as the strength of the vehicle for certiorari improves. Again, in light of the identity of the petitioner and his co-counsel, settlement or the dismissal of an improvidently granted writ will not happen; both Blackman and his counsel have committed not to accept personal payment to drop this objection.

It is thus neither fair nor wise to delay review and hope such cases will continue to come before the Court. In truth, it is only because of petitioner Blackman's and his non-profit counsel's issue-driven mission – and their willingness to swear off settling objections – that this case has reached the Court at all. *See, e.g.*, Ashby Jones, *A Litigator Fights Class-Action Suits*, WALL ST. J. (Oct. 31, 2011) (noting that Blackman's counsel is a "rare breed in the world of class-action objectors" because "[h]is stated mission is different" and "he tends to stay and fight"). There is no vested interest behind this work: Neither trial lawyers nor corporate defendants prefer vigorous enforcement of Rule 23(e)(2), and both have attacked Blackman's counsel for his efforts. So while the incentives to *make* these settlements and insulate them from review is overwhelming, the incentive to bring them before this Court is negative – a risk of resources and reputation for little personal gain. Waiting again and again when members of this Court have long flagged these critical issues for review thus seriously risks missing the last or best train. *Int'l*

Precious Metals Corp. v. Waters, 530 U.S. 1223, 1224 (2000) (O'Connor, J., respecting denial of certiorari).

5. Finally, this issue is of critical importance not only because outsized fee requests are bad for the system, but because there is *real* good to do for absent class members. Settlement proponents frequently say that they have done as well as possible for the class; that the alternative to their settlement is zero recovery; and that objectors only risk all that. But this is just not true: The point of objecting is not to punish lawyers, but to endeavor to actually improve the outcomes of these settlements for the real parties in interest – the absent class members whose claims are being settled away. And make no mistake: When courts *do* blow the whistle, it works.

Most importantly, Judge Posner's suggestion that class counsel will respond to court-imposed incentives to "maximize the settlement benefits actually received by the class," *Pearson*, 772 F.3d at 781, has been borne out by experience. After the Third Circuit rejected the settlement in *Baby Products*, on remand, the parties arranged for direct distribution of settlement proceeds, and paid an additional $14.45 million to over one million class members – money the parties initially directed to *cy pres* before the successful objection led to an "exponential increase" in class recovery. *McDonough*, 80 F. Supp. 3d at 660. After Blackman's counsel objected to a claims-made settlement in *Bayer*, the parties used subpoenaed third-party retailer data to identify over a million class members (instead of the 18,938 who would have been paid $5 each in the

original claims-made structure), and paid an additional $5.84 million to the class. Order at 4, *In re Bayer Corp. Litig.*, No. 09-md-2023, Doc. 254 (E.D.N.Y. Nov. 8, 2013). And on remand in *Pearson*, the parties renegotiated to give class members at least $4 million more in cash, with any reduction in attorneys' fees now going to class members rather than back to defendants. Settlement ¶¶ 7-8, No. 11-cv-07972, Doc. 213-1 (N.D. Ill. May 14, 2015). In short, as *Pearson* predicted, if courts make lawyers get money to clients in order to get paid, that is *exactly* what happens. "The Poze knows." William Domnarski, RICHARD POSNER 17 (2016).

CONCLUSION

Claims-made settlements where "class action math" leads to fee awards that exceed the class relief are a growing problem. This case is a stark example, and one well framed to resolve disagreements among the circuits about how to scrutinize these cases. The Court should take this opportunity to make class actions work better for the people whose rights are really at stake.

This Court should grant certiorari.

Respectfully submitted,

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September 19, 2016

TABLE OF APPENDICES

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION Pursuant to Sixth Circuit I.O.P 32.1(b)

File Name:16a0114p.06

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 14-3761/3798

AMBER GASCHO, on behalf of herself and all others similarly situated, et al., *Plaintiffs-Appellees*,

v.

GLOBAL FITNESS HOLDINGS, LLC, *Defendants-Appellees*,

ROBERT J. ZIK, APRIL ZIK, and JAMES MICHAEL HEARON (14-3761); JOSHUA BLACKMAN (14-3798), *Objectors-Appellants*

Appeal from the United States District Court for the Southern District of Ohio at Columbus. No 2:11-cv-000436—George C. Smith, District Judge

Argued: June 9, 2015

Decided and Filed: May 13, 2016

Before: KEITH, CLAY, and STRANCH, Circuit Judges.

COUNSEL

ARGUED: Joshua T. Rose, HUMMEL COAN MILLER, SAGE & ROSE LLC, Louisville, Kentucky, for Appellants in 14-3761. Theodore H. Frank, CENTER FOR CLASS ACTION FAIRNESS, Washington, D.C., for Apellant in 14-3798. Kenneth J. Rubin, VORYS, SATER, SEYMOUR AND PEASE LLP, Columbus, Ohio, for the Gascho Appellees. **ON BRIEF:** Joshua T. Rose, HUMMEL COAN MILLER, SAGE & ROSE LLC, Louisville, Kentucky, Gregory A. Belzey, BELZEY BATHURST ATTORNEYS, Prospect, Kentucky, for Appellants in 14-3761. Theodore H. Frank, CENTER FOR CLASS ACTION FAIRNESS, Washington, D.C., for Appellant in 14-3798. Kenneth J. Rubin, Thomas N. McCormick, VORYS, SATER, SEYMOUR AND PEASE LLP, Columbus, Ohio, Gregory M. Travalio, Mark H. Troutman, ISAAC WILES BURKHOLDER & TEETOR, LLP, Columbus, Ohio, for the Gascho Appellees. V. Brandon McGrath, BINGHAM GRENEBAUM DOLL LLP, Cincinnati, Ohio, Richard S. Gurbst, Larisa M. Vaysman, SQUIRE PATTON BOGGS (US) LLP, Cleveland, Ohio, for Appellee Global Fitness.

STRANCH, J., delivered the opinion of the court in which KEITH, J., joined. CLAY, J. (pp 34-46), delivered a separate dissenting opinion.

OPINION

STRANCH, Circuit Judge. This case involves challenges to the settlement of a consumer class action. Amber Gascho and other Plaintiffs (collectively, "Plaintiffs") sued Global Fitness Holdings, LLC alleging that between 2006 and 2012 Global sold gym memberships and incorrectly charged fees pertaining to cancellation, facility maintenance, and personal training contracts. When class counsel and Global announced the settlement, two objectors—Joshua Blackman and the Zik objectors—challenged its terms, both claiming that the settlement was unfair under Federal Rule of Civil Procedure 23(e). They argued that class counsel's fees were disproportionate to the claims paid, that the settlement unnecessarily required a claims process, and that the settlement contained "clear-sailing" and "kicker" provisions that suggest self-dealing by class counsel. The Zik objectors further argued that the settlement must be rejected because it failed to provide adequate compensation for the Kentucky plaintiffs' state-law claims and for plaintiffs who had signed an early, more favorable version of the contract.

The district court approved the settlement based on a magistrate judge's 80-page Report and Recommendation (R&R), which addressed each

objection. Both objectors appealed. We find that the district court did not abuse its discretion when approving the settlement, and therefore AFFIRM the district court's decision.

I. BACKGROUND AND PROCEDURAL HISTORY

This case is one of a number of suits against fitness facilities. Each is a consumer class action consolidating numerous claims of small monetary value on behalf of individuals who purchased memberships in such facilities and allege that they were charged improper fees. Global is a Kentucky LLC that operated fitness facilities under the brand name "Urban Active" in Ohio, Kentucky, Georgia, Nebraska, North Carolina, Pennsylvania, and Tennessee until October 2012, when it sold its assets to the entity doing business as LA Fitness. Plaintiffs filed suit against Global on behalf of a class of Ohio consumers in Ohio state court in 2011. Global removed the suit to federal court under the Class Action Fairness Act (CAFA). The Gascho case and several similar actions filed in other courts alleged that Global engaged in a variety of unfair sales practices relating to lack of disclosure to consumers, improper deductions from bank accounts, and improper handling of contract cancellations; the cases brought claims under theories of breach of contract, unjust enrichment, fraud, and various state consumer protection laws.

One such consumer class action, *Robins v. Global Fitness Holdings, LLC*, 838 F. Supp. 2d 631 (N.D. Ohio 2012), was dismissed. The parties later

stipulated to the dismissal of the resulting appeal, apparently after settling the case. In another suit brought in Kentucky state court in 2012, Global and plaintiffs' counsel (not related to class counsel or the objectors in this case) also attempted to settle claims, but class counsel in this litigation and counsel for the Zik objectors together objected to that settlement. The Kentucky court rejected that settlement for several reasons, including the "lack of value" of the settlement owing to the "dismal" participation rate of the class plaintiffs. The court stated that the low participation rate might have been because the settlement was a coupon settlement for the most part, and that those seeking a cash refund had to undergo a "cumbersome" process in which 90% of the cash refund claims were rejected. In denying approval of the settlement, the court noted that 1,444 out of the 242,243 potential class members—i.e, only 0.6% of the potential class—had claims of any kind that were approved.

A. The approved Global settlement

Global and class counsel reached a settlement in this case in September 2013, after more than two years of litigation that included extensive discovery. The settlement class consists of the approximately 606,246 people who signed a gym membership or personal training contract with Global from January 1, 2006 through October 26, 2012. ***Id.* at 1496–97, 1491**. Any class member who filed an approved claim received $5 in addition to any other claim award provided for in the settlement. The settlement also created three subclasses, defined as follows:

> 1 The "FIF Subclass," which includes all class members who paid a $15 Facility Improvement Fee (FIF) or any other biannual $15 fee charged by the defendant between April 1, 2009 and October 26, 2012. The FIF Subclass has approximately 316,721 members, and all who filed approved claims were entitled to receive $20 in addition to any other claim award.
>
> 2 The "Gym Cancel Subclass," which includes all class members who cancelled their gym membership contracts between January 1, 2006 and October 26, 2012. The Gym Cancel Subclass has approximately 387,177 people, and all who filed approved claims were entitled to receive $20 in addition to any other claim award.
>
> 3 The "Personal Training Cancel Subclass," which includes all class members who cancelled a personal training contract between January 1, 2006 and October 26, 2012. The Personal Training Cancel Subclass has approximately 64,805 members, and all who filed approved claims were entitled to receive $30 in addition to any other claim award.

(R. 97-1, Settlement, PageID 1490, 1492, 1497.)[1] Each class member had the opportunity to recover once

[1] These numbers were modified slightly in a February 22, 2014 Joint Motion in which the parties stated that there were approximately 606,000 class members, 323,518 Gym Cancel

from each subclass to which she/he belonged. The maximum per-person recovery was therefore $75 (5+20+20+30). Class members were required to file a simple claim form and if total claims amounted to less than $1.3 million, approved claimants would have their awardsincreased in equal shares.

The settlement permitted class counsel to apply for $2.39 million in attorney's fees and costs, and contained a "clear sailing" clause: an agreement from Global not to oppose any application for that sum or less. The agreement also included a "kicker" clause: an agreement that in the event the court awarded less than $2.39 million for costs and fees, that amount would constitute full satisfaction of Global's obligation for costs and fees.

B. The notice-and-claims process

Jeffrey Dahl, president of Dahl Administration, LLC, a claims administration firm hired by class counsel to implement the settlement, testified that he sent individualized notice by postcard to 601,494 class members, and email notice to just under half the class. After correcting the addresses of the 146,617 postcard notices returned as undeliverable and re-mailing them, 90.8% percent of the notices were successfully delivered to an address associated with a class member, though Dahl could not confirm how many notices reached the specific class member to whom they were addressed. Class members could either fill out a claim on paper or on a website

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subclass members, 300,017 FIF subclass members, and 50,038 Personal Training Cancel subclass members.

provided in both the postcard and the email notice. The claim form itself required class members to provide basic contact information, identify which of the three subclasses they qualified for, and sign under penalty of perjury. Dahl testified that about 55,600 claims were made in total, and 49,808 claims were approved, resulting in a total class payment of $1,593,240. Dahl calculated that the average payout to a claimant was $31.99, and that the average payout to a claimant in the Gym Cancel Subclass was $41.28.

C. The Blackman objection

Joshua Blackman, a class member, objected through his counsel affiliated with the Center for Class Action Fairness. Though Blackman suffered no actual damages because he cancelled his gym membership for a full refund within three days of enrolling, he fell within the definition of the Membership Cancellation subclass, and made a claim for $25 under the settlement. Blackman states that he did not make a $20 claim for the FIF subclass because the class notice did not specify whether he was a member of that subclass. He almost certainly was not, as he was a gym member for only three days. Blackman alleged that the settlement was one-sided in favor of class counsel because it awarded $2.39 million for the legal services they rendered in representing the class but likely paid much less in class claims due to the class members' predictable low response to the claims-made process. Blackman argued that the terms of the settlement were counter to this court's decision in *In re Dry Max Pampers Litigation*, 724 F.3d 713 (6th Cir. 2013), which forbids "preferential treatment" to class attorneys over

unnamed class members. Invoking the Ninth Circuit's decision in *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935 (9th Cir. 2011), Blackman further objected to the settlement's clear sailing clause and kicker clause, and argued that any fee award in a claims-made settlement must be based on the claims paid only, rather than on the total amount made available by the settlement should all class members make a claim.

D. The Zik objection

The Zik objectors echo Blackman's objections and add that the settlement is unfair because it fails to provide sufficient relief for (1) class members who had an early version of the contract with allegedly more favorable cancellation terms, and (2) class members from Kentucky who can assert claims under the Kentucky Health Spa Act (KHSA). The Zik objectors argue in the alternative that, if the settlement is approved, they should be awarded attorney's fees because they benefited this class by successfully objecting to the *Seeger* settlement and because their Kentucky state court case likely drove Global and class counsel to settle in this case at the time they did.

E. The fairness hearing and settlement approval

Magistrate Judge King held a fairness hearing in February 2014, during which the parties argued their positions and testimony was taken from Dahl. In April 2014, the magistrate judge issued an 80-page R&R approving the settlement and the requested fees. The magistrate judge found the settlement in

Pampers distinguishable because this case had been "vigorously litigated" for two-and-a-half years prior to settlement and involved "extensive" discovery and motion practice, and because class counsel obtained "significant monetary relief to class members" rather than the "illusory injunctive relief" obtained in the *Pampers* settlement. (R. 141, PageID 2841.)

The R&R found the proposed attorney's fees and costs to be reasonable based on the work performed and because the request was well below counsel's lodestar (hours worked on the case multiplied by counsel's hourly rate), and also noted the significance of the settlement's creation of an available benefit of $15.5 million (the total payout if all of the class members filed claims). The magistrate judge included a common fund cross check of the lodestar calculation. For this percentage fee calculation, the $15.5 million available award was proposed; Blackman argued that the relevant benefit is the $1.5 million actual payout. Instead of adopting either position, the R&R split the difference and found that "the potential monetary compensation to class members should be valued at $8,546,835, *i.e.*, the midpoint between the Available Benefit of $15,500,430 and the actual payment of $1,593,240," resulting in a "reasonable" ratio of 21%.[2] (*Id.* at 2874–75.) The R&R explained that the "clear sailing" clause was not an issue in light of the reasonable value of the

[2] The magistrate judge's calculations: $8,546,835 + attorneys' fees and costs of $2,390,000 + administration costs of $496,259 = $11,433,094 Total Class Benefit. $2,390,000 ÷ $11,433,094 = Fees constituting 20.904% of the Total Class Benefit.

class settlement, and that the "kicker" clause was "not improper in this case" because the parties negotiated a reasonable attorney fee that the court upheld, so the class was not deprived of "any benefit, real or perceived." (*Id.* at 2849–52.) The R&R further determined that the claims-made process was reasonable, given the age of class address information, the lack of certainty that the postcards actually reached the named class members, and because the 8.2% response rate was "well within the acceptable range of responses in a consumer class action." (*Id.* at 2857–59.) Dahl had testified that response rates in consumer class actions generally range from 1 to 12 percent and, given the age of the address information, a claims-made process rather than a direct payout to class members was the norm.

Upon reviewing all the circumstances surrounding the fee request, the R&R also concluded that though class counsel had not submitted detailed billing records for review by the court, the lodestar award was justified because: class counsel provided the number of hours worked and averred under penalty of perjury that those hours were reasonably necessary to prosecute the action; class counsel's hourly rates were consistent with the market rate; class counsel indicated they would not submit a fee request for the hours they worked after the settlement date, which were substantial; the fee request resulted in a lodestar of less than one (meaning that the fee requested represented payment for fewer hours than were actually worked); and there was no objection to the reasonableness of the hourly rates or the number of hours worked despite "vigorous objections" to other aspects of the settlement.

Blackman and the Zik objectors filed objections to the magistrate judge's R&R. The district court overruled all objections to the R&R, and adopted and affirmed it. It issued a final order approving the class action settlement and final judgment in July 2014. The separate appeals of Blackman, Case No. 14-3798, and the Ziks, Case No. 14-3761, followed and were consolidated.

II. ANALYSIS

We review both the district court's approval of the settlement and class counsel's attorney fee request under an abuse-of-discretion standard. *In re Dry Max Pampers Litig.*, 724 F.3d at 717 (settlement); *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 779 (6th Cir. 1996) (fees).

A. Fairness of the settlement

Rule 23(e) governs class action settlements and mandates that the court may approve a settlement upon holding a fairness hearing and concluding that it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). In 2007, we set out the factors that guide the court's inquiry and that we apply here:

> (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest.

Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Gen. Motors Corp., 497 F.3d 615, 631 (6th Cir. 2007).

The R&R determined that the following case specific factors weigh in favor of approving the settlement: (1) The parties' two-and-a-half years of litigation, extensive discovery, ongoing settlement negotiations, and formal mediation session all weighed against the possibility of fraud or collusion; (2) Discovery was "extensive," including the service of multiple sets of interrogatories, the production of over 400,000 documents, and over ten depositions, and required "significant Court involvement," (R. 141, PageID 2832); (3) The likelihood of plaintiffs' success on the merits was called into question by the dismissal of *Robins*, 838 F. Supp. 2d at 631, which the *Gascho* court had noted presented similar facts and legal issues to those alleged here; (4) The litigation had been pending for nearly three years, resulting in millions of dollars in legal fees, and continued litigation would undoubtedly require years of extensive and costly litigation, including fact discovery, expert discovery, and motion practice; (5) Class counsel and representatives approved the settlement agreement; (6) Out of a pool of 605,000 class members, only 90 class members opted out and only 2 objections were filed; (7) The public interest favored settlement because it provided an immediate cash payout to class members for their compensable injuries in an amount the court found to be fair, reasonable, and adequate, and because settlement would conserve judicial resources.

In addition to the seven *UAW* factors, Blackman and the dissent cite our recent *Pampers* case, which addressed whether the settlement gave "preferential treatment" to class counsel or named plaintiffs, while only "perfunctory relief to the unnamed class members." *Pampers*, 724 F.3d at 718. They also rely on the Ninth Circuit's decision in *Bluetooth*, which found that signs of collusion include a kicker clause, a clear sailing clause, or a situation in which class counsel "receive a disproportionate distribution of the settlement" or the "class receives no monetary distribution but class counsel are amply rewarded," 654 F.3d at 947 (internal quotation marks omitted).

The primary focus of the objections by Blackman and the dissent are these additional considerations introduced in *Pampers* and *Bluetooth*. They take issue with the district court's conclusion that relief to the class was "substantial" (as opposed to nominal) because, though a claims process was created to allow all class members to participate, only 8.2% of the class filed a claim. They argue that, because Global need only pay approximately $1.6 million—as opposed to more than $15.5 million in relief that plaintiffs argue counsel secured for the entire class—allowing class counsel to collect a fee of $2.39 million would constitute the "preferential treatment" for class counsel that *Pampers* forbids.

The central issue is how to value the benefit to the class: as (1) only the value of the claims actually approved, (2) the total relief available to the class if every member filed a claim, or (3) by splitting the difference between the two, as the district court did here. Blackman and the dissent argue that for the

benefit calculation to be valid under Pampers, only the value of the claims actually approved may be used.

We do not find either *Pampers* or *Bluebooth* to be dispositive here. First, the *Pampers* case involved a Rule 23(b)(2) class for injunctive relief and does not discuss how to value cash benefits for a class that are secured by the work of class counsel but go unclaimed. 724 F.3d at 716. The relief at issue in *Pampers*, moreover, has little relation to the cash settlement obtained here. The Pampers settlement agreement allotted class counsel $2.73 million, even though "counsel did not take a single deposition, serve a single request for written discovery, or even file a response to [the defendant's] motion to dismiss." *Id.* at 718. The class members's purported benefits included (1) a refund for one box of diapers, if they retained a receipt and a UPC code from a box of diapers purchased up to eight years before (relief that had been available before the filing of a lawsuit), (2) changes to the Pampers box labeling to warn about diaper rash, and (3) minimal and obvious medical advice about diaper rash posted on the Pampers.com website. *Id.* at 718–19. The settlement contained no other cash relief whatsoever. The facts of *Bluetooth* itself also shed little light on the instant case, as that was a cashless settlement for the class at large that involved, among other things, $100,000 in cy pres awards,[3] package labeling about acoustic safety,

[3] A *cy pres* award is "used to distribute unclaimed portions of a class-action judgment or settlement funds to a charity that will advance the interests of the class." Black's Law Dictionary (10th ed. 2014)

payments to the class representatives only, and up to $800,000 in attorney's fees for class counsel. *Bluetooth*, 654 F.3d at 939–40.

Relying on *Pampers* and *Bluetooth*, Blackman asks us to approve a proposed per se rule of unfairness, arguing that "disproportionate allocation violates Rule 23(e) even without a showing of actual collusion." (Blackman Br. at 16.) Blackman's proposal depends on acceptance of two premises: first, it assumes that use of the percentage of the fund calculation method is mandated whenever class counsel settles a claim; and second, it requires that such calculation be based only on the value of the class claims paid as opposed to the total relief that class counsel's work obtained for the entire class.

As discussed below, the reasoned basis of ample precedent in our circuit and decisions from multiple other circuits counsel against these presumptions. These authorities demonstrate that it is within the discretion of a district court both to select a lodestar computation as the appropriate method of fee calculation and, if choosing to use or include a percentage of the fund calculation, to value the benefit to the class based on the total relief class counsel makes available to all the class members. Supreme Court authority, moreover, does not support the benefit calculation that Blackman proposes. The Court has held that class plaintiffs' "right to share the harvest of the lawsuit upon proof of their identity, *whether or not they exercise it*, is a benefit in the fund created by the efforts of class representatives and their counsel." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480 (1980) (emphasis added).

The subsections below focus on each of Blackman's and the dissent's bases for challenging the settlement in turn: that the attorney's fee was too high as a proportion of the claims paid, that the claims process was an improper barrier to the class obtaining relief, and that the clear sailing and kicker provisions were improper. The Zik objectors raise the same concerns and some additional objections that will be addressed.

1. Attorney's fee

Blackman does not ask this court to find that the dollar payout to class claimants was unreasonable: he does not challenge the fundamental fairness of the amount the class itself received; instead, his objection is to the amount the attorneys received in comparison to the amount the class members claimed and received. The analysis the district court employed when approving class counsel's fee—grounded in our precedent—reaches the heart of the issue.

In applying the abuse-of-discretion standard to an award of attoreny's fees, the trial court is entitled to "substantial deference because the rationale for the award is predominantly fact-driven." *Imwalle v. Reliance Med. Prods., Inc.* 515 F.3d 531, 551 (6th Cir. 2008). Such deference "is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Id.* (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)).

"When awarding attorney's fees in a class action, a court must make sure that counsel is fairly

compensated for the amount of work done as well as for the results achieved." *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993). These two measures of the fairness of an attorney's award—work done and results achieved—can be in tension with each other. The lodestar method of calculating fees "better accounts for the amount of work done," whereas "the percentage of the fund method more accurately reflects the results achieved." *Id.*

To determine the lodestar figure, the court multiplies the number of hours "reasonably expended" on the litigation by a "reasonable hourly rate." *Bldg. Serv. Local 47 Cleaning Contractors Pension Plan v. Grandview Raceway*, 46 F.3d 1392, 1401 (6th Cir. 1995). The court "may then, within limits, adjust the 'lodestar' to reflect relevant considerations peculiar to the subject litigation." *Adcock-Ladd v. Sec'y of Treasury*, 227 F.3d 343, 349 (6th Cir. 2000). In contrast, to employ the percentage of the fund method, the court determines a percentage of the settlement to award to class counsel. *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 268 F. Supp. 2d 907, 922 (N.D. Ohio 2003).

As the two methods measure the fairness of the fee with respect to different desired outcomes, "it is necessary that district courts be permitted to select the more appropriate method for calculating attorney's fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them." *Rawlings*, 9 F.3d at 516. District court decisions must include "a clear statement of the reasoning used in

adopting a particular methodology and the factors considered in arriving at the fee" in order to allow effective appellate review for abuse of discretion. *Id.* This court has noted that there are advantages and drawbacks to each method. *Id.* at 516–17.

The advantages of the percentage of the fund method are that: "it is easy to calculate; it establishes reasonable expectations on the part of plaintiffs' attorneys as to their expected recovery; and it encourages early settlement, which avoids protracted litigation." *Id.* But, "a percentage award may also provide incentives to attorneys to settle for too low a recovery because an early settlement provides them with a larger fee in terms of the time invested." *Id.* With the lodestar method, the

> listing of hours spent and rates charged provides greater accountability. In addition, enhancing the lodestar with a separate multiplier can serve as a means to account for the risk an attorney assumes in undertaking a case, the quality of the attorney's work product, and the public benefit achieved. The lodestar method also encourages lawyers to assess the marginal value of continuing work on the case, since the method is tied to hours and rates, and not simply a percentage of the resulting recovery.

Id. But "the lodestar method has been criticized for being too time-consuming of scarce judicial resources." *Id.*

District courts have the discretion to select the particular method of calculation, but must articulate the "reasons for 'adopting a particular methodology and the factors considered in arriving at the fee.'" *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 352 (6th Cir. 2009) (quoting *Rawlings*, 9 F.3d at 516). *Moulton* set out the germane factors:

> Often, but by no means invariably, the explanation will address these factors: "(1) the value of the benefit rendered to the plaintiff class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides."

Id. (quoting *Bowling*, 102 F.3d at 780). Here, the district court employed the lodestar method to determine the fairness of the fee, then chose to cross-check it with the percentage-of-the-fund calculation. *See, e.g., Bowling*, 102 F.3d at 780; *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 F. App'x 496, 500–01 (6th Cir. 2011).

a. Lodestar method

Applying the factors enumerated in *Moulton*, the district court determined that the lodestar method was appropriate because the "results achieved" by the settlement are "substantial" and therefore the "interest in fairly compensating counsel for the

amount of work done is great." (R. 141, PageID 2869.) It further noted that class counsel had devoted substantial time and energy (8,684 hours at the time of settlement) to the action despite the risk of not being compensated, the litigation was complex, opposing counsel was skilled, and limiting an award to a percentage of the actual recovery could dissuade counsel from undertaking similar consumer class actions in the future. The district court also correctly noted that several of the plaintiffs' claims involved fee shifting statutes, KRS 367.930(2); O.R.C. 1345.09(F)(2), and that the purpose of such statutes is to induce a capable attorney to take on litigation that may not otherwise be economically viable. *See, e.g., Perdue v. Kenny A. ex rel Winn*, 559 U.S. 542, 552 (2010) (explaining that a "reasonable" fee is one that is "sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case"). The court concluded that "[u]nder the circumstances of the case, the lodestar method will best ensure that Class Counsel is fairly compensated for their time and it will fairly account for the risk to Class Counsel and the policy underlying the fee shifting statutes." (R. 141, PageID 2869 (internal citation and quotation omitted).) It was undoubtedly within the court's discretion to select this method.

The district court approved class counsel's lodestar figure based on declarations from counsel about each person who billed hours on the case, their rates and experience, and what percentage of the billing was attributed to each lawyer or paralegal. Lawyers' rates varied from $180 to $450 per hour based on the lawyer's experience, with the average at $275.20 per hour after subtracting for costs.

Several of this court's opinions suggest that before approving class counsel's lodestar amount, the court should review the attorney's lodestar fee request in more detail than what was presented in class counsel's affidavits in this case. We have found that

> [t]he key requirement for an award of attorney fees is that the documentation offered in support of the hours charged must be of sufficient detail and probative value to enable the court to determine with a high degree of certainty that such hours were actually and reasonably expended in the prosecution of the litigation . . . . Although counsel need not record in great detail each minute he or she spent on an item, the general subject matter should be identified.

Imwalle, 515 F.3d at 553 (internal quotation marks and citations omitted); *see also Rawlings*, 9 F.3d at 516–17.

Here, the district court acknowledged this body of case law and noted that the "best practice may have been to submit more detailed records of the costs and time expended in the litigation." (R. 141, PageID 2870.) Nonetheless, the court was "satisfied" that the number of hours billed and hourly rates of class counsel were reasonable because counsel "averred under penalty of perjury that the hours expended and costs incurred in the litigation were reasonably necessary to prosecute the action," the hourly rates were "consistent with those in the market" and the court's experience, class counsel had not billed for the significant number of attorney hours expended after

the date of settlement, and despite vigorous objections to other aspects of the settlement, the objectors had not argued that class counsel's number of hours worked or hourly rates were unreasonable. (R. 141, PageID 2871-72.) Class counsel represented that, by the time the magistrate judge ruled on the fairness hearing, the actual lodestar had grown to almost $2.8 million, though it would only seek to recoup the $2.39 million it had already agreed on.

Blackman argues that the plaintiffs failed to sustain their "burden of providing for the court's perusal a particularized billing record," (Blackman Br. at 36 (quoting *Imwalle*, 515 F.3d at 553)), and that the R&R "drastically understated the problem" when opting to rely on the lodestar method as the basis for awarding counsel fees in the absence of detailed billing records, (Blackman Br. at 35). The dissent also challenges the adequacy of class counsel's billing records.

The district court appropriately addressed the *Moulton* factors and explained its rationale for choosing to use the lodestar method, and it would clearly have been within its discretion to rely on the lodestar method supported by adequate billing records. It is, however, a close question whether the minimal billing information provided suffices to justify the lodestar award in light of our caselaw. We need not reach the issue, however, because the district court also employed the percentage of the fund cross-check and, as discussed below, that method independently validated the decision to award the attorney's fees in the case. *See Van Horn*, 436 F. App'x at 501 (finding that a mistake in the

district court's percentage of the fund analysis was not an abuse of discretion because the district court was justified in awarding the fee based on the lodestar alone); *Bowling*, 102 F.3d at 779–81 (6th. Cir. 1996) (affirming the district court's fee award, which was based on the percentage-of-the-fund and cross-checked with the lodestar, without reviewing the lodestar analysis).

b. Percentage-of-fund cross check

A percentage of the fund cross-check is optional, and we have repeatedly upheld a district court's determination that a fee award is reasonable based solely on a lodestar analysis. Van Horn, 436 F. App'x at 500–01 (citing *Rawlings*, 9 F.3d at 516). Here we review the percentage¬of-fund cross check for two reasons: (1) the issue of sufficiency of the records submitted for the lodestar analysis, and (2) Blackman's argument for a standard creating a per se violation of Rule 23(e). With respect to the second issue, we specifically address below the calculation method; the benefit to the class and its ratio to attorney's fees; and—central to the dispute here—what the district court may, within its discretion, choose to do.

When conducting a percentage of the fund analysis, courts must calculate the ratio between attorney's fees and benefit to the class. Attorney's fees are the numerator and the denominator is the dollar amount of the Total Benefit to the class (which includes the "benefit to class members," the attorney's fees and may include costs of administration). The dispute here is over the first component—what the

court may choose as the benefit to class members. Blackman argues that the benefit may be only the actual payments to class members and plaintiffs argue that it should be the entire benefit made available to the class through the efforts of counsel.

Because a settlement addresses the particular facts of and parties in a case, calculation of the denominator is necessarily case specific. To reach a resolution satisfactory to all parties, litigants may agree to cash and noncash settlement components. Calculating the ratio between attorney's fees and benefit to the class must include a method for setting the denominator that gives appropriate consideration to all components that the parties found necessary for settlement. Circuits have resolved the issue in several different ways, with a few establishing categorical rules but many maintaining a more case-specific approach and reviewing for abuse of discretion without mandating a particular method. Our circuit precedent fits within the latter approach.

Here, class counsel asserts that the "benefit to the class" portion of the denominator is the value of the settlement if all class members exercised their right to file valid claims. The magistrate judge calculated that available benefit to be $15,500,430.[4] Blackman counters that the $15.5 million figure is illusory because class counsel and Global could easily

[4] Though class counsel reiterates in its appellate brief that the available benefit is $17 million, we adopt the lower court's figure without further discussion because the difference is not dispositive, as either figure would lead to an acceptable ratio if used to calculate the denominator.

anticipate that only a fraction of the class would actually file a claim, given the testimony that only 5 to 8% of plaintiffs file claims in a typical consumer class action. Blackman's argument is that the benefit component of the denominator must be calculated based only on the amount of money actually paid to the class.

Here, the district court properly relied on Supreme Court authority recognizing that class plaintiffs' "right to share the harvest of the suit upon proof of their identity, *whether or not they exercise it*, is a benefit in the fund created by the efforts of class representatives and their counsel." *Boeing Co.*, 444 U.S. at 480 (emphasis added). *Boeing* concerned a case in which a common fund was created for the class, and the court recognized that "[t]o claim their logically ascertainable shares of the judgment fund, absentee class members need prove only their membership in the injured class." *Id. Boeing*'s "latent claim" to the money left in the fund after class member claims had been paid did not affect the Court's determination that the "present rights" of class members to access that money through a claims process was a benefit to class members. *See id.* at 482. The Supreme Court held that the district court had not abused its discretion by awarding fees to class counsel based on the size of the entire fund as opposed to the portion of it for which claims had been approved. *Id.* at 477–78.

Despite *Boeing*'s guidance, the circuits have split on the most appropriate way to value settlement funds, though such differences are sometimes explainable based on factual distinctions in

settlement structures. In a case where unclaimed funds would be distributed to a *cy pres* beneficiary as opposed to reverting back to the defendant, we noted that it is correct to weigh the amount allocated to the class rather than the amount actually disbursed in claims when determining whether an attorney's fee award is unreasonable:

> The thirty percent attorney's fee award, [the objectors] add, is too high, claiming that it "will exceed the recovery of the Class by over $100,000.00." Moulton Br. 32. But this estimate is wrong: The objectors focus on the amount *claimed* rather than the amount *allocated*. Claimants, it is true, will in the aggregate receive less than Class Counsel. But that is because just 4,026 class members submitted claims. Except for fees and costs, class members had the first shot at the settlement proceeds—nearly $2.5 million by our estimate—which exceed the amount paid to Class Counsel by some measure. That the public schools [the beneficiaries of the unclaimed residue of the fund] will receive $1.28 million in *unclaimed* funds does not reflect on the settlement's fairness.

Moulton, 581 F.3d at 352.

In another case involving funds that would not revert back to defendants if unclaimed, the Second Circuit held that a district court abused its discretion by calculating fees strictly based on the dollar amount paid to approved claimants, and expressly rejected the idea that basing an award on the benefit available

to the class would create a windfall for class counsel. *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007). The court reasoned that "[t]he entire Fund, and not some portion thereof, is created through the efforts of counsel at the instigation of the entire class. An allocation of fees by percentage should therefore be awarded on the basis of the total funds made available, whether claimed or not." *Id.*

Similarly, in a class action settlement involving a fund where all unclaimed money would revert to the defendant, the Eleventh Circuit affirmed a district court's award of 30 percent of the total recovery fund, and rejected the argument that the fee should only have consisted of 30 percent of the funds actually claimed. *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1296–97 (11th Cir. 1999). *Waters* expressly noted that the district court had relied on the Supreme Court's reasoning in *Boeing* in reaching its conclusion and found that though the unclaimed funds would revert to the defendant, the relief was real and available to the class. *Id.* at 1297. The appellate court also noted that it was reviewing for abuse of discretion, and that a different result might be warranted on the facts of a different case. *Id.* at 1298.

The Ninth Circuit has also applied *Boeing* to determine that—with respect to a class action settlement involving a common fund holding money that would revert to the defendant if unclaimed—the district court erred by awarding class counsel a fee of only one third of the $10,000 actually claimed rather than a fee of one third of the entire $4.5 million settlement fund or a fee based on a lodestar

calculation. *Williams v. MGM-Pathe Commc'ns. Co.*, 129 F.3d 1026, 1026–27 (9th Cir. 1997) (per curiam).

The Third Circuit has not ruled on the issue, but in dicta noted that it would be unwise to impose on a district court a categorical rule in which a portion of a common fund that went unclaimed by class members and was then distributed under the agreement as a *cy pres* award must be discounted for the purpose of calculating attorney's fees:

> There are a variety of reasons that settlement funds may remain even after an exhaustive claims process—including if the class members' individual damages are simply too small to motivate them to submit claims. Class counsel should not be penalized for these or other legitimate reasons unrelated to the quality of representation they provided. Nor do we want to discourage counsel from filing class actions in cases where few claims are likely to be made but the deterrent effect of the class action is equally valuable.

In re Baby Prods. Antitrust Litig., 708 F.3d 163, 178 (3d Cir. 2013). The Third Circuit refused to mandate discounting of cy pres awards, though it noted that "awarding attorneys' fees based on the entire settlement amount rather than individual distributions creates a potential conflict of interest between absent class members and their counsel." *Id.* The court therefore concluded that when "a district court has reason to believe that counsel has not met its responsibility to seek an award that adequately prioritizes direct benefit to the class . . . it [is]

appropriate for the court to decrease the fee award." *Id.* It explained that "our approach is case by case, providing courts discretion to determine whether to decrease attorneys' fees where a portion of the fund will be distributed *cy pres*." *Id.* at 179.

A case-by-case analysis honors both the principles that undergird the abuse of discretion review standard and the practical realities of examining a settlement reached by particular parties in their specific circumstances. A case-by-case approach allows a reviewing court to address the varying danger of tacit collusion between the parties for unclaimed funds distributed through a *cy pres* award as in *Moulton* and *Baby Products*, as well as cases such as this one, where such funds are left with the defendant. The Third Circuit correctly noted that devaluing the available relief if it goes unclaimed could in many cases unduly penalize class counsel and have the lasting effect of discouraging the filing of class actions in cases where few claims are likely to be made but the deterrent effect of such a suit would be socially desirable. *See In re Baby*, 708 F.3d at 179. The latter policy concern reflects one of the purposes of consumer class actions—the need to insure that mistreatment of consumers will not be insulated because the damage suffered by an individual consumer is too small to justify the expense and time required to challenge the practice—both for the individual harmed and the attorney who represents that consumer.

Determining the appropriate relationship between fees and benefits to the class, however, can be significantly impacted by the facts of a case. For

example, where class counsel had already been awarded more than the full lodestar value of their services but were seeking to apply a multiplier, the Fifth Circuit permitted a district court to determine fees relative to benefits distributed. *Strong v. BellSouth Telecomm., Inc.*, 137 F.3d 844, 851–52 (5th Cir. 1998). It questioned reference to the percentage of the fund analysis in a lodestar case, but addressed the issue, holding that under the facts the district court did not abuse its discretion by focusing on the $1.5 million of benefits distributed to the class rather than the $64 million estimated value of the settlement fund that included coupon-like benefits. *Id.* at 851-53. In this context, the district court found class counsel's valuation of the relief to be "phantom" because class members had the option of continuing phone service *or* receiving a credit, making the relief akin to coupons or certificates, "where the true value of the award was less than its face value." *Id.* at 852.

In upholding the district court's method of determining fees, *Strong* acknowledged that in *Boeing* the Supreme Court had upheld the district court's decision to consider the potential awards available rather than the actual claims made. *Id.* It distinguished *Boeing* because there each member had an "ascertainable claim to part of [the] lump-sum judgment" that could be accessed "simply by proving their individual claims," whereas in Strong the agreement did not establish a fund and included the difficult to access "phantom" benefits rather than cash. *Id.* But far from creating a categorical rule requiring courts to consider only the benefits actually distributed, Strong noted that fees had already been awarded under the lodestar method and explained

that "this course of action is not the usual one" and "under the atypical circumstances of this case, the district court did not abuse its discretion in considering the actual results of the settlement." *Id.* at 853.

In a recent decision on which the dissent relies, the Seventh Circuit varied from these cases by overturning a district judge's use of the value of the available settlement in the denominator of a percentage of fund calculation. *Pearson v. NBTY, Inc.*, 772 F.3d 778, 779–81 (7th Cir. 2014). There, the settlement agreement was reached only eight months after suit was filed, and it called for the defendant to pay $3 per claim. *Id.* at 779, 781. *Pearson* held that the correct ratio to calculate is always that of "(1) the fee to (2) the fee plus what the class members received." *Id.* at 781. The court noted that its mandated ratio "gives class counsel an incentive to design the claims process in such a way as will maximize the settlement benefits actually received by the class . . . ." *Id.* Importantly, *Pearson* held that the value of the attorney's fees being sought there also failed under a lodestar analysis. *Id.*

Pearson addressed the import of *Boeing* to its decision, acknowledging that "it is true that an option to file a claim creates a prospective value, even if the option is never exercised." *Id.* at 782. Nonetheless, *Pearson* distinguished *Boeing* by noting that *Boeing* pertained to an existing judgment fund, and that each class member's claim on the fund was "undisputed" and "mathematically ascertainable." *Id.* In contrast, the court reasoned, the settlement in *Pearson* did not concern a litigated judgment, and "there was no

expectation in advance of the deadline for filing claims that more members of the class would submit claims than did." *Id.* Well under one percent of the *Pearson* class members had filed claims for the $3 in relief at issue. *Id.*

We find *Pearson*'s efforts to distinguish *Boeing* unconvincing. No matter how the *Boeing* fund was structured, the Supreme Court found value in the work of class counsel that provided a fund from which class members could access their claims. Further, though it went unacknowledged by the Seventh Circuit, there *was* a claims process in *Boeing*, 444 U.S. at 479 ("members of the class can obtain their share of the recovery simply by proving their individual claims against the judgment fund"), and there was a possibility that unclaimed funds would revert back to the defendant, *id.* at 482 (acknowledging *Boeing*'s "latent claim against unclaimed money in the judgment fund"). *Boeing*'s factual features are not significantly different from the settlement terms in this case as they involve a straightforward claims process and a provision that unclaimed funds will remain with the defendant. Considering these comparable facts, we see no reason why *Boeing*'s application should turn on the existence of an actual escrow fund of money for the payment of claims.[5]

[5] We disagree with the dissent's assertion that *Boeing*, while good law, has fallen into disfavor. Its sole case citation for this point is Justice O'Connor's statement regarding the denial of certiorari in *International Precious Metals Corp. v. Waters*, 530 U.S. 1223 (2000). We do not find this statement to evidence rejection of *Boeing*. First, no other justices joined it. Justice

The other cases noted do not suggest a different conclusion. While it may be true that a class settlement with a needlessly onerous claims process might warrant discounted relief using the case by case approach the Third Circuit (*In re Baby*) discussed, that is a different matter—one of application as opposed to a general rule. Further, the Ninth Circuit (*Williams*) imposed and the Eleventh Circuit (*Waters*) upheld attorney's fees based on the whole value of the fund in cases where unclaimed money in the fund would revert back to the defendant. There is no meaningful distinction between a fund with a reversion provision and a defendant-paid-claims process, as here. In both cases, unclaimed funds wind up with the defendant.

O'Connor, moreover, did not argue for overruling *Boeing*, but simply for requiring "some rational connection between the fee award and the amount of the actual distribution to the class." Id. Our case-by-case approach is consistent with this statement; if a fee award lacks rational connection to the amount distributed to the class, a district court may reject the settlement.

The dissent also points to the Advisory Committee notes to the 2003 amendments to Rule 23, arguing that the Committee distinguished benefits from actual results. But the Committee did not define "result actually achieved" and, as *Boeing* makes clear, the total available benefit *is* a result actually achieved for the class. Further, nothing in the note would support the dissent's categorical rule—the Advisory Committee did encourage courts to scrutinize the claims procedure to ensure "significant actual payments to class members," but it also emphasized that "[a]t the same time, it is important to recognize that in some class actions the monetary relief obtained is not the sole determinant of an appropriate attorney fees award." Fed. R. Civ. P. 23, 2003 Amend., Note to Subdivision 23(h). Only a case-by-case approach can balance these twin concerns.

As this survey of appellate decisions demonstrates, courts have upheld a variety of methods employed by district courts to determine benefit to the class. The only circuits that have crafted a strict rule have been the Ninth and Second (both holding that the district court erred by using the value of the funds actually distributed rather than the full value of the authorized fund when calculating attorney's fees), and the Seventh (holding the opposite, i.e., that courts *must* only consider the value of the funds actually distributed as opposed to the entire value of the funds made available to the class).

Rather than adopting the Seventh Circuit's categorical rule that Blackman and the dissent urge, we leave the determination of how to value the benefit provided to the class to a district court's discretion, exercised in accordance with our precedent. This respects the Supreme Court's position, as well as our own, that making claims available to all class members provides them with a benefit. In a case-by-case analysis, district courts are able to determine fees by considering all the facts of a case, and thereby address the concerns that Blackman and the dissent argue can be resolved only by a per se rule. Courts may do so, moreover, without the inherent problems recognized by Blackman in his ambiguous assertion he is not "proposing" that the blanket rule would extend to all cases where "Congress established fee-shifting statutes to vindicate specific rights beyond purely pecuniary ones." (Blackman Br. at 16 n.2.) But consumer claims also may seek to vindicate rights beyond monetary ones and many of those cases, including this case, raise claims under both common law *and* fee shifting statutes. Blackman's counsel's

inability to articulate a functional limiting principle for application of a per se rule to other categories of cases or settlements is evidence of the problematic nature of this blanket rule proposal.

Consumer class actions, furthermore, have value to society more broadly, both as deterrents to unlawful behavior—particularly when the individual injuries are too small to justify the time and expense of litigation—and as private law enforcement regimes that free public sector resources.[6] If we are to encourage these positive societal effects, class counsel must be adequately compensated—even when significant compensation to class members is out of reach (such as when contact information is unavailable, or when individual claims are very

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[6] *See* William B. Rubenstein, *On What A "Private Attorney General" Is—and Why It Matters*, 57 Vand. L. Rev. 2129, 2168 (2004) ("[Class counsel's] clients are not just the class members, but the public and the class members; their goal is not just compensation, but deterrence and compensation."); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 106 (2006) ("[T]he deterrence of corporate wrongdoing is what we can and should expect from class actions."); William B. Rubenstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. Rev. 709, 724-25 (2006) ("By enabling litigation, the class action has the structural consequence of dividing law enforcement among public agencies and private attorneys general and of shifting a significant amount of that enforcement to the private sector.").

small).[7] An inflexible, categorical rule neglects these additional considerations.

Although we decline to adopt a categorical rule, we recognize the validity of the dissent's concern about settlement structures that are contrived to discourage claims. A needlessly burdensome claims process was one problem with the settlement in *Pampers*, which provided class members a refund for one box of diapers, but only if the claimant had a receipt and a UPC code—including for diapers purchased up to eight years before the settlement. *See* 724 F.3d at 718. Given the low value of individual awards in most consumer class actions, a sworn statement attesting to the purchase may often be sufficient documentation. We also find troubling claim forms and websites that appear designed to confuse class members, either by omitting information on the claims process or by presenting this information in a confusing way. A claims process that includes these features may well be inappropriate for approval. But as we discuss in greater detail below, that is not the

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[7] *See* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. Pa. L. Rev. 2043, 2047 (2010) (concluding that courts "should not be concerned about compensating class members in small-stakes class actions and, instead, should be concerned only with fully incentivizing class action lawyers to bring as many cost-justified actions as possible" because "the only function they serve is deterrence"); Hailyn Chen, Comment, *Attorneys' Fees and Reversionary Fund Settlements in Small Claims Consumer Class Actions*, 50 UCLA L. Rev. 879, 892 (2003) (arguing that courts should not limit attorney's fees to a percentage of actual claims because doing so will often "result in a fee that is so small as to prevent class action attorneys from pursuing such cases, which serve primarily a regulatory and deterrent function").

claims process here, which was transparent and not burdensome.

Having rejected a per se rule, we turn to the decision below. In performing the percentage of the fund cross-check, the district court took a middle of the road approach, selecting a midway point between the benefit available to the entire class and the actual payments made. It acknowledged that the claimants benefited from the potential for relief, but found that, under these particular circumstances, it might be appropriate to value that potential relief as different from money in the plaintiff's pocket. The $8.5 million figure the R&R selected recognizes that class counsel provided the valuable service of obtaining substantial relief for each class member who cared to invest the minimal time required to claim it and that in obtaining this relief, counsel undertook a substantial effort for which they deserve compensation.

Blackman protests that if a court is allowed to "split the baby," the parties can game the system by awarding members an inflated benefit then imposing an onerous process to limit claims, making the midpoint higher than if a more modest settlement award had simply been mailed to each class member. Blackman also argues that there is no universally-applicable "principled dividing line" between fully valuing a settlement where only .001% of the class participates and fully valuing a settlement where just under 10% of the class participates. It does not follow, however, that the only way to judge the validity of the claims process is to rely solely on the amount the claims process will *actually* pay to the class. And concern about gaming the system ignores the district

court's discretionary right to reject the settlement under Rule 23(e) because the claims process is unduly burdensome.

Our job is to determine whether the district court's actions were an abuse of its discretion. We do not agree with Blackman's and the dissent's argument that the district court erred by not accepting the proposal of a per se rule of unfairness. Such a rule would require us to jettison the Supreme Court's guiding principles and our own circuit's past acknowledgement that there is value in providing a class member the ability to make a claim, whether she takes advantage of it or not. We do not abandon that foundational principle.

The question remains whether the district court's valuation of the benefit amount as the midpoint between the parties' positions was a proper exercise of its discretion. As a general matter, this procedure presents concerns and we do not endorse a rule adopting a "midpoint" calculation. In the circumstances of this case, however, the decision is an acceptable way to quantify the court's recognition that having the ability to make a claim has value. Given the facts of this case and the well-reasoned opinions concluding that the settlement relief made available was fair to the class, we decide only that the method employed was within the court's discretion with respect to the case before it.

2. The claims process

Blackman, the Zik objectors, and the dissent assert that the district court abused its discretion by

approving the settlement given the claims process employed in this case. The court considered the objectors' position, and Dahl testified about the claims process at length during the Fairness Hearing. Here, class members were identified using the name and address provided at the time they initially signed a contract, between January 1, 2006 and October 26, 2012. Because notice was sent to class members in October 2013, each class member's contact information was between one and eight years old. Class counsel also indicated that Global had used four different electronic record management systems during the class period and had transferred information between them, causing class members' records to become incomplete and inaccurate.

Nearly 25% of the notice postcards were returned after the first mailing, suggesting that many class members had moved since joining a gym. Dahl cross-checked the rejected cards against available address databases, re-sent the cards and a far smaller number were returned. Ultimately, slightly more than 90% of the cards were delivered to an address associated with the member. Nonetheless, as Dahl testified, there is "no way of definitively saying they actually reached the class member." (R. 139, PageID 2718.) In addition to the postcard program, Dahl also engaged in an email notice program in which 150,581 emails were delivered, created a website for the class, published notice in papers of record, and established a toll-free information helpline.

Dahl testified that the notice and claims program was "robust" and that both postcard and email notice prominently displayed the website or provided a

direct link so that class members could easily file a claim online. According to Dahl, who has been the settlement administrator for hundreds of settlements, this method is "modern," "grabs people's attention," follows how people tend to consume media," and "get[s] robust filing rates." (R. 139, Fairness Hearing, PageID 2704–08.)

To file a claim, a class member had to click the link in the email, enter the website url from the postcard, or request that a form be sent via U.S. Mail. The claim form required basic information (name, address, phone number, and email address), that the claimant check boxes indicating subclass membership if applicable, and that the claimant to sign a statement on the form asserting "under penalty of perjury" that the information entered was true.

Dahl testified that, of the more than 3,000 settlements he has administered in his 20 years in the business, fewer than 20 involved direct payment rather than a claims process. Further, all of those direct payment cases involved a "current component to the data," meaning that the recipients had relationships with the defendant that heightened the reliability of their address data, such as current employees, insurance policy holders, and clients with ongoing account relationships.[8] (R. 139, PageID 2711–12.) None of these direct distributions had data

[8] Dahl's testimony is consistent with academic work on this issue. *See* Adam S. Zimmerman, *Funding Irrationality*, 59 Duke L.J. 1105, 1167 (2010) (observing that direct payments are practical when the parties have "a great deal of information" about potential claimants, but "more problematic" when parties "have less information about potential claimants").

as "out of date" as Global's data. The claims procedure was open, meaning that class members could make claims even if they had not received direct notice. As a result, several hundred class members who were not in Global's records became claimants, and over 2,000 class members not appearing in Global's subclass records were granted subclass membership and will receive more money than they would have had Global just mailed checks based on its data.

The objectors assert that a check simply should have been mailed to the address listed for each class plaintiff because common sense dictates that direct payment would have resulted in a payout greater than 8% of the claims made. This ignores the inadequate member data, the number of the checks that would not have reached the class members and the administrative costs of managing that procedure. Blackman's assumption that class counsel "structured the settlement to withhold benefit from 92% of the class," (Blackman Br. at 19), moreover, is not supported by any evidence of an unduly burdensome component of the claims process. Here, there is every indication that Dahl diligently attempted to reach each class member: multiple forms of notice were provided, including ads in 13 different newspapers, a website, and a dual email and postcard mailing approach targeting individual class members. The actual claim form was also short and straightforward.

Class counsel has provided a substantial number of citations to cases employing claims processes similar to this one, including in similar health club

settlements. The objectors have provided no authority indicating that the claims process here was improper. Furthermore, Dahl's testimony that response rates in class actions generally range from 1 to 12 percent, with a median response rate of 5 to 8 percent, indicates that the 8 percent response rate was well within the acceptable range for a consumer class action.[9] Given this response, the obvious uncertainty about any class member's address, and Dahl's testimony about the robustness of the process, we conclude that the district court acted within its discretion when finding the claims process employed here to be appropriate.

3. The clear sailing and kicker clauses

The objectors and the dissent point to the settlement's clear-sailing and kicker-clauses as evidence of self-dealing by class counsel that would warrant a finding that the settlement was unfair under Rule 23(e). This court has recently noted different perspectives among the circuits with respect to clear sailing provisions:

> Courts have expressed mixed views about the relationship between clear-sailing provisions and adequacy of representation. In *Malchman v. Davis*, the Second Circuit said that, "where . . . the amount of the fees is important to the party paying them, as well as to the attorney

[9] In contrast, only 0.6% percent of claims were approved in Seeger, R. 118-10, PageID 2002, and slightly more than 0.5% of class members submitted claims in *Redman v. RadioShack* Corp., 768 F.3d 622, 628 (7th Cir. 2014).

> recipient, it seems . . . that an agreement 'not to oppose' an application for fees up to a point is essential to the completion of the settlement, because the defendants want to know their total maximum exposure and the plaintiffs do not want to be sandbagged." 761 F.2d 893, 905 n.5 (2d Cir. 1985), *cert. denied*, 475 U.S. 1143 (1986), *abrogated on other grounds*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). Other judges have been less impressed with clear-sailing provisions. In the view of a concurring judge in *Malchman*, such a "clause creates the likelihood that plaintiffs' counsel, in obtaining the defendant's agreement not to challenge a fee request within a stated ceiling, will bargain away something of value to the plaintiff class." *Id.* at 908 (Newman, J., concurring). Another danger is that "the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees." *Weinberger* [*v. Great Northern Nekoosa Corp.*], 925 F.2d [518,] 520 [(1st Cir. 1991)] (holding that courts should "scrutinize" fees requested pursuant to clear-sailing agreements to see whether they "are fair and reasonable").

Gooch v. Life Investors Ins. Co. of Am., 672 F.3d 402, 425 (6th Cir. 2012). After examining the specifics of the application, the *Gooch* court approved the settlement with the clear sailing provision. *Id.* at 426.

Neither clear sailing provisions nor kicker clauses have ever been held to be unlawful per se, but courts have recognized that their inclusion gives the district

court "a heightened duty to peer into the provision and scrutinize closely the relationship between attorneys' fees and benefit to the class." *Bluetooth*, 654 F.3d at 948. Here, the R&R *did* peer into the relief to the class and the attorney's fees at issue, and found both to be appropriate.

Blackman argues that "most critically, the reversion and separate compartmentalization" brought about by a standalone attorney's fee and an agreement with a clear-sailing provision and kicker clause "precludes a district court from reallocating an excessive fee request to the class to fix any disproportion: a reduction in attorneys' fees goes to the defendant, thus deterring both courts and objectors from reducing the fee. The combination unfairly insulates the fee request from scrutiny." (Blackman Br. 18.)

Blackman's concern is unwarranted here because the district court unreservedly found that the relief to the class was "substantial" and that class counsel's fee request was appropriate, findings it made within its legitimate discretion. (R. 141, PageID 2850.) The lengthy R&R extensively discussed both relief and fees, and did not exhibit any inclination to find that the former was inadequate or the latter was excessive. Blackman's argument that the court could not rewrite the settlement agreement to reallocate funds between the plaintiffs and class counsel is unpersuasive. If a court concludes that the ratio between attorney's fees and relief to the class creates an inequitable situation, it could reject the settlement on Rule 23(e) grounds and send the parties back to the negotiating table.

Though some courts have "disfavored" clear sailing agreements and kicker clauses, their inclusion absent more—as is the case here—does not show that the court abused its discretion in approving the settlement.

B. The Zik objectors' contract claims and KHSA claims

In addition to echoing Blackman's arguments, the Zik objectors assert that the class settlement was not fair, reasonable, and adequate because it did not appropriately distinguish between the differing values of and legal theories underlying class members' claims. The Zik objectors assert that class counsel did not obtain any additional consideration for their "unique and valuable" contract claims or for legal rights afforded under the Kentucky Health Spa Act. (Zik Br. at 30-33.)

With respect to their contract claims, the Zik objectors allege that (1) their contract terms are clearer than subsequent versions of the contract about allowing only one month of additional fees upon cancellation (as opposed to two), and (2) their contracts do not contain a provision for a $10 cancellation fee, which later contracts did. They, like other plaintiffs, were charged two months of fees after they cancelled (one more than permitted under their contracts, they allege), and were charged the $10 cancellation fee. They argue that because their

contracts terms are different, their claims are worth more and deserve a higher settlement value.[10]

In explaining the reasons it found the amount awarded in the Gym Cancel Subclass to be "fair, reasonable, and adequate," despite some differences in the actual charges individual class members incurred, the R&R noted that

> The Zik Objectors sought to certify a class in the *Zik* action premised on a claim that Global Fitness acted in breach of "its members' membership agreements by charging its members one extra month of membership dues and a $10.00 cancellation fee when members terminate their membership agreement." As discussed . . . the claims asserted in the *Zik* action are subsumed in the Gym Cancel Subclass, and an Allowed Claimant who cancelled his or her gym membership contract during the Class Period is entitled to an award of $25. The Claims Administrator has validated claims and calculated final award amounts for the Allowed Claimants: the average Class Payment is $31.99 and the average Gym Cancel Subclass Payment will be $41.28.

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[10] The Ziks themselves (husband and wife) also appear to have been paying membership fees at the high end of the range of what plaintiffs were charged: $49/month for Robert and $44.99/month for April, as opposed to the class average of $26.76/month. The Zik objectors provide no information or evidence regarding the monthly membership fees of other would-be members of their subclass.

(R. 141, PageID 2844 (internal citations removed).) The court found the $31.99 and $41.28 figures to be "a significant recovery because it exceeds the $26.76 average monthly fee of a gym membership with Global Fitness between January 1, 2009 and July 2012." (*Id.*) Because the *Zik* class complaint sought the contract damages of payment for the one extra month charged after cancellation (the first month was legitimate, the second was not) and reimbursement for the $10 cancellation fee (with no mention of the FIF or other fees), the average Zik objector would receive about $36.76 in contract damages. This is only a few dollars more than the average claimant in the case, and several dollars *less* than the average Gym Cancel Subclass member, a group in which each member of the Zik objectors' proposed class would necessarily be a part. The court noted the closeness of the value of the settlement to the average class member and the expected damages of the average Zik objector and correctly found that this was an indicator of the settlement's fairness.

Rejecting the Zik objectors' argument that the settlement was unfair owing to its lack of individual damages calculations, the court found it appropriate to consider the risks of the litigation going forward and the costs and delays that would likely result from a settlement in which it was required to calculate and verify individual damage awards for the approved claimants, including those for which Global had no records. Given the close approximation of the payout to a typical Zik plaintiff's actual damages and the costs involved in individual calculations, the court could reasonably find that this weighed in favor of approving the settlement.

The Zik objectors also fail to present meaningful factual support for their argument that class counsel failed to extract sufficient value for their plaintiffs' possible Kentucky Health Spa Act (KHSA) claims. Instead they rely on class counsel's testimony in *Seeger* about the potential value of those claims. But as the Zik objectors acknowledge, the *Robins* court found no value in the plaintiffs' contract-based KHSA claims. *Robins*, 838 F. Supp. 2d at 650–51. And the dearth of caselaw about the Act's other provisions make its utility difficult to predict. Though the Zik objectors' briefing on appeal is vocal about the value of the relief attainable under the KHSA, they fail to provide detail or offer a theory of how the statute would be applied.

At the fairness hearing, the Zik objectors noted that the KHSA requires spas to register the costs of their membership plans with the Kentucky Attorney General, and that if they fail to register and provide the member a list of costs, the member is entitled to void the contract and obtain disgorgement of any difference. The Zik objectors hypothesize that a Kentucky member charged $39.99 per month for four years of membership when the plan registered with the Kentucky Attorney General called for a charge of $29.99 per month would be entitled to damages of $480 ($10/month).

Class counsel countered that:

> [T]here is no situation of Kentucky Health Spa members signing contracts for $49 when the contract was actually $29. We have all of that data from Urban Active's third party vendor

> software because we subpoenaed it, and we through our IT staff have done technical analysis of that data. And the vast majority of the cases, which we would put forth as violations of the Kentucky Health Spa Act actually show that Urban Active sold memberships for less than what the price was registered with the Kentucky Attorney General. So, again, that brings us straight back to the equitable argument, that while we are confident that we can prove a violation, we have significant hurdles in proving damages in excess of what we already negotiated as part of the settlement . . . .

(R. 139, PageID 2782.) The court appropriately found significance in the Zik objectors' acknowledgement that class counsel "devoted a large percentage of [its] work . . . to ESI discovery to be used for the purpose of proving the KHSA claims." (R. 141, PageID 2846 (citing R. 118, PageID 1935).) This suggests that the KHSA claims were adequately developed, and that class counsel considered the likelihood of success on the merits of those claims. And though the Zik objectors litigated their case for over three years, there does not appear to be anything in their briefing or in the record demonstrating that their hypothetical Kentucky class member who was overcharged $10/month exists, or that they have the factual basis to assert a viable KHSA claim on another theory.

As the court below noted, in the context of determining whether to approve a class action consent decree, we have held that:

> A court may not withhold approval simply because the benefits accrued from the decree are not what a successful plaintiff would have received in a fully litigated case. A decree is a compromise which has been reached after the risks, expense, and delay of further litigation have been assessed. Class counsel and the class representatives may compromise their demand for relief in order to obtain substantial assured relief for the plaintiffs' class.

Williams v. Vukovich, 720 F.2d 909, 922 (6th Cir. 1983) (internal citations omitted). Given that the relief sought achieved a number roughly equivalent to the extra month of dues charged and the cancellation fee the Zik objectors seek, while avoiding the costs and risk of additional litigation, there was merit to the settlement. *Williams* also cautioned that:

> Significantly, however, the deference afforded counsel should correspond to the amount of discovery completed and the character of the evidence uncovered. The court should insure that the interests of counsel and the named plaintiffs are not unjustifiably advanced at the expense of unnamed class members. Objections raised by members of the plaintiff class should be carefully considered.

Williams, 720 F.2d at 923 (internal citations omitted). As discussed above, class counsel has engaged in ample discovery and motion practice for a period of years, and specifically focused on the Kentucky Health Spa Act claims. There is therefore reason to believe that some deference is warranted. This case

is a far cry from *Seeger* or *Pampers*, which were said to have settled before conducting discovery or having an opportunity to understand the relative strengths and weaknesses of their cases.

The Zik objections were carefully considered during the Fairness Hearing and in the orders of the lower court. Having failed to put forth any evidence suggesting that their proposed class's claims and—very importantly—realistic anticipated recovery are significantly different from what was obtained here, we conclude that the district court acted within its discretion when determining that the settlement was fair despite the Zik objectors' assertions.

C. The Zik objectors' attorney's fee request

The Zik objectors argue that the district court erred in refusing their request for fees. This court reviews a district court's award or denial of attorney's fees for an abuse of discretion. *Bowling*, 102 F.3d at 779. "Fees and costs may be awarded to the counsel for objectors to a class action settlement if the work of the counsel produced a beneficial result for the class." *Olden v. Gardner*, 294 F. App'x 210, 221 (6th Cir. 2008); *see also Lonrado v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 803–04 (N.D. Ohio 2010) ("Sixth Circuit case law recognizes that awards of attorneys' fees to objectors may be appropriate where the objector provided a benefit to the class by virtue of their objection."). Here, the district court found that because none of the Ziks' objections had merit, they had not provided the necessary benefit to the class to receive fees. Though the Zik objectors also argue that counsel provided some benefit to the class by objecting

to the prior settlement in *Seeger* and helped drive the defendant to settle by advancing the Zik case, they have provided no authority indicating that the district court must award attorney's fees to counsel whose work in an entirely separate litigation may have provided some benefit to a class in the litigation before the court. Accordingly, we conclude that the district court acted within its discretion in denying attorney fees to the Zik objectors.

III. CONCLUSION

For the reasons stated above, we AFFIRM the district court's order.

DISSENT

CLAY, Circuit Judge, dissenting. Contrary to the focus of the majority opinion, this is not primarily a case about the theoretical policy considerations that should be taken into account in order to determine or apportion the economic or societal benefits of this form of consumer class action litigation. What the majority misses in its survey of the case law and academic literature is that the court below abused its discretion in approving a class action settlement which fails to adequately protect the interests of class

members and unduly enriches class counsel at the expense of their own clients.

Rule 23 imposes obligations on class representatives, class counsel, and the district court to protect the interests of absent class members: class representatives may be appointed only if they will "fairly and adequately protect the interests of the class"; class counsel has the "duty" to do the same; and a court may approve a settlement "only after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(a)(4), (g)(4), (e)(2). We have previously described class counsel's duty as "fiduciar[ies]" of the class, whose performance as such "courts must carefully scrutinize." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013); *see also Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993). Because class counsel fell short of their obligations both under Rule 23 and as fiduciaries, and the district court failed to exercise the necessary careful scrutiny to determine that the settlement was fair, reasonable and adequate, I respectfully dissent.

When deciding whether to approve a class action settlement, courts look to several factors:

> (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest.

Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp., 497 F.3d 615, 631 (6th Cir. 2007). The circumstances of this settlement, including its disproportionate fee award, strongly suggest an abuse of discretion by the district court in approving the settlement, including the fee award.

The Ninth Circuit warned that courts "must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011). Bluetooth gave three examples of such signs: (1) "when counsel receive a disproportionate distribution of the settlement"; (2) "when the parties negotiate a 'clear sailing' arrangement[1] providing for the payment of attorneys' fees separate and apart from class funds, which carries 'the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class'"; and (3) "when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund." *Id.* (internal citations omitted). All three warning signs are present in this case.

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[1] A so-called "clear sailing" provision is an agreement on the amount of attorney's fees whereby "the party paying the fee agrees not to contest the amount to be awarded by the fee-setting court so long as the award falls beneath a negotiated ceiling." *Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 425 (6th Cir. 2012).

Class counsel, who were also class counsel in the court below, argue that we must consider the compensation to the class and the award of attorney's fees separately. They obtained what they consider significant relief for the class—which, in congratulating themselves, they label "exceptional" at least five times in their brief—and therefore believe that they have rightly earned a hefty fee award. Objector Joshua Blackman, however, urges us to view the settlement and the fee award as inseparable. Because the class recovery was dwarfed by the fee award class counsel ultimately received—a fee award negotiated behind closed doors—the settlement and fee award represent an unconscionable elevation of the interests of class counsel over those of the class that should be rejected under *Dry Max Pampers*. *See* 724 F.3d at 717 (rejecting $2.73 million attorney fee award where the class itself received no cash whatsoever). To evaluate these arguments, both separately and together, it is necessary to retrace the relief, the settlement, the fee award, and the role of the district court.

At the time of the fairness hearing in this case, the deadline to file claims had passed, and although some of the payments were still being finalized, the claims administer, Jeffrey Dahl, had filed a declaration, docketed in the record, that identified 49,810 "Allowed Claimants"[2] out of a total gym membership of 605,735. (R. 136-1, Dahl Decl. of Feb. 11, 2014 at

[2] This was later amended to 49,808 in a later declaration from Dahl, docketed between the fairness hearing and the magistrate judge's report and recommendation. (R. 140-1, Dahl Decl. of Mar. 21, 2014 at Page ID 2797.)

Page ID 2659.) Thus, when the fairness hearing took place, the district court was on notice that only some 8.2% of class members had obtained monetary relief. Dahl testified at the fairness hearing that the median response rate in a study of consumer class actions was 5-8%. (R. 139, Fairness Hr'g Tr. at Page ID 2722.) These figures are consistent with the recent observation of the Third Circuit that "consumer claim 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) (quoting finding of special master). Dahl's testimony, and Plaintiffs' argument, might be recharacterized to ask whether the district court, aware of the low customary response rate in consumer class actions, should have approved a settlement in which 91.8% of the class—whose interests class counsel were under a fiduciary obligation zealously to represent—is left with absolutely nothing.

The majority opinion's argument regarding the propriety of the district court's approval of the settlement is predicated entirely on acceptance of the status quo. Focusing on the average payment amount to a claimant—and not the average payout spread across all class members— the magistrate judge described the recovery, which by that point had been fixed at $1,593,240, as "substantial."[3] (R. 141, Report

[3] Unclaimed funds were to be redistributed pro rata to claimants only if the total payout were less than $1.3 million, and were capped at that amount. Class counsel also did not see fit to include a cy pres beneficiary, as there often is in cases like this; all unclaimed funds were to revert to Defendant. *Compare Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 351 (6th Cir. 2009) (awarding unclaimed funds to a nearby school district).

and Recommendation at Page ID 2844.) And perhaps this case may exceed the average claim rate of consumer class actions. However, there is another interpretation of class counsel's performance in this scenario: class counsel spent years litigating this case and, as a result of the claims process in whose design they participated, their clients were left with little to show for their counsel's efforts. From this perspective, class counsel did poorly in absolute terms.

In the district court's view, this purportedly substantial recovery and the protracted proceedings—which had already dragged on for nearly three years by the time of the report and recommendation—were enough to justify class counsel's requested $2,390,000 fee award. (*Id.* at Page ID 2831–32, 2835–36, 2841.) The district court first justified its findings under the lodestar approach, a method of compensating counsel based on hours of work at the applicable rates (and sometimes a multiplier), and then performed a so-called "percentage of the fund cross-check" whereby it calculated the percentage of the fee award as a proportion of its valuation of an $8.5 million constructive common fund.[4] *See Rawlings*, 9 F.3d at

[4] District courts are required to explain their reasons for "adopting a particular methodology and the factors considered in arriving at the fee." *Moulton*, 581 F.3d at 352. Such explanations often discuss the following factors: "(1) the value of the benefit rendered to the plaintiff class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the

516–17 (approving both lodestar and percentage-of-the-fund methods in this Circuit). Such cross-checks against the other method are not uncommon. *See Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 F. App'x 496, 500 (6th Cir. 2011); *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996). Even if Blackman had not raised issues about the allocational fairness of this fee relative to the class payout, the fee award could not be sustained under either of these methodologies.

Although "the lodestar method has been criticized for being too time-consuming of scarce judicial resources," the "listing of hours spent and rates charged provides greater accountability." *Rawlings*, 9 F.3d at 516. Class counsel failed to submit the voluminous records contemplated by Rawlings and instead submitted perfunctory, impenetrable bullet-point lists in two affidavits in which they simply asserted that they had kept contemporaneous records. (R. 114-1, McCormick Decl. at Page ID 1865–80; R. 114-2, Troutman Decl. at Page ID 1881–1903.) To these bullet lists were appended the lengthy curriculum vitae of class counsel. (*Id.*) With no such contemporaneous records actually submitted by class counsel, the message to the district court was obvious: we are experienced litigators; just trust us that we did this work. The district court took class counsel at their word, although it chided counsel that "the best practice may have been to submit more detailed records of the costs and time expended in the

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professional skill and standing of counsel involved on both sides." *Id.*

litigation." (R. 141, Report and Recommendation at Page ID 2870.)

Confronted with counsel's uncorroborated sworn statements, the district court should not have been so trusting. This Circuit places the "burden of providing for the court's perusal a particularized billing record" on the party seeking fees. *Imwalle v. Reliance Med. Products, Inc.*, 515 F.3d 531, 553 (6th Cir. 2008) (quoting *Perotti v. Seiter*, 935 F.2d 761, 764 (6th Cir. 1991)) (upholding fee award where counsel "submitted 52 pages of detailed, itemized billing records that specify, for each entry, the date that the time was billed, the individual who billed the time, the fractional hours billed (in tenths of an hour), and the specific task completed"). Reviewing case law, *Imwalle* held that "[a]lthough counsel need not record in great detail each minute he or she spent on an item, the general subject matter should be identified." 515 F.3d at 553 (citations omitted). District courts, *Imwalle* noted, have reduced fee awards "where billing records 'lumped' together time entries under one total so that it was 'impossible to determine the amount of time spent on each task.'" *Id.* (quoting *Cleveland Area Bd. of Realtors v. City of Euclid*, 965 F. Supp. 1017, 1021 (N.D. Ohio 1997)). In the bullet points at issue here, there was no description of the specific task or of the subject matter—apart, of course, from what counsel simply termed the "Litigation." For example:

> • I[, Thomas McCormick, class counsel,] have 11 years of experience in handling complex litigation and billed at my standard hourly rates of $260 per hour in 2011, $350 in 2012;

> and $375 in 2013. My time constitutes over 52% of the time billed by Vorys in the Litigation.

(R. 114-1, McCormick Decl. at Page ID 1868.) Such "documentation" is completely inadequate and should not have been accepted, especially coming from attorneys who touted their experience in the succeeding pages. *Cf. McCombs v. Meijer, Inc.*, 395 F.3d 346, 360 (6th Cir. 2005) (affirming fee award where the district court found that "*entries* made by [the plaintiff's] counsel were sufficient even if the description *for each entry* was not explicitly detailed") (emphases added). In approving the $2.39 million fee award, the magistrate judge relied on this deficient recitation and the oral representation of class counsel that the lodestar by the time of the fairness hearing was "just shy of $2.8 million." (R. 141, Report and Recommendation at Page ID 2871.) That the fee ultimately awarded was below its orally asserted lodestar should not, alone, save it. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 433–37 (1983) (allowing district court to reduce lodestar amount for inadequate documentation and limited success).

In performing its percentage-of-the-fund cross-check, the district court also committed legal error because it miscalculated the value of the fund. Following the approach of *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766 (N.D. Ohio 2010), it chose as its valuation the midpoint of the $1,593,240 actual payout to class members and the "Available Benefit" of $15,500,430, the maximum payout if all class members were to file claims, for a final valuation of $8,546,835. (R. 141, Report and Recommendation at Page ID 2875.) It then added administration costs

($496,259) and the attorney's fee itself for a "Total Class Benefit" of $11,433,094, of which the requested fee award was 20.9%—an acceptable percentage, in its view. (*Id.*)

Not only has no Circuit in the country approved of such a methodology, it is premised on the faulty and fictional premise that counsel should be given credit for compensation that the class did not receive—in other words, for millions of dollars that would never leave Defendant's coffers. We have long held that "[w]hen awarding attorney's fees in a class action, a court must make sure that counsel is fairly compensated for the amount of work done *as well as for the results achieved.*" *Rawlings*, 9 F.3d at 516 (emphasis added). Rawlings further stated that "the percentage of the fund method more accurately reflects the results achieved." *Id.* With the claims deadline months past, the district court knew that neither the $15.5 million "Available Benefit" nor the $8.5 million midpoint figure could ever materialize. Yet the district court could have predicted this beforehand simply because it was presiding over a claims-made consumer class action, which would have an extremely low response rate, as courts have begun to recognize. *See Sullivan*, 667 F.3d at 329 n.60.

This is the predictable "economic reality" of claims-made class actions, and one that we must acknowledge. *Dry Max Pampers*, 724 F.3d at 717 (quoting *Strong v. BellSouth Telecomms., Inc.*, 137 F.3d 844, 849 (5th Cir. 1998)). The defense bar, at least, recognizes this; among defense counsel, low participation rates under claims-made class action

settlements are both common knowledge and a selling point: class members recover—and a defendant pays—much less when class members opt in than when a defendant disburses funds directly to class members.[5] The problem is not, as the majority seems to think, with settlement procedures that are intented to discourage claims. Even without overt efforts on the part of defense counsel to thwart claims, opt-in claims procedures naturally depress response rates to single-digit percentages for the very predictable reason that class members simply are not sufficiently incentivized to bother to opt in.

The Seventh Circuit rightly rejected a hypothetical total maximum payout of $14.2 million in a consumer class action in which $1 million was paid out as "fiction," holding that the district court should have computed the percentage of the fund by calculating the "'ratio of (1) the fee to (2) the fee plus what the class members received.'" *Pearson v. NBTY, Inc.*, 772 F.3d 778, 781 (7th Cir. 2014) (quoting *Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014)).[6] *See also Strong*, 137 F.3d 844. This is a

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[5] Wystan M. Ackerman, *Class Action Settlement Structures*, 63 Federation of Defense and Corporate Counsel Quarterly 35 (2012) (claiming that the "principal advantage" of opt-in, claims-made settlements from the perspective of the defense is that defendants would pay much less than if they simply mailed out checks).

[6] On this basis, the court also held, correctly, that "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." *Id.*

simple, common-sense rule: in assessing the fairness of the division of the payout between class counsel and the class, courts should look to the amounts actually pocketed by both parties. Thus, the district court should have used the $1,593,240 actually paid as the benefit to the class for the calculation of its fee.

Yet if valuations based on counterfactual maximum payouts are fiction, they are the sort of fiction in which courts, including the Supreme Court some decades ago, have indulged. In *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480 (1980), the Supreme Court held that the "right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel." *Accord Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007). Although *Boeing* has never been directly overruled, it has hardly been met with universal acclaim. In a statement respecting the denial of a petition for certiorari in *Int'l Precious Metals Corp. v. Waters*, 530 U.S. 1223, 120 S.Ct. 2237 (2000), Justice O'Connor expressed serious misgivings about a fee award of $13,333,333 based on a reversionary fund of $40 million, the unclaimed portion of which (all but the $6,485,362.15 actually paid out to the class) would revert to the defendant:

> We had no occasion in *Boeing*, however, to address whether there must at least be some rational connection between the fee award and the amount of the actual distribution to the class. The approval of attorney's fees absent any such inquiry could have several troubling consequences. Arrangements such as that at

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

120 S.Ct. at 2237–38. The Advisory Committee notes to the 2003 amendments to Rule 23 that "[o]ne fundamental focus" of a district court's analysis "is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members. . . . For a percentage approach to fee measurement, results achieved is the basic starting point." Fed. R. Civ. P. 23, 2003 Amend., Note to Subdivision 23(h). The Advisory Committee had no power to abrogate *Boeing*, but it nonetheless distinguished benefits from actual results.[7]

In *Pearson*, the Seventh Circuit also found *Boeing* distinguishable from constructive common fund cases because *Boeing* was actually litigated to a judgment

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[7] The Note's caution that "in some class actions the monetary relief obtained is not the sole determinant of an appropriate attorney fees award," for which it cites *Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989), appears to refer to the irrefutable fact that class counsel should have an incentive to seek and be compensated for obtaining injunctive or declaratory relief, and does not necessarily support basing a fee award on funds never actually claimed or paid out.

of $3,289,359 plus interest, and "[n]othing in the court's order made Boeing's liability for this amount contingent upon the presentation of individual claims." 772 F.3d at 782 (quoting *Boeing*, 444 U.S. at 479 n.5). In a case involving an actual, quantifiable common fund with a *cy pres* beneficiary, we valued "settlement proceeds," which, by virtue of the *cy pres* beneficiary, the defendant had to pay out, as the amount received by both the class members and the cy pres beneficiary for calculation of attorney's fees. *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 352 (6th Cir. 2009). Such valuations are intuitive when courts are forced to calculate liabilities or a defendant actually agrees to pay out a certain sum. In so-called "constructive common fund" cases where the vast majority of class members do not claim their awards, but in which unclaimed money remains with the defendant, district courts should not be allowed to engage in unreasonable, counterfactual valuations of the fund—even supposed compromise measures, as the district court did here.

The correct valuation of the benefit of the class at $1.59 million leads naturally to Blackman's preferred approach of treating the $1.59 million class payout in the context of the $2.39 million attorney fee award. In a case involving a "clear sailing" agreement not to contest fees before the court, the Eighth Circuit described settlement terms and a negotiated fee amount as a "package deal." *Johnston v. Comerica Mortgage Corp.*, 83 F.3d 241, 246 (8th Cir. 1996). By *Johnston*'s sound logic, the fee award and the settlement must be considered together because the fee amount was, for all intents and purposes, negotiated between the parties and memorialized in

the settlement agreement, as the other settlement terms were. Courts have frequently expressed "the fear that class actions will prove less beneficial to class members than to their attorneys," as here. *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991). Courts' concerns are twofold—not only might class counsel benefit more than the class, but they might also benefit at the expense of the class. A defendant, concerned only with its total payout, has little incentive to be concerned with "the allocation between the class payment and the attorneys' fees." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 820 (3d Cir. 1995). *See also Dry Max Pampers*, 724 F.3d at 717; *Strong*, 137 F.3d at 849–50. *Weinberger* recognized that class counsel could, in essence, sell out its client: "the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees." 925 F.2d at 524.

To decide whether that was the case here, it is worth doing a little arithmetic. The amount that the attorneys received exceeded the amount the class received by just over 50%; put differently, calculating the "relevant" ratio that *Pearson* and *Redman* proposed—which compares the amounts received by class counsel and the class as a percentage of the defendant's total payout, exclusive of administration costs—reveals that the attorney's fees represent 60% of Defendant's payout. *See Redman*, 768 F.3d at 630 (rejecting fee award where 55% of the defendant's payout went to attorney's fees). Even though the $1.59 million paid to the class was a more substantial result than the "perfunctory," non-cash relief at issue in *Dry Max Pampers*, which Blackman concedes, that

case compels us to consider the allocation of relief between class counsel and the class. 724 F.3d at 718. Because of its concerns about the misallocation of relief between class counsel and the class, *Dry Max Pampers* rejected a settlement that "g[ave] preferential treatment to class counsel" as demonstrating "disregard" of their "fiduciary responsibilities." *Id.* A fee award that exceeds the recovery of the class by 50%, as the $2.39 million attorney fee award granted by the district court in this case did, seemingly constituted a windfall to the attorneys that the district court should not have allowed in the proper exercise of its discretion.

Two particular clauses in the settlement relating to the fee award are of additional concern: the "clear sailing" clause, whereby Defendant agreed not to contest any attorney's fee request up to $2,390,000, and the "kicker" clause, which stipulated that if the district court were to award less than $2,390,000 in attorney's fees, the unpaid balance would revert to Defendant. (See R. 97-1, Settlement, at Page ID 1499–1500.) Blackman sees both these clauses as evidence of yet further "self-dealing" on the part of class counsel at the expense of the class. (Blackman Br. at 17.) The clear sailing clause required Defendant to file a notice with the district court at least 21 days before the fairness hearing stating that it did not oppose the requested fee amount up to the $2,390,000 cap. The kicker clause, in seemingly uncontroversial legalese, stipulated that whatever payment the district court approved "shall constitute full satisfaction of Defendant's obligations" to pay the attorney's fee. (R. 97-1, Settlement, at Page ID 1499.) A clause two paragraphs prior, stating that "such

payments shall have no effect on . . . the Class Payment" precluded any potential pro rata distribution of unpaid attorney's fees—and sent such unpaid fees right back to Defendant. (*Id.*)

Plaintiffs defend the use of the clear sailing clause, and argue that we have upheld clear sailing agreements in the past, as in *Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402 (6th Cir. 2012), which held that "not every 'clear sailing' provision demonstrates collusion." *Id.* at 426 (affirming use of clear sailing provision "where the 'clear sailing' provision caps attorney compensation at approximately 2.3% of the total expected value of the settlement to the class members"). However, as *Weinberger* acknowledged, clear sailing agreements necessarily suggest conflict between the class and its counsel, for "the very existence of a clear sailing provision increases the likelihood that class counsel will have bargained away something of value to the class." 925 F.2d at 525 (citing *Malchman v. Davis*, 761 F.2d 893, 908 (2d Cir. 1985) (Newman, J., concurring), *abrogated on other grounds by Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

Plaintiffs also accuse Blackman of predicating his argument "on the erroneous factual assumption that negotiations concerning attorneys' fees affected the relief available to the class," and point to the district court's finding that class counsel negotiated the fee award only after agreeing to the other settlement terms. (Pls. Br. at 47.) In support of their fee request, class counsel from the two lead firms submitted affidavits to the district court in which they averred the following:

> The parties did not begin negotiations on attorneys' fees and costs until after the substantive relief was agreed upon between Plaintiffs and Urban Active. Thus, it is clear that the Settlement resulted from arms'-length negotiation and fair dealing with the named Plaintiffs and classes' [sic] best interests in mind.

(R. 97-10, Decls. of Thomas McCormick and Mark Troutman at Page ID 1605, 1610). While the blatantly self-serving and conclusory language of the second sentence might have raised serious red flags, the district court held that the risk of collusion was "lessened" because of the order of negotiations. (R. 141, Report and Recommendation at Page ID 2850.) In *General Motors*, the Third Circuit declined to "place such dispositive weight on the parties' self-serving remarks" about counsel's assurances about the order in which the settlement and fees had been negotiated. 55 F.3d at 804.

General Motors also expressed skepticism about this nearly simultaneous form of negotiation, with no intervening court involvement. *Id.* (citing Court Awarded Attorney's Fees, Report of the Third Circuit Task Force, 108 F.R.D. 238 (1985)) ("even if counsel did not discuss fees until after they reached a settlement agreement, the statement would not allay our concern since the Task Force recommended that fee negotiations be postponed until the settlement was judicially approved, not merely until the date the parties allege to have reached an agreement"). *See also Pearson*, 772 F.3d at 786 (dismissing similar arguments as "not realistic"). Quoting the same Third

Circuit task force report, the Ninth Circuit explained that "[e]ven if the plaintiff's attorney does not consciously or explicitly bargain for a higher fee at the expense of the beneficiaries, it is very likely that this situation has indirect or subliminal effects on the negotiations." *Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003). Class counsel cannot be unaware that fee negotiations are nigh—that is, after all, how plaintiffs' lawyers finance their work—and that knowledge simply might cause them to push less hard for the interests of their clients, even if they fail to realize that they are doing so.

With subconscious or even overt collusion a serious risk, the district court possesses a vital role in monitoring potential collusion. The Ninth Circuit held in *Bluetooth* that "when confronted with a clear sailing provision, the district court has a *heightened duty to peer into the provision and scrutinize closely the relationship between attorneys' fees and benefit to the class*, being careful to avoid awarding unreasonably high fees simply because they are uncontested." 654 F.3d at 948 (emphasis added and citations omitted). *Gooch*, the only Sixth Circuit case to date to have considered the validity of clear sailing provisions, did not explicitly adopt the Ninth Circuit requirement of heightened scrutiny of such provisions, but *Bluetooth* was correct that district courts must be especially wary when the parties agree not to contest fees in class actions. *See Gooch*, 672 F.3d at 426. To its credit, the district court did not simply "ignore[] the clear sailing fee provision," as the court below did in *Bluetooth*, and instead discussed it at some length. 654 F.3d at 948. The court below nonetheless greatly underestimated how the very

presence of the clear sailing provision was itself evidence of possible collusion, and thereby cast doubt on the fairness of the settlement as a whole, including the adequacy of class counsel's representation. *See* Rule 23(e)(2), (g)(4).

The inclusion of the so-called "kicker clause," which allowed unpaid attorney's fees to revert to Defendant, only "amplifies the danger of collusion already suggested by a clear sailing provision." *Bluetooth*, 654 F.3d at 949. *Bluetooth* recognized that these two types of suspicious clauses are intimately related: "[t]he 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." *Id.* At some point in the settlement negotiations, the parties presumably wished to resolve what would happen if the district court decided to award less than the $2.39 million cap, and agreed that, should the district court do so, any remaining funds would revert to Defendant—rather than being distributed to class members. The district court reasoned that this clause was in no way problematic and had no practical effect because class counsel were awarded the full $2.39 million in attorney's fees. (R. 141, Report and Recommendation at Page ID 2852.) Yet as with the clear sailing clause, the district court overlooked the extent to which the inclusion of this provision in the agreement may have been the product of compromised representation by class counsel who were willing to deprive their clients of Defendant's full set-aside for fees, so long as they themselves were paid off. The Seventh Circuit rightly held that it is impossible to discern any "justification for a kicker

clause," which should be subject to a "strong presumption of [] invalidity." *Pearson*, 772 F.3d at 787.

Consumer class actions may indeed confer societal benefits. Yet allowing such purportedly desirable litigation to remain economically viable should not guide a district court's fairness inquiry under Rule 23. Class counsel are fiduciaries of the class, not of the public at large, and should not be able to justify a poor result for their clients because of the nobility of their mission. The majority cites some scenarios in which "significant compensation to class members is out of reach," such as small claims and unavailable contact information for class members. Indeed, acquiescence to the dysfunctional procedures associated with the status quo of opt-in settlements fails to provide "an incentive to design the claims process in such a way as will maximize the settlement benefits actually received by the class." *Id.* at 781. In fact, the desirable deterrent effect on defendants' behavior might even be expected to increase as the payout to class members grows.

The "package deal" that this settlement, including its disproportionate fee award, offered to the class was a bad one relative to what it offered class counsel. *See Johnston*, 83 F.3d at 246. The disparity is so great that it calls into question whether class counsel may have violated their "fiduciary obligations" to class members. *Dry Max Pampers*, 724 F.3d at 718. As in *Dry Max Pampers*, "[t]he reality is that this settlement benefits class counsel vastly more than it does the consumers who comprise the class." *Id.* at

721. Accordingly, it should have flunked any fairness inquiry the district court made under Rule 23(e).

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

AMBER GASCHO, *et al.*, on behalf of themselves and all similarly situated, Plaintiffs,

v.

GLOBAL FITNESS HOLDINGS, LLC, Defendant.

Case No. 2:11-CV-00436

Judge Smith

Magistrate Judge King

[Entered July 16, 2014]

OPINION AND ORDER

On April 4, 2014, the United States Magistrate Judge issued a Report and Recommendation finding that the Settlement Agreement is fair, reasonable, and adequate and recommending that the Settlement Agreement be finally approved by the Court and the action be dismissed with prejudice. (*See Report and Recommendation*, Doc. 141). The parties were advised of their right to object to the Report and Recommendation. This matter is now before the Court on the Objections of Joshua Blackman to the

Magistrate Judge's Report and Recommendation (Doc. 142); and the Objections of Robert and April Zik and James Michael Hearon to the Magistrate Judge's Report and Recommendation (Doc. 143). The Objections are fully briefed and ripe for disposition. For the reasons that follow, the Court **OVERRULES** the objections and **AFFIRMS** the Magistrate Judge's Report and Recommendation.

I. BACKGROUND[1]

On April 13, 2011, Plaintiffs initiated this class action against Defendant Global Fitness Holdings, LLC, formerly doing business as Urban Active ("Global Fitness"), in the Court of Common Pleas for Franklin County, Ohio. In May 2011, Defendant Global Fitness removed the case to this Court. Defendant, Global Fitness, is a Kentucky limited liability corporation that operated fitness facilities in Ohio, Kentucky, Georgia, Nebraska, North Carolina, Pennsylvania, and Tennessee until October 2012, when it sold all of its assets to Fitness and Sports Clubs, LLC, doing business as LA Fitness. Plaintiffs are residents of Ohio who entered into membership and/or personal training, child care, and/or tanning contracts at Global Fitness's Ohio Urban Active gym facilities. Plaintiffs allege that they were financially wronged as members of Urban Active fitness clubs in Ohio.

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[1] The factual and procedural history of this case has been set forth in detail in prior decisions by this Court, as well as the Magistrate Judge's Report and Recommendation. That information is hereby incorporated by reference herein and is summarized, restated, and supplemented as necessary to resolve the pending objections.

On September 12, 2013, the parties involved in this case executed a settlement agreement. On September 18, 2013, the parties then filed a Joint Motion for an Order Preliminarily Approving the Class Action Settlement, Preliminarily Certifying a Class and Subclasses for Settlement Purposes, Appointing Class Representatives, Appointing Class Counsel, Approving and Directing the Issuance of a Class Notice, and Scheduling a Final Fairness Hearing (Doc. 97). On September 30, 2013, the Court preliminarily approved the proposed settlement, preliminarily certified a class and subclasses for settlement purposes, appointed lead counsel for the class, approved and directed the issuance of notice to the class, and referred the matter to the undersigned for a fairness hearing

> to determine (a) whether the proposed settlement of the action on the terms and conditions set forth in the Settlement Agreement is fair, reasonable, and in the best interest of the Classes and Subclasses and should be finally approved by the Court; (b) whether the Class and Subclasses should be finally certified for settlement purposes; (c) whether the Action should be dismissed with prejudice pursuant to the terms of the Settlement; (d) whether Settling Plaintiffs should be bound by the release set forth in the Settlement Agreement; (e) whether and in what amount Class Counsel should be awarded fees and reimbursement of expenses, (f) whether and in what amount the Class Representatives shall be awarded the Class Representative

> Enhancement Payments, (g) and to rule on any other matters the Court may deem appropriate.

(*See* Preliminary Approval Order, Doc. 111, at 5). Additionally, in this preliminary order, the Court referred the Fairness Hearing to Magistrate Judge King to be held on February 13, 2014. Objections were filed by Robert and April Zik and James Michael Hearon, on behalf of themselves and a class of similarly situated individuals (collectively "Zik/Hearon Objectors") (Doc. 118); and Joshua Blackman (Doc. 122). The objectors appeared at the Fairness Hearing. On April 4, 2014, Magistrate Judge King issued a Report and Recommendation recommending that the Settlement Agreement be finally approved by the Court based on her findings that the terms and conditions of the Settlement Agreement are fair, reasonable, adequate, and in the best interest of the Class and Subclasses. The Report and Recommendation further recommends final certification of the Class and Subclasses, that the action be dismissed with prejudice, that Class Counsel be awarded reasonable attorneys fees and reimbursement of expenses in the amount of $2,390,000, and that Class Representatives be awarded the Class Representative Enhancement Payments in the amounts specified in the Settlement Agreement. Finally, the Report and Recommendation recommends denial of the Motion to Strike the Objection of Joshua Blackman (Doc. 125).[2]

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[2] Global Fitness moved to strike Blackman's objections on the basis that he lacked standing. Blackman signed a membership agreement at a Global Fitness in Louisville, but then rescinded the contract pursuant to a three-day cancellation

Both Joshua Blackman and the Zik/Hearon Objectors also filed objections to the Magistrate Judge's Report and Recommendation. Those objections are now ripe for decision.

II. STANDARD OF REVIEW

When objections are received to a report and recommendation on a dispositive matter, the District Judge "shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). After review, the District Judge "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions." *Id.* General objections are insufficient to preserve any issues for review; "[a] general objection to the entirety of the magistrate's report has the same effects as would a failure to object." *Howard v. Secretary of Health and Human Services*, 932 F.2d 505, 509 (6th Cir. 1991).

III. DISCUSSION

Joshua Blackman and the Zik/Hearon Objectors (collectively "the Objectors") object to the findings of Magistrate Judge King in the Report and Recommendation, asserting that it should not be approved because the proposed settlement is not fair

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provision. However, at the Fairness Hearing, Global Fitness conceded that because he signed a membership agreement, he was technically part of the class as defined in the Settlement Agreement.

to the entire class. Plaintiffs and Defendant respond that the seventy-nine page Report and Recommendation is fair, reasonable, and adequate, and complies with the requirements of Rule 23 of the Federal Rules of Civil Procedure. Plaintiffs and Defendant assert that the Objectors are raising the same unsupported arguments raised during the Fairness Hearing. Most of these objections have already been considered and dismissed by the Magistrate Judge; nonetheless, the Court will consider them in turn.

A. Objections of Joshua Blackman

Objector, Joshua Blackman, reasserts ten objections to the Report and Recommendation. He essentially provides bullet point objections, with very little argument as to how the detailed analysis in the Report and Recommendation is incorrect. He reincorporates by reference his objections filed prior to the Fairness Hearing. In these objections, he relies on two distinguishable cases: *In re Dry Max Pampers Litigation*, 724 F.3d 713 (6th Cir. 2013), and *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935 (9th Cir. 2001). The Report and Recommendation carefully considered and ultimately distinguished each of these cases from the case at bar.

Mr. Blackman's first two objections regard the reaction of absent class members and the public interest. Blackman asserts that it was legal error for the Magistrate Judge to find the settlement is fair when the objections were "vigorously presented and pursued." (*Report and Recommendation* at 38-39). Blackman relies on *Pampers*, citing that the court reversed settlement approval when three class

members objected. The Magistrate Judge in this case did acknowledge the vigorous representation of the objectors in this case, but further held that "the Court nevertheless concludes that the number of objectors and opt-outs in relation to the size of the class supports a finding that the *Settlement Agreement* is fair, reasonable, and adequate." (*Report and Recommendation* at 39). This finding was reasonable as other courts have held that when there are few objections filed, an inference can be drawn that most of the class members do not have a problem with the proposed settlement. See *Hainey v. Parrott*, 617 F. Supp. 2d 668, 675 (S.D. Ohio 2007) (Beckwith, J.) ("Generally, however, a small number of objections, particularly in a class of this size, indicates that the settlement is fair, reasonable and adequate."); *see also In re Delphi Corp. Sec., Derivative & "ERISA" Litigation*, 248 F.R.D. 483, 500 (E.D. Mich. 2008) ("If only a small number [of objections] are received, that fact can be viewed as indicative of the adequacy of the settlement."). Blackman even acknowledges the public interest for settlement of complex litigation. He fails to show how it is outweighed by his allegation of "red carpet treatment to attorneys." (Blackman Objections at 1).

Next, Blackman objects on the grounds that preferential treatment has been afforded to class counsel. Blackman disagrees with the Report and Recommendation finding that fees paid to class counsel are reasonable because they were engaged in vigorous litigation for two and one-half years and the settlement actually involves cash pay-outs to the claimants. Blackman asserts that regardless of how much time is spent litigating, it does not justify a

settlement that "is disproportionately slanted in favor of counsel and against their clients." (Blackman Objections at 2). Again, Blackman relies on *Pampers*, but the Report and Recommendation clearly distinguishes this case from *Pampers*. The Sixth Circuit in *Pampers* reversed the trial court's approval of a class settlement because it gave preferential treatment to class counsel but only perfunctory relief to unnamed class members. *Pampers*, 724 F.3d at 721. The class counsel in *Pampers* didn't do nearly the work of class counsel in the case at bar yet were awarded $2.72 million in fees. Further, the class members in *Pampers* were only awarded injunctive relief and not significant monetary payments like in this case. Again, the findings in the Report and Recommendation are reasonable, and no preferential treatment has been afforded to class counsel.

Blackman's next objections are to the inclusion of the clear sailing clause and kicker provision in the Settlement Agreement, objections he raised at the Fairness Hearing arguing the mere presence of these provisions render the Settlement Agreement unfair. The Court, however, disagrees with Blackman's arguments and finds the Magistrate Judge's analysis accurate. Because the Settlement Agreement provides for immediate and substantial cash payments to class members, the risk of collusion associated with a clear sailing provision is diminished. Further, because the parties negotiated reasonable attorneys' fees, the class will not be deprived of any benefit by the inclusion of a kicker provision. These provisions are included for purpose of finality and risk avoidance.

Next, Blackman objects to the Class Representatives Enhancement Payments. Again, this objection was thoroughly considered and addressed in the Report and Recommendation. The Magistrate Judge carefully set forth the concerns raised by courts with respect to these enhancements. The enhancements in this case were tailored to each of the Class Representatives time and effort in this case. Accordingly, the Court does not find any error in the findings by the Magistrate Judge.

Blackman next takes issue with the claims process of the Settlement Agreement, as opposed to remitting settlement payments to known, eligible class members. Plaintiffs argue, and the Court agrees, that the Objectors misconstrue the Dahl testimony at the Fairness Hearing. Though Dahl testified that "90.8 percent of the Postcard Notices were delivered," he clarified that there is "no way of definitively saying they actually reached the class member." (*Report and Recommendation* at 61). Further, there was testimony that the data was outdated and unreliable.

Blackman's final objections all relate to the attorneys' fees to be paid to Class Counsel pursuant to the Settlement Agreement. Specifically, he objects that the division of fees between the two lead firms was not disclosed prior to the objection deadline. He objects to the lodestar method of calculation of fees as opposed to the percentage of recovery method. And he objects to using the mid-point approach to determine the denominator from which the fee is taken.

First, with respect to division of fees between the two firms comprising Class Counsel, Plaintiffs argue, and the Court agrees that how the firms divide the

work and ultimately the fees, is irrelevant to the fairness and reasonableness of the Settlement Agreement. The Magistrate Judge discussed in detail the requirements of Rule 23 and found that all the applicable requirements were satisfied. Further, the Magistrate Judge noted that there was no prejudice to the objectors because the disclosure was made well in advance of the Fairness Hearing.

Next, the Magistrate Judge carefully considered each of these objections. Blackman is concerned that the attorney fee award is greater than the total payments to the Class. The Magistrate Judge found, however, that the lodestar method was appropriate and noted that the Class Counsel originally took this case on a contingency fee basis with the risk of not being compensated. The Magistrate Judge concluded, and the Court agrees, that "limiting an award to a percentage of the actual recovery by Allowed Claimants, as Blackman suggest, could dissuade counsel from undertaking similar consumer class actions in the future." (*Report and Recommendation* at 71). Further, the fee in this case was reasonable and the method appropriate, "where, as here, the results achieved are substantial, the interest in fairly compensating counsel for the amount of work done is great." (*Id.*).

Finally, with respect to using the mid-point approach, the Magistrate Judge thoroughly analyzed the applicable case law, including *Boeing Co. v. Van Gemert,* 444 U.S. 472 (1980) and *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766 (N.D. Ohio 2010), and held that "the midpoint method adopted in Lonardo will sufficiently protect the interests of the class against the risk of the actual distribution being

misallocated between attorneys' fees and the class recovery, while at the same time adhering to the principle of *Boeing* that the right to share in the harvest of the lawsuit is a benefit to the class. *See Boeing*, 44 U.S. at 480." (*Report and Recommendation* at 76-77).

As set forth above, all of Mr. Blackman's Objections to the Magistrate Judge's Report and Recommendation are hereby **OVERRULED**.

B. Objections of Zik/Hearon

The Zik/Hearon Objectors raise many of the same objections asserted by Mr. Blackman, including the objection to using a claims process as opposed to a direct payout, the reaction of the class, and preferential treatment to Class Counsel. The Magistrate Judge addressed each of these issues in her Report and Recommendation and the Court has considered both Blackman and the Zik/Hearon objections on each of these issues and those objections were overruled. The Court will consider the following objections by the Zik/Hearon Objectors in turn: that the Settlement Agreement does not adequately represent the entire class; that the Proposed Settlement Agreement and Plaintiffs' position here is contrary to their position when objecting to the *Seeger* settlement; that the release is overbroad; that there has been collusion by Class Counsel; and that the Zik/Hearon Objectors and their counsel should be awarded attorneys fees and incentive awards.

The first objection is that the Plaintiffs fail to adequately address the Class, including the Ziks. They assert that Plaintiffs' claims are not common or typical of the Class' claims or common issues. The

Ziks assert that they were charged a cancellation fee of $10 that was not included in their membership agreement, and the contract only provided for dues to be charged for one month post cancellation, whereas the Class Plaintiffs had contracts that expressly provided for dues to be charged for two months post cancellation, plus a $10 cancellation fee.

All of the arguments raised in support of this objection were carefully considered by the Magistrate Judge in the Report and Recommendation. The Court does not find any error in the analysis. Rule 23(a)(3) requires the Class Plaintiffs' claims be typical, not identical to all the class members' claims. See *Prater v. Ohio Educ. Ass'n*, 2008 U.S. Dist. LEXIS 88511, *9 (S.D. Ohio June 26, 2008) (Sargus, J.) ("The claims of the named plaintiffs and the absent members must be typical, not identical or homogeneous."); *Jenkins v. Hyundai Motor Fin. Co.*, 2008 U.S. Dist. LEXIS 23073, *17 (S.D. Ohio March 24, 2008) (Sargus, J.) (same). Further, if the Ziks believed that their compensation was inadequate, they could have chosen to opt-out of the class to protect their rights. *See Cobell v. Salazar*, 679 F.3d 909, 920 (D.C. Cir. 2012) (holding that "any . . . class member who is allegedly under-compensated by the distribution formula, could have opted out" and "the opt-out provision fulfilled its purpose of protecting objecting class members").

The Zik objectors also argue that the Magistrate Judge failed to analyze the differences in state law, specifically that the Kentucky plaintiffs have claims under the Kentucky Health Spa Act that are unavailable to class members from other states. Though not specifically addressing all the disparities

in the laws of the states that have potential class members, the Report and Recommendation acknowledges that the damages due to each class member could vary based upon a number of factors. However, individual damages calculations do not preclude class certification. *See, e.g., In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 861 (6th Cir. 2013).

Second, the Zik/Hearon Objectors argue that judicial estoppel should bar final approval in this case because Class Counsel objected to final approval in the *Seeger* case. The Objectors also allege collusion by Class Counsel. Class Counsel argues, and the Court agrees, that the proposed Settlement in *Seeger* was a coupon and provided little or no value to the Class and the release was unlimited in time and scope. There is no question that the settlement in this case provides a greater recovery and the release is narrowly tailored. Further, the allegations of collusion are not well-taken. Again, the Magistrate Judge thoroughly analyzed this factor and did not find collusion based on the litigation of this case for two and one-half years, which included extensive and contested discovery.

Next, the Court finds that the release is sufficient and not overbroad. The Report and Recommendation specifically considered this argument and held that "the release in question is limited to claims that share the same factual predicate as the settled claims, and therefore is not unfair to that extent." (*Report and Recommendation* at 64). The Court agrees.

Finally, the Zik/Hearon Objectors assert that their attorneys and class representatives should be

compensated. As the Report and Recommendation acknowledges, "[f]ees and costs may be awarded to the counsel for objectors to a class action settlement if the work of the counsel produced a beneficial result for the class." *Olden v. Gardner*, 294 F. App'x 210, 221 (6th Cir. 2008); *see also Lonardo v. Travelers Indem*. Co., 706 F. Supp. 2d 766, 803-04 (N.D. Ohio) ("Sixth Circuit case law recognizes that awards of attorneys' fees to objectors may be appropriate where the objector provided a benefit to the class by virtue of their objection.").

However, the Magistrate Judge did not find any of the objections meritorious, nor does the Court. The objectors have not provided any benefit to the Class and therefore are not entitled to any incentives or attorneys' fees.

IV. CONCLUSION

For the foregoing reasons, the Court **OVERRULES** all of Blackman and the Zik/Hearon Objections to the Magistrate Judge's Report and Recommendation. Accordingly, the Report and Recommendation is **ADOPTED AND AFFIRMED**. Plaintiffs have met their burden of showing that the prerequisites for the certification of a class action pursuant to Rule 23(a) and Rule 23(b)(3) have been satisfied in this case, that the Settlement Agreement is fair, reasonable, and adequate, and that the Class Counsel's requested award of fees and expenses is fair and reasonable. Therefore, the Settlement Agreement is hereby approved. The Class and Subclasses are certified for settlement purposes. All the settling Plaintiffs are hereby bound by the release set forth in the Settlement Agreement. And, this action is hereby

dismissed with prejudice pursuant to the terms of the Settlement Agreement.

IT IS SO ORDERED.

GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

AMBER GASCHO, *et al.*, Plaintiffs,

vs.

GLOBAL FITNESS HOLDINGS, LLC, Defendant.

Case No. 2:11-CV-00436

Judge Smith

Magistrate Judge King

[Entered April 4, 2014]

REPORT AND RECOMMENDATION

I. Background

A. Procedural History and Third Amended Complaint

Plaintiffs initiated this class action in the Court of Common Pleas for Franklin County, Ohio, on April 13, 2011, against defendant Global Fitness Holdings, LLC, formerly doing business as Urban Active ("Global Fitness" or "defendant"). Defendant removed the action to this Court on May 19, 2011, pursuant to the Class Action Fairness Act, 28 U.S.C. §§ 1332(d), 1453. Plaintiffs are residents of Ohio and Kentucky who signed a gym membership contract and/or a

personal training, child care, and/or tanning contract with Global Fitness. *Third Amended Complaint*, Doc. No. 100, ¶ 2. Defendant is a Kentucky limited liability corporation that operated fitness facilities in Ohio, Kentucky, Georgia, Nebraska, North Carolina, Pennsylvania, and Tennessee until October 2012, when it sold all of its assets to Fitness and Sports Clubs, LLC, doing business as LA Fitness. *Id.* at 3.

This action is one of five similar actions pending against Global Fitness. Class Counsel also represented the plaintiffs in an action in Boone County Circuit Court, Commonwealth of Kentucky, titled *Tartalia v. Global Fitness Holdings, LLC*, No. 11-CI-1121 (the "Tartalia action"). The claims asserted in the Tartalia action were asserted in this action in the *Third Amended Complaint*, which was filed on September 19, 2013.

The *Third Amended Complaint* alleges that Global Fitness engaged in common practices of, *inter alia*, knowingly misrepresenting the terms and conditions of contracts at the time of sale, making unauthorized deductions from plaintiffs' bank accounts, failing to provide consumers with copies of contracts at the time of signing, failing to provide consumers with a list of available plans, selling membership plans that did not appear on required registration statements, failing to orally inform consumers at the time of signing of their right to cancel, failing to provide copies of "notice of cancellation" forms, failing to honor contract cancellations, and failing to perform in good faith its duties under the contracts. *See e.g., Third Amended Complaint*, ¶ 9. Plaintiffs assert the following claims: breach of contract (Count I), unjust

enrichment (Count II), and false, deceptive, and unconscionable consumer practices violative of

> the Ohio Consumer Sales Practice Act [CSPA] and Prepaid Entertainment Contract Act [PECA], O.R.C. §§ 1345.02, 1345.03, and 1345.41-1345.45; the Kentucky Consumer Protection Act and Kentucky Health Spa Act, KRS 367.170,367.910-367.920; the Pennsylvania Health Club Act and Unfair Trade Practices and Consumer Protection Law 73 Pa.Cons. Stat. § 2161 *et seq*., the North Carolina Prepaid Entertainment Contract Act N.C. Gen. Stat. § 66-118 *et seq*., the Tennessee Health Clubs Act and Consumer Protection Act Tenn. Code Ann. § 47-18-301 *et seq*., and the Nebraska Consumer Protection Act, Neb. Rev. Stat. § 59-1601

Third Amended Complaint, ¶¶ 143-173 (footnote omitted) (Counts III and IV). The *Third Amended Complaint* seeks compensatory and equitable relief, including rescission, as well as an award of costs and attorneys' fees.

On February 2, 2011, *i.e.*, before this action was initiated, Robert J. Zik, April N. Zik, and James Michael Hearon, acting on behalf of themselves and a class of similarly situated persons, filed a complaint against Global Fitness in the Jefferson County Circuit Court, *Commonwealth of Kentucky. Zik v. Global Fitness Holdings, LLC*, No. 11-CI-7909 (the "*Zik* action"). *See* Doc. Nos. 118-1 (docket sheet), 118-2 (amended complaint). The *Zik* action presented claims of breach of contract, fraud, and violations of the Kentucky Consumer Protection Act ("KCPA"),

K.R.S. § 367.170, *et seq.*, premised on the alleged breach by Global Fitness of "its members' membership agreements by charging its members one extra month of membership dues and a $10.00 cancellation fee when members terminate their membership agreement." Doc. No. 118-2, pp. 1, 6. The *Zik* action sought "compensatory damages for unpaid dues and cancellation fees, interest, and court costs, . . . punitive damages and their attorney's fees." *Id.* at 37.

On April 15, 2011, *i.e.*, two (2) days after this action was filed, Phillip S. Robins, proceeding on behalf of himself and others similarly situated, initiated an action against Global Fitness in the Cuyahoga County Court of Common Pleas, which action was thereafter removed to the United States District Court for the Northern District of Ohio. *Robins v. Global Fitness Holdings, LLC*, No. 1:11-cv-1373 (N.D. Ohio) ("the Robins action"), Notice of Removal, Doc. No. 1. The complaint in the Robins action alleged

> that, contrary to the express terms of Global's Membership Contracts and Personal Training Contracts . . . Global has (1) retained fees paid by members of its health clubs for the period in which they were disabled, deceased, or relocated, (2) collected from Plaintiffs' credit, debit orbank accounts additional fees not part of the agreed-upon monthly fees, and (3) drafted form contracts containing egregious, confusing and misleading cancellation provisions that guarantee members will be charged for one or more months beyond the date they cancel their memberships. Based on these allegations,

> Plaintiffs assert the following common-law claims against Global: breach of contract (Count One), unjust enrichment (Count Two), and fraud (Count Three). Plaintiffs have also asserted claims against Global for violation of the following state and federal statutes: Ohio's Consumer Sales Practices Act (Count Four), Ohio's Prepaid Entertainment Contracts Act, O.R.C. §§ 1345.41 *et seq.* (Count Five), Ohio's Deceptive Trade Practices Act, O.R.C. §§ 4165.01 *et seq.* (Count Six), Kentucky's Consumer Protection Act–Health Spas (Count Seven), the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* ("RICO") (Count Eight), Ohio's version of RICO, O.R.C. §§ 2923.31 *et seq.* (Count Nine), and the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693 *et seq.* (Count Ten).

Robins v. Global Fitness Holdings, LLC, 838 F.Supp. 2d 631, 637 (N.D. Ohio 2012). On January 18, 2012, all claims in the Robins action were dismissed, some with prejudice and some without prejudice. *Id.* at 654. Plaintiffs' appeal from that judgment remains pending. *Robins v. Global Fitness Holdings, LLC*, Case No. 12-3231 (6th Cir.).

The earliest of the five class actions against Global Fitness was filed by David Seeger and fifteen other named plaintiffs, on behalf of themselves and a class of similarly situated persons, in the Boone County Circuit Court, Commonwealth of Kentucky. *Seeger v. Global Fitness Holdings, LLC*, No. 11-CI-7909 (the "*Seeger* action"). The *Seeger* plaintiffs asserted claims of forgery, fraud, breach of contract, concealment and non-disclosure, breach of good faith and fair dealing,

and violations of K.R.S. §§ 516.030 and 367.170. *See Seeger Amended Complaint*, Doc. No. 118-12.

The *Seeger* plaintiffs negotiated a class settlement with Global Fitness and, on December 21, 2012, the Boone County Circuit Court held a fairness hearing to determine whether the settlement was fair, reasonable, and adequate. Counsel for plaintiffs in this action (and in the *Tartaglia* action) and counsel for plaintiffs in the *Zik* action appeared at the hearing and objected to the proposed settlement. *Order*, Doc. No. 118-10. The court in *Seeger* declined to approve the proposed settlement. *Id.* In "summarize[ing] the greatest reasons" for rejecting the proposed settlement, the court in *Seeger* concluded that the release sought by Global Fitness in that action was "overly broad" because it was "unlimited to time or nature of the claims," "includes claims that do not share the identical factual predicate as Plaintiff's claims," and class counsel "had not conducted meaningful and adequate discovery on many of the claims sought to be released." *Id.* at p. 2. The *Seeger* court also concluded that the notice of settlement provided to the putative class members was deficient and that the claims process was too cumbersome, resulting in an approval rate of just 0.6 percent of the potential class. *Id.* Moreover, the proposed settlement had a "lack of value:" it was a "coupon settlement for the most part" and 90 percent of the cash refund claims had been rejected. *Id.* at pp. 2-3. The *Seeger* court therefore concluded that the settlement was unfair in that too large a group of people were bound

to an agreement for which little benefit was given.[1] *Id.*

On September 12, 2013, the parties to this action executed a settlement agreement, *Settlement Agreement and Release* ("*Settlement Agreement*"), Doc. No. 97-1, and shortly thereafter applied to the Court for preliminary approval of the settlement. *Joint Motion for an Order Preliminarily Approving the Class Action Settlement*, etc., Doc. No. 97. On September 30, 2013, the Court preliminarily approved the proposed settlement, preliminarily certified a class and subclasses for settlement purposes, appointed the named plaintiffs as Class Representatives, appointed lead counsel for the class, approved and directed the issuance of notice to the class, and referred the matter to the undersigned for a fairness hearing

> to determine (a) whether the proposed settlement of the action on the terms and conditions set forth in the Settlement Agreement is fair, reasonable, and in the best interest of the Classes and Subclasses and should befinally approved by the Court; (b) whether the Class and Subclasses should be finally certified for settlement purposes; (c) whether the Action should be dismissed with prejudice pursuant to the terms of the Settlement; (d) whether Settling Plaintiffs should be bound by the release set forth in the

[1] Defendant represents that the plaintiffs in the *Seeger* action have taken no substantive action since the proposed settlement was rejected in January 2013. *Memorandum in Response to Objections* ("*Defendant's Response*"), Doc. No. 126, p. 17.

> Settlement Agreement; (e) whether and in what amount Class Counsel should be awarded fees and reimbursement of expenses, (f) whether and in what amount the Class Representatives shall be awarded the Class Representative Enhancement Payments, (g) and to rule on any other matters the Court may deem appropriate.

Preliminary Approval Order, Doc. No. 111, pp. 1, 5. The Court also established a procedure for the filing of written objections to the proposed settlement. *Id.* at p. 6.

The named plaintiffs in the *Zik* action, Robert J. Zik, April N. Zik, and James Michael Hearon (the "Zik Objectors"), have filed objections to the proposed settlement on behalf of themselves and a class of similarly situated persons. *Objection to Proposed Class Action Settlement* ("*Zik Objections*"), Doc. No. 118. The Zik Objectors compare the proposed settlement in this action to the proposed settlement in the *Seeger* action and argue that the proposed settlement in this action should be rejected because the Class Representatives and Class Counsel have failed to adequately protect the interests of the class and because the proposed settlement is procedurally and substantively unfair.

Joshua Blackman has also filed objections. *Objection of Joshua Blackman* ("*Blackman Objections*"), Doc. No. 122. "[T]he gist of Blackman's objection" is the "[p]referential treatment to class counsel;" "[h]is cardinal objection is that the settlement is unfair because class counsel is appropriating an excessive 65% of the settlement value for itself." *Id.* at *PAGEID* 2083-84 (footnote

omitted). Blackman also challenges the claims process, the adequacy of class representation given the requested incentive awards (or enhancement payments), and the adequacy of the notice of Class Counsel's request for attorneys' fees. *Id.* at PAGEID 2089, 2094-99, 2107.

Plaintiffs have responded to the objections, *Plaintiffs' Response to the Objection of Joshua Blackman and the Objection of Zik/Hearon* ("*Plaintiffs' Response*"), Doc. No. 128, as has Global Fitness, Defendants' Response, Doc. No. 126. The Zik Objectors have filed a reply, *Zik Objectors' Reply*, Doc. No. 135, as has Blackman, *Blackman's Reply*, Doc. No. 133.

The undersigned held a fairness hearing, conducted pursuant to Fed. R. Civ. P. 23(e), on February 13, 2014. Counsel for plaintiffs, for Global Fitness, for the Zik Objectors, and for Blackman all appeared. Jeffrey D. Dahl, President of the Court appointed Claims Administrator Dahl Administration, LLC, also appeared and testified. This matter is now ripe for consideration.

B. Preliminarily Certified Class and Subclasses

The preliminarily certified Class and Subclasses of plaintiffs consist of the following:

> a. The "Class" includes all individuals who signed a gym membership or personal training contract with Defendant during the Class Period which is January 1, 2006, to October 26, 2012. At the time of preliminary certification, the total number of Class Members is estimated to be 606,246 persons.

> b. The "FIF Subclass" includes all Class Members who paid a $15 Facility Improvement Fee ("FIF"), Club Administrative Fee ("CAF"), or any other biannual $15 fee charged by Defendant during the FIF Subclass Period, which is April 1, 2009, to October 26, 2012. At the time of preliminary certification, the total number of FIF Subclass members is estimated to be 316,721 persons.
>
> c. The "Gym Cancel Subclass" includes all Class Members who cancelled their gym membership contract. At the time of preliminary certification, the total number of Gym Cancel Subclass members is estimated to be 387,177 persons.
>
> d. The "Personal Training Cancel Subclass" includes all Class Members who cancelled a Personal Training contract. At the time of preliminary certification, the total number of Personal Training Cancel Subclass members is estimated to be 64,805 persons.

Preliminary Approval Order, p. 3. Plaintiffs Amber Gascho, Ashley Buckemeyer, Michael Hogan, Edward Lundberg, Terry Troutman, Anthony Meyer, Rita Rose, Julia Cay (fka Julia Snyder), Albert Tartaglia, Michael Bell, Matt Volkerding, and Patrick Cary have been appointed as Class Representatives of the Class, FIF Subclass, and Gym Cancel Subclass; Amber Gascho, Julia Cay, and Albert Tartaglia have been appointed as Class Representatives of the Personal Training Cancel Subclass. *Id.*

C. Settlement Agreement

The *Settlement Agreement* authorizes the payment of monetary compensation to any Class or Subclass member who becomes an Allowed Claimant[2] by filing a timely and valid claim form with the Claims Administrator and upon confirmation by the Claims Administrator. *Settlement Agreement*, § 6.1. Each Allowed Claimant is entitled to $5 for his or her membership in the Class, $20 if he or she is a member of the FIF Subclass, $20 if he or she is a member of the Gym Cancel Subclass, and $30 if he or she is a member of the Personal Training Cancel Subclass. *Id.* at §§ 6.1.1-6.1.4. Claim awards are cumulative, which means that an Allowed Claimant may recover for every Subclass membership for which he or she qualifies. *Settlement Agreement*, §6.2.

The Settlement Agreement provides for a Minimum Class Payment of $1,300,000, which includes payments to Allowed Claimants and incentive awards totaling $40,000 to the Class Representatives. *Id.* at §§ 7.1, 8.1. Class Representatives Tartaglia and Bell are authorized to receive incentive awards of $5,000; Class Representatives Gascho, Buckemeyer, Hogan, Lundberg, Troutman, Meyer, Rose, and Cay are authorized to receive $3,500; and Class Representatives Volkerding and Cary will each receive $1,000. *Id.* at §§ 8.2.1, 8.2.2, 8.2.3. The incentive awards have been characterized as payment for services rendered to the class members and Class Representatives will receive a Form 1099 for the payments. *Id.* at § 8.3.

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[2] Capitalized terms not otherwise defined have the meaning indicated in the *Settlement Agreement*.

The *Settlement Agreement* also provides that Global Fitness will pay the reasonable attorneys' fees and actual costs awarded by the Court, not to exceed $2,390,000, and will not oppose Class Counsel's application for fees. *Id.* at §§ 9.1, 9.2. The agreement to pay Class Counsel's reasonable attorneys' fees and costs has "no effect on, and will not reduce, the Class Payment by Defendant." *Id.* at § 9.1. According to the Settlement Agreement, the allocation of fees among Class Counsel is "the sole responsibility of Class Counsel." *Id.* at §9.3.

The *Settlement Agreement* requires Global Fitness to pay the administration costs of the Claim Administrator. *Id.* at § 10.1. The Claims Administrator is charged with the sole responsibility for determining eligibility for, and the amount of, claims awards to be paid, in accordance with the terms of the *Settlement Agreement*. *Id.* at §§ 10.4, 10.5.

D. Notice, Response, and Claims

Pursuant to the Court's order granting preliminary approval, Global Fitness provided Claims Administrator Dahl Administration, LLC, data files related to potential class members. *Declaration of Jeffrey D. Dahl with Respect to Notice and Claims Administration Tasks Complete as of January 21, 2014* ("*Dahl Declaration*"), Doc. No. 126-1, ¶ 5. The Claims Administrator reviewed the data for completeness and duplication and processed the data through the United States Postal Service National Change of Address database. *Id.* at ¶¶ 6-8. After compiling a list of potential class members with the updated mailing addresses, the Claims Administrator

"sent a notice postcard in a form and content substantially similar to the Summary Notice attached as Exhibit 7 to the Settlement Agreement, on October 30, 2013" to 601,494 class members via First Class mail. Id. at ¶¶ 10, 12. *See also Transcript, PAGEID* 2715-17 (Mr. Dahl's testimony detailing the address scrubbing and confirmation process). Of the 601,494 Postcard Notices mailed, 146,617 were initially returned as undeliverable. *Dahl Declaration*, ¶ 14. Of these, 2,077 were re-mailed to a forwarding address provided by the United States Postal Service and 89,198 were re-mailed to new addresses obtained by an address search firm. *Id.* "After re-mailing the Notices, 90.8% of the Postcard Notices weredelivered." *Id.* at ¶ 14.

In addition to the Postcard Notice, 259,195 class members were sent notice by email on October 30, 2013. *Id.* at ¶ 15. Of these, 154,216 were "bounced back" from invalid email addresses and 150,581 were delivered. *Id.* On November 29, 2013, "all potential Class Members with valid email addresses who had not filed Claim Forms in order to become Allowed Claimants or who had not Opted Out within thirty (30) days after the original mailing of the Postcard Notice were sent Supplemental Email Notice . . . of the settlement." *Id.* at ¶ 18.

Notice was also published on two consecutive days, with one of the two days being the first Sunday after the Notice Postcards had been mailed, in 13 different newspapers. *Id.* at ¶¶ 16-17, Exhibit F. The publication notice contained "content substantially similar to the Summary Notice attached as Exhibit 7 to the Settlement Agreement," *id.*at ¶ 16, which had been approved by the Court. The Claims

Administrator established a settlement website, www.UrbanActiveLawsuit.com, in accordance with the terms of § 12.2 of the *Settlement Agreement*. *Id.* at ¶ 27. The website provides general settlement information, contact information for the Claims Administrator, a list of frequently asked questions and answers, a list of important dates and deadlines, and certain settlement documents in .pdf format, including the long-form legal notice, the claim form, the *Settlement Agreement*, the *Preliminary Approval Order*, the *Scheduling Order* (Doc. No. 113), and the *Third Amended Complaint*. *Dahl Declaration*, ¶ 28; *Plaintiffs' Exhibit* 1. The website also provides a link that permits a claimant to file a claim online. *Plaintiffs' Exhibit* 1. The website address was included in the Postcard Notice, in the long-form notice, in the email and the reminder email, and in the publication notice. *See Dahl Declaration*, Exhibits C-H.

The Claims Administrator also established a toll-free helpline to assist individuals seeking information about the proposed settlement. Like the website address, the toll-free number was included in the Postcard Notice, in the long-form notice, in the email and reminder email, and in the publication notice. The toll-free helpline is also posted on the settlement website. *Dahl Declaration*, ¶¶ 21-22, Exhibits C-H.

The long-form notice,[3] the Postcard Notice, the email and reminder email, and the publication notice all informed potential class members that, in order to qualify for a cash settlement, the claimant was

[3] The long-form notice is also posted on the settlement website. *See Transcript, PAGEID* 2708.

required to submit a Claim Form by mail or online by December 30, 2013. All forms of notice also provided instructions for opting out of the settlement and for objecting to the settlement at the fairness hearing. *See Dahl Declaration*, Exhibits C-H.

"As of November 29, 2013, the Notice reached at least 90.8% of potential Class Members." *Id.* at ¶ 45. The Claims Administrator received 55,597 Claim Forms, 54,129 of which were filed online and 1,468 were filed by mail. *Id.* at ¶ 31. As of January 21, 2014, the Claims Administrator had confirmed 49,457 claims from Allowed Claimants, 3,965 claims were pending further review, 2,161 were duplicates, and 14 were not timely filed. *Id.* at ¶¶ 32-33. As of February 11, 2014, the Claims Administrator had validated and calculated final award amounts for 29,341 Allowed Claimants, resulting in a total Class Payment of $1,070,895.00. *Supplemental Declaration of Jeffrey D. Dahl with Respect to Deficiency Notice and Claims Administration Tasks Completed as of February 10, 2014* ("*Supplemental Dahl Declaration*"), Doc. No. 138-1, ¶ 13. For the remaining 20,469 Allowed Claimants, there was a disparity between the subclass awards claimed by the Allowed Claimants and Global Fitness' records, and the Claims Administrator secured additional information in order to verify the claims. *Id.* at ¶ 15; *Dahl Declaration*, ¶ 38; *Transcript, PAGEID* 2724-27. The Claims Administrator "was able to validate additional Class Payments to 2,284 Class Members." *Second Supplemental Declaration of Jeffrey D. Dahl with Respect to Claims Administration Tasks and Final Class Payment Calculations Completed as of March*

21, 2014 ("*Second Supplemental Dahl Declaration*"), Doc. No. 140-1, ¶ 5.

The Claims Administrator has now "validated claims and calculated final award amounts for 49,808 Allowed Claimants, resulting in a total final Class Payment of $1,593,240.00. The average Class Payment is $31.99 and the average Gym Cancel Subclass Payment is $41.28." Id. at ¶ 9.

II. Motion to Strike Blackman's Objection

Global Fitness has moved to strike Blackman's objections on the basis that Blackman lacks standing to file objections. *Motion to Strike Objection of Joshua Blackman*, Doc. No. 125. Specifically, Global Fitness argues that Blackman "signed a membership agreement on August 16, 2011 at a Global Fitness club in Louisville, Kentucky," but rescinded the contract pursuant to a three-day cancellation provision. *Id.* at pp. 2-3. Because Blackman's contract was rescinded *ab initio*, Global Fitness argues, Blackman cannot be considered a former "member" of Global Fitness and cannot qualify as a member of any Class or Subclass. *Id.*

The Settlement Agreement defines a "Class Member" as "each person who is a member of the Class as defined in Section 6." *Settlement Agreement*, § 2.8. Section 6 defines the "Class" as "all individuals who signed a gym membership or personal training contract with Defendant during the Class Period," *id.* at § 6.1.1, i.e., "January 1, 2006, to October 26, 2012." *Id.* at § 2.10. Blackman meets the literal definition of a "Class Member," and therefore has standing to object to the settlement, see Fed. R. Civ. P. 23(e)(5); *Tenn. Ass'n of Health Maint. Orgs., Inc. v. Grier*, 262

F.3d 559, 566 (6th Cir. 2001), because he "signed a membership agreement on August 16, 2011 at a Global Fitness club in Louisville, Kentucky." *See Motion to Strike Objection of Joshua Blackman*, pp. 2-3. Indeed, Global Fitness effectively conceded this point at the fairness hearing. *See Transcript, PAGEID* 2747-48.

Accordingly, it is **RECOMMENDED** that defendant's motion to strike, Doc. No. 125, be **DENIED**.

III. Class Certification

A. Standard

A class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982). *See also Stout v. J.D. Byrider*, 228 F.3d 709 (6th Cir. 2000). Rule 23(a) of the Federal Rules of Civil Procedure establishes four prerequisites to class certification:

> **(1)** the class is so numerous that joinder of all members is impracticable;
>
> **(2)** there are questions of law or fact common to the class;
>
> **(3)** the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> **(4)** the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). "In addition to fulfilling the four prerequisites of Rule 23(a), the proposed class must

also meet at least one of the three requirements listed in Rule 23(b)." *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 850 (6th Cir. 2013) (citing *Wal-Mart Stores, Inc. v. Dukes*, -- U.S. --, 131 S. Ct. 2541, 2550 (2011)). Plaintiffs in this action seek class certification under Rule 23(b)(3), which requires a finding "that the questions of law or fact common to class members predominate over any questions affecting only individual members" and that the class action is "superior to other available methods" to adjudicate the controversy fairly and efficiently. Fed. R. Civ. P. 23(b)(3). "The trial court has broad discretion in deciding whether to certify a class, but that discretion must be exercised within the framework of Rule 23." *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996). This Court will consider each of the Rule 23 requirements for certification.

B. Numerosity

Rule 23(a)(1) requires the class to be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Although "there is no strict numerical test, 'substantial' numbers usually satisfy the numerosity requirement." *Daffin v. Ford Motor Co.*, 458 F.3d 549, 552 (6th Cir. 2006) (quoting *In re Am. Med. Sys.*, 75 F.3d at 1079). The parties have established that the Class consists of 605,735 members, the FIF Subclass consists of 300,017 members, the Gym Cancel Subclass consists of 323,518 members, and the Personal Training Cancel Subclass consists of 50,038 members. *Supplemental Dahl Declaration*, ¶ 17. Joinder of tens – or hundreds – of thousands of class members across multiple states would be impracticable. The numerosity

requirement of Rule 23(a)(1) is therefore satisfied. *See e.g., In re Whirlpool Corp.*, 722 F.3d at 852; *Adams v. Anheuser-Busch Cos., Inc.*, No. 2:10-cv-826, 2012 WL 1058961, at *3-4 (S.D. Ohio Mar. 28, 2012) (finding a class of approximately 60 individuals geographically dispersed over the country sufficient to satisfy the requirements of Rule 23(a)(1)).

C. Commonality

"Rule 23(a)(2) requires plaintiffs to prove that there are questions of fact or law common to the class . . . ." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 542 (6th Cir. 2012). "To demonstrate commonality, plaintiffs must show that class members have suffered the same injury." *In re Whirlpool Corp.,* 722 F.3d at 852 (citing *Dukes*, 131 S. Ct. at 2551). "Their claims must depend upon a common contention . . . [which is] of such a nature that it is capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 131 S. Ct.at 2551. "This inquiry focuses on whether a class action will generate common answers that are likely to drive resolution of the lawsuit." *In re Whirlpool Corp.*, 722 F.3d at 852 (citing *Dukes*, 131 S.Ct at 2551). *See also Davis v. Cintas Corp.,* 717 F.3d 476, 487 (6th Cir. 2013).

"The commonality test is qualitative rather than quantitative, that is, there need be only a single issue common to all members of the class." *In re Am. Med. Sys.*, 75 F.3d at 1083 (internal quotations omitted). *See also Dukes*, 131 S. Ct. at 2541 ("We quite agree that for purposes of Rule 23(a)(2) '[e]ven a single

[common] question' will do[.]") (internal quotations and citations omitted; alterations in original); *In re Whirlpool Corp.*, 722 F.3d at 853. "'[T]he mere fact that questions peculiar to each individual member of the class action remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible.'" *Powers v. Hamilton Cnty. Pub. Defender Comm'n*, 501 F.3d 592, 619 (6th Cir. 2007) (quoting *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988)).

This case presents common issues of fact sufficient to satisfy the requirements of Rule 23(a)(2). The *Third Amended Complaint* alleges that the policies and practices of Global Fitness resulted in common injuries to all members of the class. Specifically, plaintiffs allege that Global Fitness engaged in a common policy and practice of, *inter alia*, "knowingly misrepresenting and failing to disclose the terms and conditions of its membership contracts and personal training contracts;" "refusing to provide copies of membership contracts, personal training contracts and other contracts for services at the time they are signed;" "misrepresenting the terms, conditions, and availability of its contracts; intentionally avoiding, making it unduly burdensome and/or refusing to honor valid notices of cancellation; and knowingly taking payment from Plaintiffs and other Class members' accounts without authorization." *Third Amended Complaint*, ¶¶ 160-63. As for the FIF Subclass, the alleged policy or practice of failing to disclose the FIF or CAF at the time of sale is a common question of fact. The Class, the Gym Cancel Subclass, and the Personal Training Cancel Subclass

share common questions of fact, *i.e.*, whether Global Fitness failed to inform members of a right to cancel, failed to provide notice of cancellation, failed to honor notice of cancellations, failed to properly disclose cancellation fees, and continued to bill members monthly dues after cancellation. Accordingly, there are issues of fact common to all members of the Class and Subclasses sufficient to satisfy the requirements of Rule 23(a)(2).

D. Typicality and Fairness and Adequacy

"Rule 23(a)(3) requires proof that plaintiffs' claims are typical of the class members' claims." *Young*, 693 F.3d at 542. "Typicality is met if the class members' claims are 'fairly encompassed by the named plaintiffs' claims.'" *In re Whirlpool Corp.*, 722 F.3d at 852 (quoting *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998)). "This requirement insures that the representatives' interests are aligned with the interests of the represented class members so that, by pursuing their own interests, the class representatives also advocate the interests of the class members." *Id.* at 852-53 (citing *Sprague*, 133 F.3d at 399).

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). "A class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Id.* (quotations omitted). The determination of adequacy

of representation is grounded in two considerations: "1) the representative must have common interests with unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel.'" *In re Am. Med. Sys.*, 75 F.3d at 1083 (quoting *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976)).

The requirements of commonality and typicality "'tend to merge'" because "'[b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" *Dukes*, 131 S. Ct. at 2551 n.5 (quoting *Falcon*, 457 U.S. at 157-158 n.13). Commonality and typicality "'also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest.'" *Id.* (quoting *Falcon*, 457 U.S. at 157-158 n.13). The adequate representation requirement also "overlaps with the typicality requirement because in the absence of typical claims, the class representative has no incentive to pursue the claims of the other class members." *In re Am. Med. Sys.*, 75 F.3d at 1083. Because of the "intertwined nature" of these factors, the Court will consider typicality and the adequacy of representation together. *See In re Whirlpool Corp.*, 722 F.3d at 853 (considering commonality, typicality, and adequate representation together).

The *Zik* Objectors challenge certification on the basis of typicality and adequacy of class

representation. The *Zik* Objectors argue, first, that plaintiffs' claims are not typical of those of the class and that the named plaintiffs cannot adequately represent the class because no plaintiff "possess[es] the claims of the Ziks." *Zik Objectors' Reply, PAGEID* 2619. The *Zik* Objectors argue that April and Robert Zik's "membership contracts include very different cancellation language than Plaintiffs' contracts." *Id*. According to the *Zik* Objectors, April and Robert Zik's contracts and any membership agreement entered into with Global Fitness before March 2008 "only allow charging one additional month's dues post cancellation," whereas plaintiffs' contracts "purportedly allow charging two month's dues post cancellation." *Id*. (emphasis omitted). The *Zik* Objectors represent that Global Fitness changed the cancellation provision inits form contract in March 2008 and that none of the named plaintiffs signed a gym membership contract with the pre-March 2008 cancellation provision. *Id.* at *PAGEID* 2619-22. Adequate representation of April and Robert Zik's claims is precluded, the *Zik* Objectors argue, because "[n]ot one plaintiff had contractual language with the one-month billing cycle." *Transcript, PAGEID* 2762-63. This argument is not well taken.

The plaintiffs in the *Zik* Action sought to certify a class of members who cancelled their month-to-month memberships with Global Fitness "from February 2, 1996 through the present, and after such cancellation, were charged: (a) membership dues for the month that started subsequent to 30 days after they provided notice of cancellation of their membership to [Global Fitness]; and/or (b) a $10.00 (or greater) administrative cancellation fee." *Zik Objections*, p. 5.

The members of this purported class who signed membership agreements with Global Fitness between January 1, 2006 and October 26, 2012 are members of the Gym Cancel Subclass because they are Class Members who cancelled their gym membership contract. *See Settlement Agreement*, §§ 2.10 (defining "Class Period"), 6.1.1 (defining the "Class"), 6.1.3 (defining the "Gym Cancel Subclass").

Like objectors April and Robert Zik, plaintiff Lundberg entered into a contract with Global Fitness prior to March 2008 and was charged membership dues after he cancelled his contract. *See Third Amended Complaint*, ¶¶ 50-57. To the extent that the March 2008 change in the cancellation provision of Global Fitness's form contact impacts the claims of the class members,[4] the claims of those members who entered into a contract prior to March 2008 would nevertheless be similar to plaintiff Lundberg's claim; Lundberg possesses the same interest and suffered the same injury as those class members. Similarly, plaintiff Meyer, who allegedly signed a gym membership contract after March 2008 and was charged a $10 cancellation fee and monthly dues after cancellation, *see Third Amended Complaint*, ¶¶ 66-73, suffered the same type of injury as did the class members who entered into a contract with Global Fitness after March 2008. Furthermore, there is no indication that the interests of these (or any other) Class Representatives conflict because, regardless of which form contract the member signed, the Class

[4] Global Fitness contended at the fairness hearing that its form contracts always permitted it to charge two months' dues after cancellation. *Transcript, PAGEID* 2785-86.

Representatives allegedly suffered the same type of injury, *i.e.*, they were, pursuant to a common policy or practice of defendant, allegedly improperly charged monthly dues and a cancellation fee after cancellation of the contract.

The *Zik* Objectors also argue that the named plaintiffs cannot adequately represent the class because Robert Zik's contract – like all contracts executed before 2008 – did not contain a $10.00 cancellation fee, whereas all of the named plaintiffs' contracts did contain such a fee. *Zik Objectors' Reply, PAGEID* 2620-21. Citing to *De Leon v. Bank of America, N.A.*, No. 6:09-cv-1251, 2012 WL 2568142 (M.D. Fla. Apr. 20, 2012), the *Zik* Objectors argue that the named plaintiffs cannot adequately represent the class because they are not possessed of the precise breach of contract claim as are those classmembers who executed their contracts before 2008. *Zik Objectors' Reply, PAGEID* 2621-23. This argument is not well taken.

Rule 23(a)(3) requires that the named plaintiffs' claims be typical of the class members' claims, not identical to those claims. *Prater v. Ohio Educ. Ass'n*, No. C2-04-1077, 2008 WL 2566364, at *3 (S.D. Ohio June 26, 2008) ("The claims of the named plaintiffs and the absent members must be typical, not identical or homogeneous."); *Jenkins v. Hyundai Motor Fin. Co.*, C2-04-720, 2008 WL 781862, at *5 (S.D. Ohio Mar. 24, 2008) (same); *Tomlinson v. Kroger Co.*, No. C2-03- 706, 2007 WL 1026349, at *4 (S.D. Ohio Mar. 30, 2007) (same); *Tucker v. Union Underwear Co., Inc.*, 144 F.R.D. 325, 329 (W.D. Ky. 1992) ("Rule 23 does not require absolute homogeneity."). Although Robert Zik's contract claim may differ because his

contract did not authorize a $10.00 cancellation fee, the claims of the named and absent plaintiffs are nevertheless based on strongly similar legal theories. Whereas the plaintiffs in *De Leon*, 2012 WL 2568142, asserted a single breach of contract claim on behalf of a nationwide class, *see id.* at *5, the *Third Amended Complaint* asserts claims of breach of contract, unjust enrichment, and false, deceptive, and unconscionable consumer practices violative of state consumer protection laws based on a business practice that is common to all class members. The Class Representatives suffered the same type of injury as, and have an interest in common with, unnamed members because both were allegedly improperly charged a $10.00 cancellation fee pursuant to Global Fitness's common policies and procedures. Accordingly, in pursuing their own interests and claims related to the allegedly improper charge, the Class Representatives will also be advocating for the interests of the absent class members.

The *Zik* Objectors also argue that certification is improper because the damages due each class member could vary depending on the amount of his or her monthly dues, the number of unauthorized charges, and the amount of improper fees actually paid by each member. *Zik Objections, PAGEID* 1929-32. However, and the *Zik* Objectors' arguments to the contrary notwithstanding, individual damages calculations do not inevitably serve to preclude class certification. *See, e.g., In re Whirlpool Corp.*, 722 F.3d at 861 (quoting *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1437 (2013) (Ginsburg and Breyer, J.J., dissenting) ("Recognition that individual damages

calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal.")).

As noted *supra*, plaintiffs Gascho, Buckemeyer, Hogan, Lundberg, Troutman, Meyer, Rose, Cay, Tartaglia, Bell, Volkerding, and Cary have been appointed as Class Representatives of the Class, the FIF Subclass, and the Gym Cancel Subclass, and Gascho, Cay, and Tartaglia have been appointed as Class Representatives of the Personal Training Cancel Subclass. *Preliminary Approval Order*, p. 3. The Class Representatives all signed a gym membership or personal training contract with Global Fitness, *see Third Amended Complaint*, ¶¶ 25 (Gascho), 34 (Buckemeyer), 45 (Hogan), 51 (Lundberg), 58 (Troutman), 67 (Meyer), 77 (Rose), 91 (Cay), 113 (Tartaglia), 118 (Bell), 126 (Volkerding), 134 (Cary), and paid a biannual $15 FIF or CAF charged by defendant, *id.* at ¶¶ 73 (Meyer), 84 (Rose), 122 (Bell), 130 (Volkerding), 138 (Cary), cancelled their gym membership contract, *id.* at ¶ 47 (Hogan), 55-57 (Lundberg), 72 (Meyer), 87 (Rose), 123 (Bell), 129 (Volkerding), and/or cancelled their personal training contract with defendant, *id.* at ¶¶ 30 (Gascho), 114-15 (Tartaglia). The claims of the Class Representatives arise from the same policies and practices of defendant that give rise to the claims of other class members and are based on the same legal theories. In short, the interests of the Class Representatives are sufficiently aligned so as to ensure adequate representation of the class. *See, e.g., Beattie v. CenturyTel, Inc.,* 511 F.3d 554, 563 (6th Cir. 2007) (Because the plaintiffs suffered the same type of injury as members of the class, "there is every

reason to believe that [the plaintiffs] will vigorously prosecute the interests of the class.").

The Class Representatives and Class Counsel have also aggressively pursued the claims on behalf of the class. Class Counsel are experienced practitioners in both class action litigation and consumer law and are qualified to handle this matter. *See* Doc. Nos. 97-10, 114-1, 114-2 (declarations and résumés of plaintiffs' attorneys). Because the Class Representatives and Class Counsel have demonstrated an ability to vigorously pursue the claims of the class, and because there is no conflict of interest or antagonism among the named plaintiffs, the classes and their counsel, the Court concludes that the Class Representatives will fairly and adequately protect the interests of the class.

E. Rule 23(b)(3)

Having concluded that the four prerequisites of Rule 23(a) have been met, the Court must now determine whether plaintiffs have established that this litigation may properly be maintained as a class action under one of the subdivisions of Rule 23(b). Under Rule 23(b)(3), a class action is appropriate where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Rule 23(b)(3) thus has both a predominance and superiority requirement. *See, e.g.*, *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 756 (6th Cir. 2013) ("Because the district court certified the class under Rule 23(b)(3), the class must satisfy

the additional requirements of superiority and predominance.").

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 632. "To meet the predominance requirement, a plaintiff must establish that issues subject to generalized proof and applicable to the class as a whole predominate over those issues that are subject to only individualized proof.'" *Young*, 693 F.3d at 544 (quoting *Randleman v. Fidelity Nat. Title Ins. Co.*, 646 F.3d 347, 352–53 (6th Cir. 2011)). "Further, 'the fact that a defense may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones.'" *Id.* (quoting *Beattie*, 511 F.3d at 564). "While the commonality element of Rule 23(a)(2) requires showing one question of law or fact common to the class, a Rule 23(b)(3) class must show that common questions will *predominate* over individual ones." *Id.* (emphasis in original). However, "Rule 23(b)(3) does not mandate that a plaintiff seeking class certification prove that each element of the claim is susceptible to class wide proof." *In re Whirlpool Corp.*, 722 F.3d at 859 (*citing Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2012)). "[C]ommon issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues." *Beattie*, 511 F.3d at 564 (quotations and alterations omitted).

Plaintiffs' claims are premised on the theory that defendant's common policies and practices caused common injuries to all class members: every Gym

Cancel Subclass member was allegedly "subject to [Global Fitness's] practices and policies which included charging additional fees and refusing to honor, accept, and process gym membership cancellations in accordance with its contracts and applicable law[;]" every FIF Subclass member was allegedly "subject to [Global Fitness's] practice and policy of failing to properly disclose [a $15 FIF or CAF;]" and every Personal Training Cancel Subclass member was allegedly "subject to [Global Fitness's] practices and policies which included charging additional fees and refusing to honor, accept, and process personal training cancellations in accordance with its contracts and applicable law." *Plaintiffs' Response*, p. 21. *See also Third Amended Complaint*, ¶¶ 9, 14-17, 20-23. Evidence of Global Fitness's common policies and practices and Global Fitness's uniform application of its policies to class members unites the Class and Subclasses by a common interest in determining whether Global Fitness's course of conduct is actionable. Evidence would either prove or disprove, as to all members of the Subclasses, whether Global Fitness's alleged policies and practices resulted in, inter alia, the improper nondisclosure of fees and the improper charge of additional fees. Likewise, evidence of Global Fitness's practices and the application of those common practices to class members will minimize the need to examine each class member's individual claims.

Although the class members' claims are not governed by the same state law, see *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 946-50 (6th Cir. 2011), this action is not, notably, presented as a nationwide class action premised on conduct that

differed in every state. *See id*. at 946-48 (affirming the district court's finding of no predominance where the plaintiffs' claims were governed by the laws of the various states and the defendants' "program did not operate the same way in every State and the plaintiffs suffered distinct injuries as a result"). Rather, as discussed *supra*, plaintiffs' claims are premised on defendant's alleged misconduct and the effect of that alleged misconduct on class members. For example, plaintiffs' breach of contract claims arise from the interpretation of Global Fitness' form contracts and the common policies and practices that allegedly conflict with those contracts. *See Third Amended Complaint*, ¶¶ 143-49. "[C]laims arising from the interpretation of a form contract are particularly suited for class treatment, and breach of contract cases are routinely certified as such." *Cowit v. CitiMortgage, Inc.,* No. 1:12-cv-869, 2013 WL 940466, at *6 (S.D. Ohio Mar. 8, 2013). The issues of manageability, which often arise in the application of different state laws to a class, *see id.*, are in fact minimized by the proposed settlement of this matter. *See Amchem*, 521 U.S. at 619-20, 622 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial."); *In re Inter–Op Hip Prosthesis Liab. Litig.,* 204 F.R.D. 330, 347 (N.D. Ohio 2001) ("[W]hen taking the proposed settlement [] into consideration for purposes of determining class certification, individual issues which are normally present in . . . litigation become irrelevant, allowing the common issues to predominate.") (internal quotations omitted). Under the circumstances, the Court concludes that common

issues predominate over questions that affect only individual members.

Rule 23(b)(3) also requires that the class action vehicle be superior to other methods of adjudication. In determining the superiority of a class action to other litigation options, a court must consider

> **(A)** the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> **(B)** the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> **(C)** the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> **(D)** the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3).

In the case presently before the Court, all of the factors weigh in favor of a class action. First, the potential recovery by any one individual is relatively small; plaintiffs' claims are premised on having been improperly charged membership dues,[5] a $10 cancellation fee, and/or a biannual $15 FIF or CAF. True, the *Third Amended Complaint* seeks rescission;

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[5] "A review of the database produced by Urban Active's third party vendor Motionsoft for members in Ohio, Kentucky, Georgia, Tennessee, North Carolina, and Pennsylvania indicates that the average monthly fee from 2009 until 2012 was approximately $26.76." *Declaration of Thomas McCormick* ("*January 2014 McCormick Declaration*"), Doc. No. 128-4, ¶ 6.

however, as discussed in greater detail *infra*, the likelihood of actually obtaining that remedy on a classwide basis is questionable in light of the dearth – indeed, the absence – of authority either interpreting or applying the rescission statutes at issue. Under these circumstances, individual class members would be expected to have little interest in individually controlling separate actions. Second, although this is one of five similar class-action lawsuits pending against Global Fitness, there are no known actions pending by individual class members, nor is such litigation likely given the costs of litigation relative to the potential recovery on individual claims. Third, concentration of these claims in this Court will have the desirable benefit of streamlining the resolution of the claims and conserving resources. Finally, the Court is aware of no particular difficulties associated with the management of this class action, especially given the current stage of the litigation. It is often the case, as here, that class action litigation grows out of alleged systemic failures that result in small monetary losses to large numbers of people. *See Young*, 693 F.3d at 540. The potential for only a small individual recovery lessens the likelihood of individual lawsuits and supports the conclusion that the class action is a superior mechanism for adjudicating the dispute. *See Beattie*, 511 F.3d at 567. In this regard, the Court also notes that any class member who wishes to control his or her own litigation may opt out of the class under Rule 23(c)(2)(B)(v). *See In re Whirlpool Corp.*, 722 F.3d at 861. In short, the Court concludes that the class action vehicle is superior to other methods of adjudication.

Based on the foregoing, the Court concludes that this action should be certified pursuant to Rule 23(a) and 23(b)(3).

IV. Approval of the Proposed Class Settlement

Rule 23(e) governs settlements of class actions and imposes the following procedural safeguards:

> **(1)** The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
>
> **(2)** If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
>
> **(3)** The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
>
> . . .
>
> **(5)** Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

Fed. R. Civ. P. 23(e).[6]

The parties submitted the terms of the settlement, which the Court preliminarily approved. *Preliminary*

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[6] Rule 23€(4), which is not applicable to this case, provides: "If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so."

Approval Order, Doc. No. 111. Notice provided to the class, as described *supra*, was effected in conformity with the directions of the Court. A fairness hearing was conducted pursuant to Fed. R. Civ. P. 23(e) on February 13, 2014. The Court must now consider whether the Settlement Agreement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). In making this determination, the Court considers several factors:

> "(1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest."

Poplar Creek Dev. Co. v. Chesapeake Appalachia, L.L.C., 636 F.3d 235, 244 (6th Cir. 2011) (quoting *UAW v. Gen. Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007)). In considering these factors, the task of the court "is not to decide whether one side is right or even whether one side has the better of these arguments. . . . The question rather is whether the parties are using settlement to resolve a legitimate legal and factual disagreement." *UAW*, 497 F.3d at 632.

A. Risk of fraud or collusion

Having carefully examined the terms of the Settlement Agreement, the Court now turns to the first factor of its inquiry, *i.e.*, the risk of fraud or collusion. *See Poplar Creek Dev. Co.*, 636 F.3d at 244. The duration, complexity, and history of this litigation undermine any suggestion of fraud or

collusion in the Settlement Agreement. This action was initiated in April 2011 and has been highly contested since its inception. The parties litigated for two and one-half years; they engaged in extensive, contested discovery before reaching a settlement. The Court fielded numerous contested pretrial motions, including plaintiffs' motion to remand, Doc. No. 11, defendant's motions for judgment on the pleadings, Doc. Nos. 16, 36, 61, plaintiffs' motion to strike defendant's motion for judgment on the pleadings, Doc. No. 62, and plaintiffs' motion to certify a question to the Supreme Court of Ohio, Doc. No. 73. See *Opinion and Order*, Doc. No. 69; *Opinion and Order*, Doc. No. 83. The parties also exchanged in general settlement discussions over the course of several months before proceeding to formal mediation on July 8, 2013; settlement negotiations continued for a period of time after the mediation before the parties were able to reach agreement. *Declaration of Thomas N. McCormick in Support of Plaintiffs' Motion for Preliminary Approval of Settlement Agreement*, Doc. No. 132-6, ¶¶ 6-8. Class Counsel characterizes these settlement negotiations as "vigorous" and "hard fought," and that characterization is entirely consistent with nearly every aspect of this litigation. It would be difficult to take seriously a charge that this history was fabricated in an effort to mask collusion between the parties. *See Moulton v.U.S. Steel Corp.,* 581 F.3d 344, 351 (6th Cir. 2009) (finding no collusion where the settlement agreement was entered into after four years of complex and contested litigation and the agreement was the product of supervised negotiations).

B. The Amount of Discovery Engaged in by the Parties

Moreover, the parties have engaged in extensive discovery in this case, including multiple sets of interrogatories, the production of more than 400,000 documents, and more than 10 depositions. The parties have also engaged in extensive discovery of electronically stored information related to, *inter alia*, defendant's policies and practices. "[T]he enormity of that undertaking," *see Order*, Doc. No. 75, p. 1, necessitated significant Court involvement in discovery related matters, as well as several extensions of the pretrial schedule. *See e.g.*, Doc. Nos. 56 (January 2012), 63 (February 2012), 68 (March 2012), 71 (April 2012), 72 (May 2012), 75 (June 2012), 77 (June 2012), 78 (August 2012), 79 (September 2012), 80 (October 2012), 87 (May 2013). However, this substantial discovery gave the parties the opportunity to assess the strengths and weaknesses of each other's litigation positions. Consideration of this factor therefore weighs in favor of finding the *Settlement Agreement* fair, adequate, and reasonable.

C. The likelihood of success on the merits

> "The most important of the factors to be considered in reviewing a settlement is the probability of success on the merits. The likelihood of success, in turn, provides a gauge from which the benefits of the settlement must be measured."

Poplar Creek Dev. Co., 636 F.3d at 245 (quoting *In re Gen. Tire & Rubber Co. Sec. Litig.*, 726 F.2d 1075, 1086 (6th Cir. 1984)).

The *Third Amended Complaint* asserts claims of breach of contract, unjust enrichment, and false, deceptive, and unconscionable consumer practices violative of state consumer protection statutes. In resolving defendant's earlier motion for partial judgment on the pleadings, and prior to the filing of the *Third Amended Complaint*, the Court dismissed plaintiffs' conversion and Deceptive Trade Practices Act claims and limited plaintiffs' claims under the CSPA and PECA. *See Opinion and Order*, Doc. No. 69, p. 27. Although this Court has not considered the merits of plaintiffs' remaining claims, *see Opinion and Order*, Doc. No. 83, the viability of the bulk of plaintiffs' claims is called into question by Judge Polster's dismissal in the Northern District of Ohio of class action claims in the *Robins* action. *See Robins v. Global Fitness Holdings, LLC*, 838 F.Supp. 2d 631 (N.D. Ohio 2012). As this Court previously noted, the plaintiffs in the Robins action alleged facts that "are the same or similar to the ones alleged in the case at bar" and "present[ed] similar legal issues to those in the case at bar." *Opinion and Order*, Doc. No. 69, pp. 14-15. Although this Court previously distinguished Robins in addressing plaintiffs' CSPA and PECA claims, *see id.* at p. 27 n.5, this Court has not expressly considered to what extent, if at all, the holding or reasoning in Robins might apply to plaintiffs' contract and KHSA claims. These claims are further clouded by the pendency of the appeal in *Robins*, *Robins v. Global Fitness Holdings, LLC*, Case No. 12- 3231 (6th Cir.), which was being briefed at the time of settlement. There is also, as noted *supra*, a dearth of judicial authority related to plaintiffs' claims for rescission and damages under the KHSA and PECA, making the likelihood of success on these

claims less certain. Furthermore, the Court notes that Global Fitness no longer operates fitness centers and has no ongoing business, although it is not entirely clear what impact that fact may have had on this litigation.

Beyond the legal obstacles facing plaintiffs in their pursuit of their claims, Global Fitness has contested class certification and asserted various defenses that present financial risks to the class. Global Fitness is also represented by experienced and competent counsel and has already mounted a zealous and thorough defense.

Under all of these circumstances, it cannot be said that the likelihood of success on the merits of plaintiffs' claims is certain. This factor therefore weighs in favor of approval of the *Settlement Agreement*.

D. Complexity, Expense, and Likely Duration of the Litigation

"Generally speaking, '[m]ost class actions are inherently complex and settlement avoids the costs, delays, and multitude of other problems associated with them.'" *In re Telectronics Pacing Sys., Inc.*, 137 F.Supp. 2d 985, 1013 (S.D. Ohio 2001) *decision clarified*, 148 F.Supp. 2d 936 (S.D. Ohio 2001) (quoting *In re Austrian & German Bank Holocaust Litig.*, 80 F.Supp. 2d 164, 174 (S.D.N.Y. 2000)). This action is no exception to that general rule, as plaintiffs have asserted a multitude of claims and defendant has posed a multitude of defenses. This action has also been pending for nearly three years, plaintiffs have incurred over $2.7 million in attorneys' fees, *see Transcript*, PAGEID 2733 (Class Counsel's

representation that their lodestar value is now "just shy of $2.8 million"), and the parties have engaged in extensive motion practice and contested discovery. Continued litigation would undoubtedly require years more of litigation and would involve additional fact discovery, expert discovery, class certification and other motion practice which, if the history of this litigation serves as a predictor, will be both extensive and costly. Consideration of this factor therefore weighs in favor of approving the *Settlement Agreement*.

E. The Opinions of Class Counsel and Class Representatives

Experienced counsel on both sides of this case recommend that the Court approve the Settlement Agreement and this recommendation is entitled to deference. *See e.g.*, *Williams v. Vukovich*, 720 F.2d 909, 922 (6th Cir. 1983) ("The court should defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs[,]" and that deference "should correspond to the amount of discovery completed and the character of the evidence uncovered."). Here, Thomas McCormick, Kenneth Rubin, Mark Troutman, and Greg Travalio, the four attorneys for plaintiffs who have invested the most time in this matter, have approximately 68 years of combined professional experience. See Doc. Nos. 114-1, 114-2 (declarations and résumés of plaintiffs' attorneys). Class Counsel ask the Court to approve the *Settlement Agreement*, which they represent is fair, adequate, and reasonable. Not insignificantly, the Class Representatives have also approved the *Settlement Agreement*. *See Settlement Agreement*, pp. 27-38.

F. The Reaction of Absent Class Members

In determining whether a class action settlement is fair, adequate and reasonable, a court must also consider the reaction of absent class members. *Vassalle*, 708 F.3d at 754. Here, from a pool of more than 605,000 absent class members, 90 opted out of the settlement, see *Dahl Declaration*, ¶ 30, and two objections were filed. "Although this is not clear evidence of class-wide approval of the settlement, it does permit the inference that most of the class members had no qualms with it." *See Olden v. Gardner*, 294 F. App'x 210, 217 (6th Cir. 2008) (finding that 79 objections in a class of nearly 11,000 members "tends to support a finding that the settlement is fair"). *See also In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 248 F.R.D. 483, 500 (E.D. Mich. 2008) ("If only a small number [of opt outs or objections] are received, that fact can be viewed as indicative of the adequacy of the settlement.") (internal quotations omitted; alteration in original); *Hainey v. Parrott*, 617 F.Supp. 2d 668, 675 (S.D. Ohio 2007) ("Generally, however, a small number of objections, particularly in a class of this size, indicates that the settlement is fair, reasonable and adequate."). Although the two objections are vigorously presented and pursued, the Court nevertheless concludes that the number of objectors and opt-outs in relation to the size of the class supports a finding that the *Settlement Agreement* is fair, reasonable, and adequate.

G. The Public Interest

The public interest also favors approval of the *Settlement Agreement*. First, "[t]here is a strong

public interest in encouraging settlement of complex litigation and class action suits because they are 'notoriously difficult and unpredictable' and settlement conserves judicial resources." *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 530 (E.D. Mich. 2003) (quoting *Granada Invs., Inc. v. DWG Corp.*, 962 F.2d 1203, 1205 (6th Cir. 1992)). *Accord In re Nationwide Fin. Servs. Litig.*, No. 2:08-cv-00249, 2009 WL 8747486, at *8 (S.D. Ohio Aug. 18, 2009) ("[T]here is certainly a public interest in settlement of disputed claims that require substantial federal judicial resources to supervise and resolve."). Second, the *Settlement Agreement* ends potentially long and protracted litigation and frees judicial resources. *See In re Telectronics*, 137 F.Supp. 2d at 1025. More importantly, the *Settlement Agreement* provides an immediate cash settlement to the class for their compensable injuries in an amount that, as discussed *infra*, is fair, reasonable, and adequate. Accordingly, the Court finds that the *Settlement Agreement* serves the public interest.

H. Preferential Treatment and Other Factors

"Although not included in the seven *UAW* factors, in evaluating the fairness of a settlement [the United States Court of Appeals for the Sixth Circuit] ha[s] also looked to whether the settlement 'gives preferential treatment to the named plaintiffs while only perfunctory relief to unnamed class members.'" *Vassalle*, 708 F.3d at 755 (quoting *Williams*, 720 F.2d at 925 n.11). The Sixth Circuit has "held that such inequities in treatment make a settlement unfair." Id. "The same is true of a settlement that gives preferential treatment to class counsel; for class counsel are no more entitled to disregard their

'fiduciary responsibilities' than class representatives are." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013) (quoting *In re Gen. Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 788 (3rd Cir. 1995)). The Sixth Circuit has warned of the danger of attorneys "urg[ing] a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees.'" *Id.* (quoting *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991)). Accordingly, when attorneys' fees in a settlement class "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 . . . than could otherwise have [been] obtained.'" *Id.* (alteration in original) (citing *Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003)). "Hence the 'courts must be particularly vigilant' for 'subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations.'" *Id.* (quoting *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012)).

The objectors argue that Class Counsel's request for attorneys' fees in relation to the compensation to the class and the requested incentive awards to the Class Representatives are both suggestive of an unfair settlement that gives preferential treatment to those Class Counsel and Class Representatives. The objectors also argue that the claims process, notice, release, and settlement negotiations render the *Settlement Agreement* unfair. These arguments will be discussed in turn.

1. Attorneys' Fees and Compensation to the Class

Blackman's objections focus on the "[p]referential treatment to class counsel;" Blackman's "cardinal objection is that the settlement is unfair because Class Counsel is appropriating an excessive 65% of the settlement value for itself."[7] *Blackman Objections, PAGEID* 2083-84. Blackman argues that the Settlement Agreement should be treated as a "constructive common fund," consisting of the actual monetary payout to the class and the requested attorneys' fees, *see id.* at *PAGEID* 2083-84, 2091.[8] As so construed, Blackman contends, the *Settlement Agreement* is unfair because Class Counsel's $2.39 million request for attorneys' fees is disproportionately high. *Blackman Objections, PAGEID* 2089.

Blackman's contention in this regard relies on *In re Dry Max Pampers Litigation*, 724 F.3d 713 (6th Cir. 2013), and *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011).[9] In *Pampers*, the United States Court of Appeals for the Sixth Circuit reversed

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[7] "The [65%] calculation is as follows: $2.39 million fee request/ (2.39 million fee request + 1.3 million class recovery) = 64.7% of the true settlement value." *Blackman Objections,* PAGEID 2084 n.3. At the fairness hearing, Blackman represented that Class Counsel would "get more than 60 percent of the proceeds -- more than double a reasonable fee." *Transcript, PAGEID* 2758.

[8] Blackman also contends that attorneys' fees should be limited to 25 percent of that common fund. *Blackman's Reply, PAGEID* 2597. The Court addresses that contention *infra*.

[9] Blackman's counsel, the Center for Class Action Fairness, successfully represented objectors in both *Pampers* and *Bluetooth*.

the trial court's approval of a class settlement because the settlement gave preferential treatment to class counsel but only perfunctory relief to unnamed class members. *See Pampers*, 724 F.3d at 721. Although the settlement awarded class counsel a fee of $2.73 million, "counsel did not take a single deposition, serve a single request for written discovery, or even file a response to [the defendant's] motion to dismiss." *Id.* at 718. On the other hand, the unnamed class members who were allegedly injured as a result of purchasing Pampers brand diapers containing "Dry Max Technology," would have been awarded only injunctive relief in the form of a reinstated diaper refund program, changes to the labels on Pampers' boxes, and changes to the Pampers' website. *Id.* at 716-18. The defendant in that case also agreed to contribute $400,000 to an undetermined pediatric resident training program and the American Academy of Pediatrics. *Id.* at 716. Notably, in determining that the settlement gave preferential treatment to class counsel, the Sixth Circuit characterized as negligible the value of the injunctive relief awarded to the class.

The refund program required consumers to have "retained their original receipt and Pampers-box UPC code, in some instances for diapers purchased as long ago as August 2008" and it was "merely a rerun of the very same program that [the defendant] had already offered to its customers" in the past. *Id.* at 718-719. The defendant was also unable to demonstrate the effectiveness of the program, despite its earlier implementation. *Id.* The labeling change on Pampers' boxes "amount[ed] to little more than an advertisement for Pampers" and the additional

information to be included on the Pampers' website was "common sense, within the ken of ordinary consumers, and thus of limited value to them." *Id.* at 720. The Sixth Circuit found that the $2.73 million benefit to class counsel was "vastly" more than the "illusory" benefit to class members. *Id.* at 721.

This action is distinguishable from *Pampers*. First, as discussed *supra*, this action was vigorously litigated for two and one-half years prior to settlement and involved extensive motion practice and discovery. *Cf. id.* at 718 ("[C]ounsel did not take a single deposition, serve a single request for written discovery, or even file a response to [the defendant's] motion to dismiss."). Second, the *Settlement Agreement* provides significant monetary relief to class members in relation to the value of their claims and the risks of this litigation. In contrast to the class members in *Pampers*, who "received nothing but illusory injunctive relief," *id.* at 722, class members in this case will receive monetary awards ranging from $5 to $75, with the average class member receiving $31.99. *See Second Supplemental Dahl Declaration*, ¶ 9. This recovery is significant in light of the estimated average injuries allegedly suffered by class members, which are premised on the improper charge of an extra month's dues at an average rate of $26.76 per month (from January 2009 through 2012), *January 2014 McCormick Declaration*, ¶¶ 5-6, a $10 cancellation fee, and/or a $15 FIF or CAF. Notably, Blackman does not argue that the *Settlement Agreement* provides inadequate compensation to members of the Class or any Subclass in relation to their alleged injuries. In fact, Blackman implicitly acknowledged at the fairness hearing that the awards

provided to the Class and Subclasses under the Settlement Agreement are appropriate. *See Transcript, PAGEID* 2753 (arguing that the proportion of the fee award to the total actual pay-out by Global Fitness is unfair, but that the monetary terms of settlement would otherwise be fair if every class member were to receive the negotiated settlement amount).

Unlike Blackman, the *Zik* Objectors argue that the Settlement Agreement fails to provide adequate compensation to class members because it fails to adequately account for differences in class members' claims and damages. Specifically, the *Zik* Objectors argue that April and Robert Zik and other class members who signed a membership agreement with Global Fitness before March 2008 have much stronger breach of contract claims than do those plaintiffs and class members who entered into a contract after March 2008. These claims are so disparate, the Zik Objectors argue, that it is unfair to combine the differing claims in the same subclass and to be settled for the same amount. *See Zik Objectors' Reply, PAGEID* 2618-23; *Transcript, PAGEID* 2766 ("What they needed to do was to settle and negotiate additional compensation for people that have a clear breach of contract claim, instead of the Ziks and people like them receiving the same amount of money as people who have no breach of contract claim, according to the *Robins* court, that was not done. They received the same amount of money. Is that fair? No, it can't be fair. It cannot be fair.").

The *Zik* Objectors' argument proposes a division of the Gym Cancel Subclass into two classes: (1) class members who entered into a gym membership

contract before March 2008 and cancelled their gym membership contract within the Class Period, and (2) class members who entered into a gym membership contract after March 2008 and cancelled their gym membership contract within the Class Period. The Court concludes that this division is unnecessary because, as discussed *supra*, both of these proposed classes are adequately represented by Class Representatives and members of both proposed classes suffered a common injury, *i.e.*, each was improperly charged, pursuant to a common policy or practice of defendant, monthly dues and a cancellation fee after cancellation.

The *Zik* Objectors also argue that the settlement is unfair because it does not award class members their actual damages; as a consequence, they contend, many class members will be compensated in an amount either greater or less than their actual damages. The *Zik* Objectors note that Blackman and Robert Zik are both members of the Gym Cancel Subclass and will receive $25 each, yet Robert Zik is "irrefutably" owed $75 and Blackman is owed less than $25 (and possibly nothing). *See Transcript, PAGEID* 2765-70.

Despite the purported variance in actual damages to class members, the Court finds the amount awarded to the Gym Cancel Subclass to be fair, reasonable, and adequate. The *Zik* Objectors sought to certify a class in the *Zik* action premised on a claim that Global Fitness acted in breach of "its members' membership agreements by charging its members one extra month of membership dues and a $10.00 cancellation fee when members terminate their membership agreement." Doc. No. 118-2, pp. 1, 6. As

discussed *supra*, the claims asserted in the *Zik* action are subsumed in the Gym Cancel Subclass, and an Allowed Claimant who cancelled his or her gym membership contract with Global Fitness during the Class Period is entitled to an award of $25. *See Settlement Agreement*, §§ 6.1, 6.1.3. The Claims Administrator has validated claims and calculated final award amounts for the Allowed Claimants: the average Class Payment is $31.99 and the average Gym Cancel Subclass Payment will be $41.28. *Second Supplemental Dahl Declaration*, ¶ 9. This is a significant recovery because it exceeds the $26.76 average monthly fee of a gym membership with Global Fitness between January 1, 2009 and July 2012. *See January 2014 McCormick Declaration*, ¶¶ 5-6. This recovery is also substantial considering the bases of plaintiffs' claims, *i.e.*, improperly charged dues, a $10 cancellation fee, and/or a $15 FIF or CAF.

The Court also finds without merit the *Zik* Objectors' argument that the *Settlement Agreement* is unfair because it does not require an individualized damages determination for each claimant. As detailed *supra*, the average award in the Gym Cancel Subclass will exceed the average monthly gym membership cost from 2009 to 2012 and will approach, if not exceed, the sum of the average monthly gym membership and the alleged improperly charged $10 cancellation fee. Considering the risks of this litigation, the additional costs and delays that would likely result from the need to calculate and verify individual damage awards for each Allowed Claimant, and the difficulty in calculating damages for the 343 Allowed Claimants for whom Global Fitness has no record, *see Second Supplemental Dahl*

Declaration, ¶ 4, the Court finds that a flat award for membership in each Class or Subclass is appropriate. *See Williams*, 720 F.2d at 922-23 ("A court may not withhold approval simply because the benefits accrued from the decree are not what a successful plaintiff would have received in a fully litigated case. A decree is a compromise which has been reached after the risks, expense, and delay of further litigation have been assessed. Class counsel and the class representatives may compromise their demand for relief in order to obtain substantial assured relief for the plaintiffs' class.") (internal citations omitted).

"The fairness of the settlement must be evaluated primarily based on how it compensates class members . . . ." *Pampers*, 724 F.3d at 720 (quoting *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 654 (7th Cir. 2006)). Here, the Settlement Agreement provides an immediate and significant monetary benefit to class members. Moreover, although individual class members had the opportunity to opt out of the settlement if they concluded that the value of their individual claims exceeded the value of the immediate relief provided by the *Settlement Agreement*, only 90 did so. *See In re Whirlpool Corp.*, 722 F.3d at 861 ("As the district court observed, any class member who wishes to control his or her own litigation may opt out of the class under Rule 23(c)(2)(B)(v).").

The *Zik* Objectors next argue that the settlement is unfair because the *Settlement Agreement* fails to provide any "additional or separate compensation to Kentucky class members for their KHSA claims that are not available to class members in other states . . . [and] would purportedly entitle Kentucky Plaintiffs .

. . to rescission of their current, illegal LA Fitness contracts[.]" *Zik Objections, PAGEID* 1932-35. *See also Transcript, PAGEID* 2767-68. This argument is premised on the proposition that it is only the Kentucky plaintiffs who are possessed of a claim for rescission, combined with the *Zik* Objectors' contention that the Class Representatives do not adequately represent them. The *Zik* Objectors' first proposition is simply not accurate; both the KHSA and PECA contemplate rescission as a potential remedy. See KRS 367.912(1); O.R.C. § 1345.44(C). However, as noted *supra*, there is no case law interpreting or applying either of these statutory provisions. The Court also rejects, for the reasons stated *supra*, the *Zik* Objectors' second proposition; the claims of the Class Representatives are typical of the claims of the Class and Subclasses and the Class Representatives will fairly and adequately protect the interests of the class. It is significant, too, that the *Zik* Objectors acknowledge that Class Counsel "devoted" "a large percentage of [their time] to ESI discovery to be used for the purpose of proving the KHSA claims." *Zik Objections, PAGEID* 1935. This fact suggests that the development of the KHSA claims was adequate and that Class Representatives and Class Counsel considered, during the court of settlement negotiations, the likelihood of success and the available remedies in connection with this claim.

As noted *supra*, Blackman also relies on *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935 (9th Cir. 2011), in arguing that Class Counsel's requested $2.39 million attorneys' fee renders the *Settlement Agreement* unfair. The plaintiffs in *Bluetooth* alleged that the defendants in

that case had failed to disclose the potential risk of noise-induced hearing loss associated with extended use of wireless Bluetooth headsets at high volumes. *Bluetooth*, 654 F.3d at 938. The settlement in *Bluetooth*, which was approved by the district court, required the defendants to "post acoustic safety information on their respective websites and in their product manuals and/or packaging for new Bluetooth headsets" and pay a $100,000 *cy pres* award, notice costs up to $1.2 million, attorneys' fees and costs up to $850,000, and incentive awards of $12,000. *Id.* at 938-40. The Ninth Circuit remanded the action, without expressing an "opinion on the ultimate fairness of what the parties have negotiated," because the district court had applied the wrong standard in approving the settlement agreement and did not adequately explain its fee award. *See id.* at 938 ("[T]he disparity between the value of the class recovery and class counsel's compensation raises at least an inference of unfairness, and . . .the current record does not adequately disel the possibility that class counsel bargained away a benefit to the class in exchange for their own interests."), 949-50.

The Ninth Circuit concluded that it "ha[d] no basis for affirming the fee award as reasonable under the lodestar approach" because the district court had not calculated a precise lodestar value nor had it evaluated the degree of success of the settlement. *Id.* at 944. As to the settlement agreement, the court found that, due to "indicia of possible implicit collusion," the district court was "required to examine the negotiation process with even greater scrutiny than is ordinarily demanded, and approval of the settlement had to be supported by a clear explanation

of why the disproportionate fee is justified and does not betray the class's interests." *Id.* at 947-49. Specifically, that greater scrutiny was necessary, the Ninth Circuit reasoned, in light of three causes for concern: (1) "the settlement's provision for attorneys' fees is apparently disproportionate to the class reward, which includes no monetary distribution[;]" (2) "[t]he settlement included a 'clear sailing agreement' in which defendants agreed not to object to an award of attorneys' fees up to eight times the monetary cy pres relief afforded the class[;]" and (3) "the settlement also contained a 'kicker': all fees not awarded would revert to defendants rather than be added to the cy pres fund or otherwise benefit the class." *Id.* at 947.

Blackman argues before this Court that the *Settlement Agreement* is unfair because, as did the settlement agreement in *Bluetooth*, the *Settlement Agreement* contains a clear sailing provision and a kicker provision, and provides for an award of attorneys' fees that will exceed the actual recovery to the Allowed Claimants. *See Blackman Objections*, *PAGEID* 2091-97. According to Blackman, the *Settlement Agreement* includes a "clear sailing" provision because Global Fitness agreed not to contest plaintiffs' request for attorneys' fees and costs so long as the request did not exceed $2.39 million. *See Settlement Agreement*, § 9.1. *See Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 425 (6th Cir. 2012). The *Settlement Agreement* includes a "kicker," Blackman contends, because all fees not awarded revert to Global Fitness, rather than to the class. *See Settlement Agreement*, § 9.2. *See Bluetooth*, 654 F.3d at 947. Finally, it is also now apparent that the

Settlement Agreement will provide for an award of attorneys' fees and costs greater than the actual monetary recovery to the Allowed Claimants. Compare *Second Supplemental Dahl Declaration*, ¶¶ 9-10 (calculating the final Class Payment as $1,593,240.00), with *Settlement Agreement*, § 9.1 ("Defendant agrees to pay Plaintiffs [sic] attorneys' fees and litigation costs as Ordered by the Court, provided that such payment does not exceed [$2,390,000.00].").

Blackman argues that the very presence of clear sailing and kicker provisions render the Settlement Agreement unfair. *See Blackman Objections*, *PAGEID* 2094-97. However, the United States Court of Appeals for the Sixth Circuit has recognized that "not every 'clear sailing' provision demonstrates collusion." *Gooch*, 672 F.3d at 425. It is true that a clear sailing provision could indicate that lawyers urged "'a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees.'" *Id.* (quoting *Weinberger*, 925 F.2d at 520). However, a clear sailing provision could just as easily be included for purposes of finality and risk avoidance, *i.e.*, "'because the defendants want to know their total maximum exposure and the plaintiffs do not want to be sandbagged.'" *Id.* (internal quotations omitted). In either event, the court in *Bluetooth* made clear that the presence of clear sailing and kicker provisions required the district court to more carefully scrutinize the proposed settlement; the ultimate issue, however, is still whether "the end product is a fair, adequate, and reasonable settlement agreement." *See id.* at 947-49.

In the case presently before the Court, there is no suggestion that relief to the class is perfunctory. Unlike in *Pampers*, where the value of class relief was "negligible" and "illusory," *see Pampers*, 724 F.3d at 721, the settlement in this case provides for an immediate and substantial cash payment to class members, considering the value of the claims and the risks of protracted litigation. Where, as here, the value of the settlement to class members is reasonable, the risk of collusion associated with a clear sailing provision — *i.e.*, that "lawyers might urge a class settlement at a low figure or on a less than-optimal basis in exchange for red-carpet treatment on fees," *Weinberger*, 925 F.2d at 524, — is diminished.

The risk of collusion is also lessened in this action because the parties negotiated the payment of attorneys' fees and costs after having reached agreement on the relief to the Class and Subclasses. *See Declaration of Thomas McCormick in Support of Application for Attorneys' Fees and Reimbursement of Costs* ("*December 2013 McCormick Declaration*"), Doc. No. 114-1, ¶ 4; *Declaration of Mark H. Troutman in Support of Application for Attorneys' Fees and Reimbursement of Costs and Expenses* ("*Troutman Declaration*"), Doc. No. 114-2, ¶ 4. Although there is no *per se* rule that separate negotiations will lessen the likelihood of collusion, *see Pampers*, 724 F.3d at 717 ("'[T]he 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.'") (internal citations omitted), separate negotiations suggest a lower risk of collusion

where, as here, relief to the class is fair, reasonable, and adequate. The Court also notes that, despite Blackman's suggestion that a settlement cannot be fair if attorneys' fees are negotiated prior to final settlement approval, *see Transcript, PAGEID* 2756 ("The only apparent way to cure this problem is to defer fee negotiations until the class settlement has been signed, submitted and approved by the district court. Or if the defendant refuses to agree to any settlement that does not also include attorney fees") (citing *In re Cmty. Bank of N. Va.*, 418 F.3d 277 (3rd Cir. 2005)), there is no such requirement in Rule 23. Requiring the parties to postpone negotiations on attorneys' fees until after final approval of the settlement could also prove detrimental to class recovery, as it would also require a second notice to the class and could require a second fairness hearing, see Fed. R. Civ. P. 23(h), which would increase both the expenses and risks associated with class settlement.

The Court also concludes that the inclusion of a kicker provision in the *Settlement Agreement* is not improper in this case. Notably, the danger of collusion suggested by such a provision is essentially eliminated when the parties have negotiated a reasonable attorneys' fee. *See Bluetooth*, 654 F.3d at 949 ("If the defendant is willing to pay a certain sum in attorneys' fees as part of the settlement package, but the full fee award would be unreasonable, there is apparent reason the class should not benefit from the excess allotted for fees. 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.").

Because, as discussed *infra*, the Court concludes that the parties have negotiated a reasonable attorneys' fee, the class will not be deprived of any benefit, either real or perceived, by the inclusion of the kicker provision in the *Settlement Agreement*. Based on the foregoing, the Court concludes that the Settlement Agreement does not accord preferential treatment to Class Counsel at the expense of the class nor does it offer only perfunctory relief to unnamed class members.

2. Incentive awards

The *Settlement Agreement* provides for a Minimum Class Payment of $1,300,000, which includes payments to Allowed Claimants and incentive awards totaling $40,000 to the Class Representatives. *Settlement Agreement*, § 7.1, 8.1. Class Representatives Tartaglia and Bell will each receive an incentive award of $5,000; Class Representatives Gascho, Buckemeyer, Hogan, Lundberg, Troutman, Meyer, Rose, and Cay will each receive $3,500; and Class Representatives Volkerding and Cary will each receive $1,000. *Id.* at §§ 8.2.1, 8.2.2, 8.2.3.

Blackman objects to the provision for incentive awards and argues that that adequacy of representation is undermined by the awards. *Blackman Objections*, *PAGEID* 2097-99. Specifically, Blackman argues that the disparity between the incentive payments and what he characterizes as the "minimal cash recovery" of class members raises an issue as to whether the Class Representatives could be expected to fairly evaluate the settlement agreement. *Id.* It is unfair, Blackman argues, for Class Representatives to receive an incentive award

equal to "many times the plausible value of their claim." *Transcript, PAGEID* 2758.

The Sixth Circuit has neither approved nor disapproved the practice of incentive awards to class representatives. *Pampers*, 724 F.3d at 722 (citing *Vassalle*, 708 F.3d at 756); *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003) ("This court has never explicitly passed judgment on the appropriateness of incentive awards.") (citing *In re S. Ohio Corr. Facility*, 24 F. App'x 520, 526 (6th Cir. 2001)). However, the Sixth Circuit has recognized that "there may be circumstances where incentive awards are appropriate,'" *Vassalle*, 708 F.3d at 756 (quoting *Hadix*, 322 F.3d at 897-98), and district courts in this circuit have authorized incentive awards. *See Johnson v. Midwest Logistics Sys., Ltd.*, No. 2:11-cv-1061, 2013 WL 2295880, at *5 (S.D. Ohio May 24, 2013) (approving an incentive award of $12,500); *Godec v. Bayer Corp.*, No. 1:10-cv-224, 2013 WL 1089549, at *4 (N.D. Ohio Mar. 14, 2013) (approving an incentive award of $2,500); *Wess v. Storey*, No. 2:08-cv-623, 2011 WL 1463609, at *12 (S.D. Ohio Apr. 14, 2011) (approving incentive awards "in a very modest amount of $3,000"); *Lonardo v. Travelers Indem. Co.*, 706 F.Supp. 2d 766, 787 (N.D. Ohio 2010) (approving an incentive award of $5,000); *Hainey v. Parrott*, No. 1:02-cv-733, 2007 WL 3308027 (S.D. Ohio Nov. 6, 2007) (approving an incentive award of $50,000 for each class representative); *In re Dun & Bradstreet Credit Servs. Customer* Litig., 130 F.R.D. 366, 373-74 (S.D. Ohio 1990) (approving incentive awards ranging from $35,000 to $55,000). Courts approving incentive awards "have stressed that incentive awards are efficacious ways of encouraging

members of a class to become class representatives and rewarding individual efforts taken on behalf of the class." *Hadix*, 322 F.3d at 897. "Yet applications for incentive awards are scrutinized carefully by courts who sensibly fear that incentive awards may lead named plaintiffs to expect a bounty for bringing suit or to compromise the interest of the class for personal gain." *Id.* District courts in the Sixth Circuit have considered the following factors in determining whether to approve incentive awards for class representatives:

> (1) the action taken by the Class Representatives to protect the interests of Class Members and others and whether these actions resulted in a substantial benefit to Class Members; (2) whether the Class Representatives assumed substantial direct and indirect financial risk; and (3) the amount of time and effort spent by the Class Representatives in pursuing the litigation.

Enterprise Energy Corp. v. Columbia Gas Transmission Corp., 137 F.R.D. 240, 250 (S.D. Ohio 1991). Although the Sixth Circuit has not had occasion to "lay down a categorical rule one way or the other as to whether incentive payments are permissible," the court in *Pampers* "made some observations" regarding the propriety of incentive awards:

> The propriety of incentive payments is arguably at its height when the award represents a fraction of a class representative's likely damages; for in that case the class representative is left to recover the remainder

> of his damages by means of the same mechanisms that unnamed class members must recover theirs. The members' incentives are thus aligned. But we should be most dubious of incentive payments when they make the class representatives whole, or (as here) even more than whole; for in that case the class representatives have no reason to care whether the mechanisms available to unnamed class members can provide adequate relief.

Pampers, 724 F.3d at 722.

In the case presently before the Court, the *Settlement Agreement* provides for incentive awards ranging from $1,000 to $5,000. The awards will make the Class Representatives more than whole and are worth many times the value of their claims. However, the awards have been tailored to compensate each Class Representative in proportion to his or her actions, time, and effort in prosecuting this action. Class Representatives Tartaglia and Bell have served as Class Representatives since July 2011 and contributed to the drafting of the *Complaint* and amended complaints, have responded to written discovery, have assisted Class Counsel with requests for information, have reviewed and provided input in settlement, and were subject to depositions. *Plaintiffs' Motion for an Award of Class Representatives' Enhancement Payments and Reasonable Attorneys' Fees and Costs* ("*Plaintiffs' Motion for Fees*"), Doc. No. 114, pp. 7-8. Class Representatives Gascho, Buckemeyer, Hogan, Lundberg, Troutman, Meyer, Rose, and Cay have served as Class Representatives since April 2011 and have made similar contributions, although they were not subject to depositions. *Id.*

Class Representatives Volkerding and Cary have served as Class Representatives since June 2013 and have contributed to the drafting of the amended complaints, have assisted Class Counsel with requests for information, and have reviewed and provided input regarding the settlement. *Id.* The Class Representatives' initiative, time, and effort were essential to the prosecution of the case and resulted in a significant recovery for the class. Although the Sixth Circuit has warned that courts should be "most dubious" of awards that make class representatives more than whole, *see Pampers*, 724 F.3d at 722, this Court finds that the awards in this case are fair, reasonable, and properly based on the benefits to the class members generated by the litigation. Accordingly, the Court concludes that the *Settlement Agreement* does not give preferential treatment to the Class Representatives.

3. Claims Process

The *Settlement Agreement* provides monetary compensation to any Class or Subclass member who becomes an Allowed Claimant by filing a timely and valid claim form signed under penalty of perjury by the Claim Period Deadline. *Settlement Agreement,* § 12.5. Claim forms could be requested by telephone, by mail, or online, and could be submitted online or via U.S. Mail. *Id.* Of the 55,597 Claim Forms received by the Claims Administrator, 54,129 were submitted online and 1,468 were submitted by U.S. Mail. *Dahl Declaration*, ¶ 31.

Both Blackman and the *Zik* Objectors challenge the claims process and argue that use of a claims-made process was unfair in this case. The *Zik*

Objectors argue that the claims process is too cumbersome because members are required to submit a claim and sign the form "under penalty of perjury." *Zik Objections*, *PAGEID* 1945-46. This is unnecessary, the *Zik* Objectors argue, because Global Fitness has all the information necessary to make payments without using a notice and claims procedure. *Id.* Similarly, Blackman argues that "[there] is no legitimate reason why this settlement does not issue direct payments to known, eligible class members." *Blackman Objections*, PAGEID 2084. According to Blackman, a claims-made settlement procedure is unnecessary because "defendant's records house the class members' identifying information and the objective criteria upon which their award value is based" and defendant has the information to pay at least some claims automatically. *Id.* at *PAGEID* 2085. Blackman argues that, because the Claims Administrator was able to verify and send notice to 90.8 percent of the potential class members, at least 90.8 percent of the potential class members could have received payment if the Settlement Agreement provided for direct payment after settlement approval. *Blackman Reply, PAGEID* 2589; *Transcript, PAGEID* 2754, 2759-60. The objectors also argue that a claims-made process served to depress class recovery and is evidence of collusion. *See Blackman Objections*, *PAGEID* 2089; Transcript, PAGEID 2752-53, 2764.

The objectors' arguments in this regard are contrary to the testimony of Jeffrey Dahl at the fairness hearing and are therefore not well taken.

Jeffrey Dahl testified at the fairness hearing that, acting on behalf of Claims Administrator Dahl

Administration, LLC., he oversaw, and was actively involved in the claims administration process in this case. *Transcript, PAGEID* 2703. Mr. Dahl has worked for Dahl Administration, LLC, for approximately five-and-one-half years and was a founding partner of Rust Consulting, the second largest class action claims administrator in the nation, where he worked for fifteen years. *Id.* at *PAGEID* 2702. Mr. Dahl has been personally responsible for the administration of more than 300 class action settlements and has been involved with the administration of approximately 3,000 settlements. *Id.* at *PAGEID* 2702-03, 2712.

Mr. Dahl testified that, in his experience with 3,000 class action settlements, most settlements are claims-made and "relatively few [of the settlements that he has been involved in] -- . . . maybe less than ten or 20 – [provide for] direct payments[.]" *Id.* at *PAGEID* 2712. Of the 300 class action settlements handled by Dahl Administration, LLC, in the past year, only "a handful," including three consumer cases, provided for checks to be sent without a claims process. *Id.* at *PAGEID* 2711. The three consumer cases referred to were "insurance cases" where there was "a high reliance on the defendant data because it w[as] either current or former clients that had . . . account relationships, and we had data that we knew was reliable." *Id.* Mr. Dahl also testified that, of approximately 100 employment cases handled by Dahl Administration, LLC, "maybe ten or 12" were direct payment without a claims process. *Id.*

Blackman acknowledges that claims-made settlements are common and not "inherently objectionable," but he argues that a claims-made process should be implemented only when "justified

by a legitimate reason beyond depressing class recovery while simultaneously creating the illusion of class benefit." *Blackman Reply, PAGEID* 2589. No legitimate reason exists here, the objectors argue, because the Claims Administrator was able to verify and send notice to 90.8 percent of the potential class members, and thus, could have issued direct payment to 90.8 percent of the potential class members. *See id.*; *Transcript, PAGEID* 2754, 2759-60; *Zik Objectors' Reply, PAGEID* 2636-37 ("The process having fully run its course, the Claims Administrator has represented to the Court that '90.8% of the Postcard Notices were delivered.' There is absolutely no evidence to suggest that checks mailed to class members under the same regime would not have had the same rate of receipt.") (citations and emphasis omitted).

The objectors misconstrue the Dahl Declaration and Mr. Dahl's testimony. The Dahl Declaration provides that, "[a]s of November 29, 2013, the Notice reached at least 90.8% of potential Class Members." *Dahl Declaration*, ¶ 45 (emphasis added). Mr. Dahl clarified at the fairness hearing that 90.8 percent of the Postcard Notices were delivered, but there is no "way of definitively saying they actually reached the class members." *Transcript, PAGEID* 2718. Moreover, Mr. Dahl testified that the direct payment cases in which he has been involved have all "had some sort of current component to the data" that was known to be reliable, and none had data as out-of-date as Global Fitness' data. *See id.* at *PAGEID* 2711-12.

Here, the class includes any individual who signed a gym membership or personal training contract with Global Fitness between January 1, 2006, and October

26, 2012, when Global Fitness sold all of its business assets. Global Fitness's data therefore spans a six year time frame and, at best, is current only as of 2012. Given the age of Global Fitness' data and in light of Mr. Dahl's testimony, the Court is satisfied that a claims-made process is appropriate in this case.

To the extent that the objectors challenge the effectiveness of the claims-based process in this case, the Court notes that the *Settlement Agreement* permits claim forms to be submitted online and by mail. Mr. Dahl testified that the use of such a claim system typically results in a claim rate twice as high as that resulting from a paper filing process. *See Transcript, PAGEID* 2705-06. Moreover, the 8.2 percent[10] claim rate in this case is well within the acceptable range of responses in a consumer class action. *See id.* at PAGEID 2721-22 (Mr. Dahl's testimony that response rates in class actions generally range from one to 12 percent with a median response rate, and a normal consumer response rate, of approximately five to eight percent).

4. Settlement Negotiations

The *Zik* Objectors argue that the *Settlement Agreement* is procedurally unfair because the *Zik* Objectors had no opportunity to participate in settlement negotiations. *Zik Objections*, pp. 25-27. The *Zik* Objectors also argue that the settlement is unfair because plaintiffs opposed the *Zik* Objectors' motion to intervene. *Id.* at p. 28.

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[10] 49,808 Allowed Claimants ÷ 605,735 Class members = 8.223% response rate

The *Zik* Objectors filed a motion to intervene in this action on September 25, 2013, *see* Doc. No. 102, and that motion was denied as untimely on September 30, 2013. *See Opinion and Order*, Doc. No. 110. The *Zik* Objectors' challenge to the Settlement Agreement premised on an inability to intervene and participate in settlement negotiations is essentially a challenge to the Court's order denying the *Zik* Objectors' motion to intervene. The *Zik* Objectors have not, however, persuaded the Court that the previous order should be revisited. The Court also notes that the *Zik* Objectors' interest in this action is similar to that of every other unnamed class member. Because the unnamed class members are adequately represented by Class Counsel and Class Representatives, the Court finds no procedural unfairness in excluding the *Zik* Objectors' from participation in settlement negotiations. *See Bailey v. White*, 320 F. App'x 364, 366-67 (6th Cir. 2009) ("The purpose for intervening – to investigate and evaluate the proposed settlement – was satisfied by the opportunity to participate in the fairness hearing . . . .").

5. Release

The *Settlement Agreement* provides that "each Class Representative and each Settling Plaintiff shall be deemed to have fully, finally, and forever jointly and severally released the Released Parties from all Released Claims." *Id.* at § 15.1. A Released Claim is defined as

> any and all claims, demands, actions, causes of action, rights, offsets, suits, damages (whether general, special, punitive, or multiple),

> lawsuits, liens, costs, losses, expenses, penalties, or liabilities of any kind whatsoever, for any relief whatsoever, including monetary, injunctive, or declaratory relief, or for reimbursement of attorneys' fees, costs, or expenses, whether known or unknown, whether direct or indirect (whether by assignment or otherwise), whether under federal, state, or local law, whether alleged or not alleged in the Action, whether suspected or unsuspected, whether contingent or vested, which any of the Class Representatives or Class Members have had, now have, or may have in the future against the Released Parties, and which were raised or which could have been raised in the Action, and which arose during the Class Period and arise out of or are related to the factual allegations or are based on the same factual predicates as alleged in the Action's Third Amended Complaint. This specifically includes any and all claims for breach of contract, unjust enrichment, misrepresentation, and/or violations of consumer protection acts, health spa acts, or prepaid entertainment contract statues resulting from Defendant's sales, communications, contracting, billing, and/or cancellations of any gym or personal training contracts.

Settlement Agreement, § 2.23 (emphasis in original). The *Zik* Objectors argue that the release is overbroad because it releases claims without an identical factual predicate to plaintiffs' claims. *Transcript, PAGEID* 2764-65. Specifically, the *Zik* Objectors challenge the

provision releasing claims that "arise out of or are related to the factual allegations . . . in the Action's Third Amended Complaint," *Settlement Agreement*, § 2.23. *See Transcript, PAGEID* 2764-65. This objection is not well taken.

"Like any other settlement, this one requires the plaintiffs to release their claims against the defendant." *See Olden*, 294 F. App'x at 220. The *Settlement Agreement* releases all claims that "arise out of or are related to the factual allegations or are based on the same factual predicates as alleged in the Action's Third Amended Complaint." *Settlement Agreement*, § 2.23. The *Zik* Objectors challenge the release because it releases claims that "arise out of or are related to the factual allegations," and is not expressly limited to the release of claims with an identical factual predicate as the settled conduct. However, a release need not expressly state that it is limited by "the identical factual predicate doctrine" in order to be so limited. *See In re WorldCom, Inc. Sec. Litig.*, 388 F.Supp. 2d 319, 342 n.36 (S.D.N.Y. 2005). In any event, the Court finds that the release in question is limited to claims that share the same factual predicate as the settled claims, and therefore is not unfair to that extent. *See Olden*, 294 F. App'x at 220 ("Because such claims have an identical factual predicate as the claims pled in the complaint, no problem is posed by their release."); *N. Star Capital Acquisitions, LLC v. Krig*, Nos. 3:07–cv–264, 3:07–cv–265, 3:07–cv–266, 3:08–cv–1016, 2011 WL 65662, at *7-8 (M.D. Fla. Jan. 10, 2011) (approving the release of claims "that are based upon, arise out of, or are related to, or in any way connected with, directly or indirectly, in whole or in part, [the claims in the

lawsuit]"); *Taft v. Ackermans*, No. 02Civ.7951, 2007 WL 414493, at *8 (S.D.N.Y. Jan. 31, 2007) (approving the release of "all of the class plaintiffs' claims against the defendants arising out of or related to the purchase of KPNQwest securities during the class period," on the basis that the "release is . . . limited to claims that share the same factual predicate as the settled claims"); *Spann v. AOL Time Warner, Inc.*, No. 02Civ.8238, 2005 WL 1330937 (S.D.N.Y. June 7, 2005) (approving the release of "all Class members' claims against the defendants that arise out of or are related to the claims in this lawsuit"); *Levell v. Monsanto Research Corp.*, 191 F.R.D. 543, 561-62, 561 n.32 (S.D. Ohio 2000) (approving a release of claims under "any other federal or state law, regulation, or rule of any kind and which relate in any way [to the defendant's] acts, omissions, disclosures, non-disclosures, or conduct concerning its operation of the Mound facility, including but not limited to all allegations set forth or which could have been set forth in the action").

Based on the foregoing, the Court finds that the Settlement Agreement is fair, reasonable, and adequate and that its approval is in the best interest of the class.

V. Attorneys' Fees and Costs

The *Settlement Agreement* provides that Global Fitness will pay the reasonable attorneys' fees and actual costs awarded by the Court, not to exceed $2,390,000. *Settlement Agreement*, § 9.1. On December 9, 2013, Class Counsel filed *Plaintiffs' Motion for Fees*, requesting an award of attorneys' fees and costs in the amount of $2,390,000. In

accordance with the "clear sailing" provision of the settlement, *see Settlement Agreement*, § 9.2, Global Fitness has not opposed the application for fees. The objectors argue that the fee request is excessive and that the class was not given reasonable notice of the fee request. Specifically, the *Zik* Objectors argue that notice of the fee request was not directed to the class in a reasonable manner because the fee request was not disclosed on the Postcard Notice. *See Zik Objections, PAGEID* 1946-47. Blackman argues that notice of the fee request was not directed to class members in a reasonable manner because the notice did not specify how an award of attorneys' fees will be divided among Class Counsel. *Blackman Objections, PAGEID* 2107-10.

"In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). "A claim for an award must be made by motion under Rule 54(d)(2) . . . ." Fed. R. Civ. P. 23(h)(1). "Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner." *Id.* Rule 54(d)(2) requires those claiming attorneys' fees to timely file a motion specifying the grounds entitling the movant to the award and stating the amount sought.

As discussed *supra*, notice was provided by postcard, email and reminder email, publication, and via a settlement website. Although, as the *Zik* Objectors argue, the Postcard Notice does not advise potential class members of Class Counsel's fee request, notice of the fee request was included on the long-form notice. Specifically, the long-form notice

expressly advised that Global Fitness "has agreed to pay . . . Class Counsel's reasonable attorneys' fees and litigation costs in an amount no greater than $2,390,000." *Long-Form Notice*, attached to *Dahl Declaration* as Exhibit C, p. 3. The long-form notice also advised class members of the date, time, and location of the fairness hearing, advised that the Court will "be asked to approve Class Counsel's request for Attorneys' Fees and Costs" at the hearing, and that "[a]ny Class or Subclass Member who does not file an Opt-Out Request may object to the proposed settlement and/or the award of attorneys' fees and expenses" during the fairness hearing. *Id.* at p. 5. The long-form notice was posted on the settlement website, the address of which is prominently posted on the Postcard Notice, longform notice, email and reminder email, and publication notice, and similar information regarding attorneys' fees and objections was included in a "Frequently Asked Questions" section of the website. The notice informed class members of the potential for an award of attorneys' fees and costs, the amount of fees and costs that Global Fitness agreed to pay, that the award was subject to court approval at the fairness hearing, and that class members would have the opportunity to object to the award at the fairness hearing. Class Counsel's motion for attorneys' fees and notice of intent to divide a fee award in proportion to each firm's lodestar value were also filed well in advance of the fairness hearing. The Court therefore finds that notice of the request for attorneys' fees and costs has been "directed to class members in a reasonable manner." Fed. R. Civ. P. 23(h)(1). *See also Newberg on Class Actions* § 8:25 (5th ed.) ("Yet other than requiring that the notice be made in a

reasonable manner,' Rule 23 does not dictate any specific content that the notice must contain. The fee notice's content is primarily dictated by Rule 23(h)(2)'s guarantee that class members have the right to object to the fee motion."); *Bessey v. Packerland Plainwell, Inc.,* No. 4:06-cv-95, 2007 WL 3173972, at *1-3 (W.D. Mich. Oct. 26, 2007) (approving notice of class counsel's motion for attorneys' fees where class members were notified of the maximum amount of attorneys' fees counsel intended to seek and of the right to object, but were not notified of the proposed apportionment of fees among class counsel).

"When awarding attorney's fees in a class action, a court must make sure that counsel is fairly compensated for the amount of work done as well as for the results achieved." *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993). "In general, there are two methods for calculating attorney's fees: the lodestar and the percentage-of-the-fund." *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 F. App'x 496, 498 (6th Cir. 2011).

> The lodestar method better accounts for the amount of work done, while the percentage of the fund method more accurately reflects the results achieved. For these reasons, it is necessary that district courts be permitted to select the more appropriate method for calculating attorney's fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them.

Rawlings, 9 F.3d at 516 (internal citations omitted).

To determine the "lodestar" figure, a court multiplies the number of hours reasonably expended on the litigation by a reasonable hourly rate. *Bldg. Serv. Local 47 Cleaning Contractors Pension Plan v. Grandview Raceway*, 46 F.3d 1392, 1401 (6th Cir. 1995) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). The court "may then, within limits, adjust the 'lodestar' to reflect relevant considerations peculiar to the subject litigation." *Adcock-Ladd v. Sec'y of Treasury*, 227 F.3d 343, 349 (6th Cir. 2000) (citing *Reed v. Rhodes*, 179 F.3d 453, 471-72 (6th Cir. 1999). "In contrast, under the percentage of the fund method, the court simply determines a percentage of the settlement to award the class counsel.'" *Londardo*, 706 F.Supp. 2d at 789 (quoting *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 268 F.Supp. 2d 907, 922 (N.D. Ohio 2003)) (internal quotations and alterations omitted). District courts have discretion to select the particular method of calculation. *Rawlings*, 9 F.3d at 516. Even so, a district court must articulate the "reasons for 'adopting a particular methodology and the factors considered in arriving at the fee.'" *Moulton*, 581 F.3d at 352 (quoting *Rawlings*, 9F.3d at 516)).

> Often, but by no means invariably, the explanation will address these factors: "(1) the value of the benefit rendered to the plaintiff class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the

> professional skill and standing of counsel involved on both sides."

Moulton, 581 F.3d at 352 (quoting *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996)). *See also Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1196 (6th Cir. 1974).

Class Counsel asks the Court to apply the lodestar method in calculating the fee award. *See Transcript, PAGEID* 2739, 2777. In contrast, Blackman argues that the lodestar method will result in an unreasonable award of attorneys' fees and permit Class Counsel to retain a disproportionate amount of the settlement proceeds. *See Blackman Objections, PAGEID* 2099-2106. In essence, Blackman argues that it is improper for Class Counsel to receive an award of attorneys' fees that is greater than the total payments to the Class and Subclasses and that any fee award should be limited to 25 percent of the actual recovery by Allowed Claimants. *See id.* at *PAGEID* 2092-93, 2099-2103; *Blackman's Reply, PAGEID* 2597-99. Blackman's arguments to the contrary notwithstanding, the Court finds that the lodestar method is appropriate in this case.

First, Class Counsel undertook the litigation on a contingent fee basis and devoted substantial time and energy to the action despite the risk of not being compensated. The risk of Class Counsel's undertaking is significant; Class Counsel devoted approximately 8,684 hours in connection with the litigation, *see December 2013 McCormick Declaration*, ¶¶ 6, 8-10; *Troutman Declaration*, ¶¶ 6, 8-11, without any guarantee of receiving a benefit. Second, many of plaintiffs' claims involve fee shifting statutes, see

KRS 367.930(2); O.R.C. § 1345.09(F)(2), the purpose of which is to induce a capable attorney to undertake representation in litigation that may not otherwise be economically viable. *See Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010); *Einhorn v. Ford Motor Co.*, 48 Ohio St. 3d 27, 30 (Ohio 1990). Given the purpose of fee shifting statutes and "the goal of class actions – *i.e.*, to provide a vehicle for collective action to pursue redress for tortious conduct that it is not feasible for an individual litigant to pursue," *Lonardo*, 706 F.Supp. 2d at 795, there is a substantial public interest in compensating Class Counsel for the amount of work done in this action. Similarly, Class Counsel should be awarded for the risk of undertaking representation on a contingent basis, especially considering the complexity of this action and the professional skill of opposing counsel. Further, limiting an award to a percentage of the actual recovery by Allowed Claimants, as Blackman suggests, could dissuade counsel from undertaking similar consumer class actions in the future.

In general, the percentage of the fund method is preferred in common fund cases. *See Rawlings*, 9 F.3d at 515 ("We are aware of the recent trend towards adoption of a percentage of the fund method in such cases."). This is not, however, a common fund case because the provision for attorneys' fees in the *Settlement Agreement* is independent of the award to the Class and Subclasses. Where, as here, the results achieved are substantial, the interest in fairly compensating counsel for the amount of work done is great. Under the circumstances of this case, the lodestar method will best ensure that Class Counsel is fairly compensated for their time, *see id.* at 516

("The lodestar method better accounts for the amount of work done . .. ."), and it will fairly account for the risk to Class Counsel and the policy underlying the fee shifting statutes. *See Perdue*, 559 U.S. at 552 ("First, a 'reasonable' fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case. . . . [T]he lodestar method yields a fee that is presumptively sufficient to achieve this objective.").

As noted *supra*, the lodestar figure is calculated by multiplying the proven number of hours reasonably expended on the litigation by a reasonable hourly rate. *See Grandview Raceway*, 46 F.3d at 1401. Class Counsel submits that, as of November 30, 2013, the Isaac Wiles firm billed 2,466.18 hours in connection with the litigation and the Vorys firm billed 6,218 hours in connection with the litigation, at rates ranging from $180 per hour to $450 per hour. *December 2013 McCormick Declaration*, ¶¶ 6, 8-10; *Troutman Declaration*, ¶¶ 6, 8-11. Based on the standard hourly rates charged by each firm, the lodestar value for the time is $2,452,010. *December 2013 McCormick Declaration*, ¶ 6; *Troutman Declaration*, ¶ 6. Class Counsel also submits that, as of November 30, 2013, $65,032.86 in necessary costs and expenses have been incurred in connection with depositions, mediation, outside professional services, mileage, lodging, copying, and research and administrative services. *December 2013 McCormick Declaration*, ¶ 11; *Troutman Declaration*, ¶¶ 5, 12.

Although the best practice may have been to submit more detailed records of the costs and time expended in the litigation, *see e.g.*, *Imwalle v. Reliance Med. Prods., Inc.*, 515 F.3d 531, 553 (6th Cir.

2008) ("The key requirement for an award of attorney fees is that '[t]he documentation offered in support of the hours charged must be of sufficient detail and probative value to enable the court to determine with a high degree of certainty that such hours were actually and reasonably expended in the prosecution of the litigation.' . . . Although counsel need not 'record in great detail' each minute he or she spent on an item, 'the general subject matter should be identified.'") (internal citations omitted); *Rawlings*, 9 F.3d at 516-17 ("District courts must pore over time sheets . . . ."); *Lonardo*, 706 F.Supp. 2d at 793 (detailing the time and rate for every hour expended on the litigation), the Court is satisfied that the number of hours billed and hourly rates of Class Counsel are reasonable. Class Counsel has averred under penalty of perjury that the hours expended and costs incurred in the litigation were reasonably necessary to prosecute the action. *December 2013 McCormick Declaration*, ¶ 12; *Troutman Declaration*, ¶¶ 11, 14. Class Counsel's hourly rates are also consistent with those in the market and the Court's experience. *See e.g.*, *In re Sulzer Orthopedics, Inc.*, 398 F.3d 778 (6th Cir. 2005); *Johnson v. Midwest Logistics Sys., Ltd.*, No. 2:11-cv-1061, 2013 WL 2295880 (S.D. Ohio May 24, 2013); *Lowther v. AK Steel Corp.*, No. 1:11-cv-877, 2012 WL 6676131 (S.D. Ohio Dec. 21, 2012). Finally, the Court notes that Class Counsel has not billed for a significant number of attorney hours expended after the date of settlement, *see Transcript, PAGEID* 2733 (Class Counsel's representation that their lodestar value is now "just shy of $2.8 million."), the fee request results in a lodestar multiplier of less than one and, despite vigorous objections to other aspects of the settlement,

there has been no objection to the reasonableness of the hourly rates or the hours expended on the litigation. Considering the relief obtained for the class, the risk undertaken by Class Counsel, the skill of counsel for both side, society's stake in rewarding attorneys for benefits secured for the class, and the complexity and duration of the litigation, all discussed *supra*, the Court finds that an award of attorneys' fees and costs in the amount of $2,390,000 is reasonable.

Although "perfectly justified in awarding a fee based on the lodestar analysis alone," *Van Horn*, 436 F. App'x at 501, district courts often employ both the lodestar and percentage of the fund methods, using each as a cross-check against the other. *See e.g.*, *Lonardo*, 706 F.Supp. 2d at 796-97; *In re Sulzer Hip Prosthesis*, 268 F.Supp. 2d at 923. "The first step in the percentage of the fund method is to determine the total monetary value of the Settlement Agreement to the Settlement Class – i.e., the "Total Class Benefit."" *Londardo*, 706 F.Supp. 2d at 797 (quoting *In re Sulzer Hip Prosthesis*, 268 F.Supp. 2d at 922).

The *Settlement Agreement* requires Global Fitness to pay administration costs of the Claim Administrator estimated at $496,259, attorneys' fees and costs in the amount of $2.39 million, and monetary compensation to any Class or Subclass member who becomes an Allowed Claimant. *See Settlement Agreement*, §§ 6.1, 9.1, 10.1; *Long-Form Notice*, p. 3. Global Fitness's independent agreement to pay administration costs and attorneys' fees and costs is a benefit to the class and is included in the Total Class Benefit. *See Lonardo*, 706 F.Supp. 2d. at 802-03.

The *Settlement Agreement* provides for an available benefit to Class and Subclass members of $15,500,430;[11] however, the overall payment to Allowed Claimants will be only $1,593,240.00. *Second Supplemental Dahl Declaration*, ¶ 9. Blackman argues that the Court should ignore the available benefit and "make the proper comparison between the fee award and the amount actually claimed by the class members." *Blackman Objections, PAGEID* 2093. *See also Transcript, PAGEID* 2755-56. Plaintiffs argue that the entire available benefit should be considered in determining a fee award or, alternatively, that a fee award should be based on the midpoint between the available benefit and the actual payments to class members. *Plaintiffs' Motion for Fees*, p. 15.

In *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980), the United States Supreme Court upheld an award of attorneys' fees in a class action where the award was based on the total fund available to the class rather than the amount actually recovered. *Id.* at 480 ("Their

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[11] Plaintiffs represent in various contexts that the available benefit is equal to $19 million, *Motion for Preliminary Approval*, Doc. No. 97, p. 6, $17.5 million, *Plaintiffs' Motion for Fees*, pp. 1, 15 n.8, or $17 million, *Plaintiffs' Response*, PAGEID 2255. Plaintiffs do not, however, provide their method for calculating these numbers. The Court calculates the Available Benefit as the total monetary compensation that Global Fitness is required to pay to Class and Subclass members under the Settlement Agreement if every potential class member becomes an Allowed Claimant: Available benefit = (605,735 potential Class members x $5) + (300,017 potential FIF Subclass members x $15) + (323,518 potential Gym Cancel Subclass members x $20) + (50,038 potential Personal Training Cancel Subclass members x $30).

right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel."). Nevertheless, courts are "split regarding how the value of the Benefit Fund should be calculated[;]" some courts "calculate[] attorneys' fees using the percentage of the fund method based only upon the amount actually claimed" and others "use the Available Benefit as the measure of the Benefit Fund." *Londardo*, 706 F.Supp. 2d at 799 (collecting cases). In addressing arguments similar to those made here, the court in *Lonardo* devised a compromise to avoid decoupling class counsel's interest from those of the class while adhering to the *Boeing* principle by incorporating the value of the available benefit into the assessment of the benefit fund. *Id.* at 799-802. The compromise in *Lonardo* provided for the calculation of attorneys' fees based on the "mid-point between the Available Benefit and the Actual Payment." *Id.* In making this compromise, the court recognized that it would be improper to calculate attorneys' fees based solely on actual payments to class members. *See id.* at 801-02. Specifically, the court noted that both the Second and Ninth Circuits have found that it is an abuse of discretion for a district court to award fees based solely on actual recovery and without regard to the Boeing principle. *Id.* (citing *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2nd Cir. 2007); *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997)). The Court finds the reasoning in Lonardo persuasive and therefore declines to calculate attorneys' fees based solely on actual recovery without regard to available benefit. The Court also finds that the mid-point method

adopted in *Lonardo* will sufficiently protect the interests of the class against the risk of the actual distribution being misallocated between attorneys' fees and the class recovery, while at the same time adhering to the principle of *Boeing* that the right to share in the harvest of the lawsuit is a benefit to the class. *See Boeing*, 444 U.S. at 480. Accordingly, the Court finds that, for purposes of the percentage of the fund cross-check, the potential monetary compensation to class members should be valued at $8,546,835, *i.e.*, the midpoint between the Available Benefit of $15,500,430 and the actual payment of $1,593,240.

For purposes of the percentage of the fund cross-check, then, the *Settlement Agreement* provides a benefit to the class totaling $11,433,094.[12] Class Counsel's requested fee of $2,390,000 is equal to approximately 21 percent of this class benefit.[13] This percentage is well within the acceptable range for a fee award in a class action. *See Lonardo*, 706 F.Supp. 2d at 803 (26.4%); *Kritzer v. Safelite Solutions, LLC*, No. 2:10-cv-0729, 2012 WL 1945144, at *9 (S.D. Ohio May 30, 2012) (52%); *In re Telectronics*, 137 F.Supp. 2d at 1042 ("Generally, in common fund cases, the fee percentages range from 10 to 30 percent (10%-30%) of the common fund created."). Furthermore, as discussed *supra*, $2.39 million is a reasonable fee award based on the analysis of the six *Ramey* factors. Accordingly, the percentage of the fund cross-check

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[12] $8,546,835 + attorneys' fees and costs of $2,390,000 + administration costs of $496,259 = $11,433,094 Total Class Benefit

[13] $2,390,000 ÷ $11,433,094 = 20.904 %

confirms that an award of attorneys' fees and costs in the amount of $2,390,000 is reasonable.

The *Zik* Objectors also request a reasonable incentive payment and attorneys' fee for their efforts in pursuing the *Zik* Action. *Zik Objections, PAGEID* 1948-49. "Fees and costs may be awarded to the counsel for objectors to a class action settlement if the work of the counsel produced a beneficial result for the class." *Olden*, 294 F. App'x at 221. *See also Lonardo*, 706 F.Supp. 2d at 803-04 ("Sixth Circuit case law recognizes that awards of attorneys' fees to objectors may be appropriate where the objector provided a benefit to the class by virtue of their objection."). However, the Court has not found any objections meritorious, and the *Zik* Objectors have not provided any legal justification for an award by this Court to an unsuccessful objector or an attorney prosecuting a separation action. Accordingly, the *Zik* Objectors' request for attorneys' fees is without merit.

WHEREUPON, based on the foregoing, the Court concludes that plaintiffs have met their burden of showing that the prerequisites for the certification of a class action pursuant to Rule 23(a) and Rule 23(b)(3) have been satisfied in this case, that the *Settlement Agreement* is fair, reasonable, and adequate, and that Class Counsel's requested award of fees and expenses is fair and reasonable. Accordingly, it is hereby **RECOMMENDED** that

> (a) because the proposed settlement of the action on the terms and conditions set forth in the *Settlement Agreement* is fair, reasonable, adequate, and in the best interest of the Class

and Subclasses, the *Settlement Agreement* be finally approved by the Court;

(b) the Class and Subclasses be finally certified for settlement purposes;

(c) the Action be dismissed with prejudice pursuant to the terms of the *Settlement Agreement*;

(d) Settling Plaintiffs be bound by the release set forth in the *Settlement Agreement*;

(e) Class Counsel be awarded reasonable fees and reimbursement of expenses in the amount of $2,390,000,

(f) Class Representatives be awarded the Class Representative Enhancement Payments in the amounts specified in the *Settlement Agreement*, and

(g) Global Fitness's Motion to Strike Objection of Joshua Blackman, Doc. No. 125, be denied.

If any party seeks review by the District Judge of this *Report and Recommendation*, that party may, within fourteen (14) days, file and serve on all parties objections to the *Report and Recommendation*, specifically designating this *Report and Recommendation*, and the part thereof in question, as well as the basis for objection thereto. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). Response to objections must be filed within fourteen (14) days after being served with a copy thereof. Fed. R. Civ. P. 72(b).

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in a waiver of the right to *de novo* review by the

District Judge and of the right to appeal the decision of the District Court adopting the *Report and Recommendation*. *See Thomas v. Arn*, 474 U.S. 140 (1985); *Smith v. Detroit Fed'n of Teachers*, Local 231 etc., 829 F.2d 1370 (6th Cir. 1987); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

April 4, 2015

Norah McCann King

United States Magistrate Judge

APPENDIX D

Nos. 14-3761/3798

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed June 20, 2016

AMBER GASCHO, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL,

Plaintiffs-Appellees,

v.

GLOBAL FITNESS HOLDINGS, LLC,

Defendants-Appellee,

ROBERT J. ZIK, APRIL ZIK, and JAMES MICHAEL HEARON (14-3761); JOSHUA BLACKMAN (14-3798),

Objectors-Appellants.

Before: KEITH, CLAY, and STRANCH, Circuit Judges

The court received two petitions for rehearing en banc. The original panel has reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court.* No judge has

* Judge Moore recused herself from participation in this ruling.

requested a vote on the suggestion for rehearing en banc.

Therefore, the petitions are denied. Judge Clay would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk