UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LORI COWEN, et al., Plaintiffs, v. LENNY & LARRY'S, INC., Defendant.	Case No. 1:17-cv-01530 Judge Robert W. Gettleman
THEODORE H. FRANK, Objector.	

THEODORE H. FRANK'S OBJECTION TO SETTLEMENT AND TO MOTION FOR ATTORNEYS' FEES

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INTRODUCTION

Frank objects to the Settlement because the settling parties are hiding from the absent class members (and this Court) the real value of the Settlement—what class members will *actually* receive—by scheduling the objection deadline on the same day as the claims deadline. *See* Preliminary Approval Order ("PAO"), Dkt. 97 at 5. To assess whether a settlement fairly allocates the relief between class counsel and class members, the Seventh Circuit requires courts to compare "(1) the fee to (2) the fee plus what the class members received." *Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014). Because the amount of claims that will be paid to class members is not yet known, such comparison is impossible.

Class counsel argued in their preliminary approval motion that their fee represented only 24% of the $5 million Settlement payment. *See* Memorandum in Support of Preliminary Approval of Class Action Settlement ("PAO Memo"), Dkt. 94 at 13. But this $5 million is a "fiction" that the Seventh Circuit rejects because it does not reflect the reality of what class members will actually receive. *Pearson v. NBTY, Inc.*, 772 F.3d 778, 782 (7th Cir. 2014). Indeed, this $5 million "fiction" includes notice and administration costs and a non-class fluid recovery award that must be excluded when comparing the fees to actual relief. *See id.* at 781. Further, class counsel scheduled their fee motion deadline after the objection deadline in violation of Rule 23(h), a violation for which the Seventh Circuit holds there is "no excuse." *Redman*, 768 F.3d at 638.

The Settlement has other offending provisions that reflect a "selfish deal" class counsel negotiated for themselves at the expense of class members. The Settlement allows class members to choose between cash (up to $350,000) or cookies (up to $3.15 million), with any unclaimed amounts to be distributed as cookies in a fluid recovery or *cy pres* award to retail stores for free samples to the retail store's future customers. *See* Settlement, Dkt 94-1 at 12-13, 15-16. But future customers "are not members of the class, defined as it is as customers who have purchased [Lenny & Larry's cookies]." *Pearson*, 772 F.3d at 786. This award is worse than the *cy pres* award at issue in *Pearson*, which at least provided money to a third-party charity—the "free cookies" distribution here amounts to nothing

more than a marketing campaign for defendant Lenny & Larry's. Under the Settlement, Lenny & Larry's decides which retail stores get the cookies, *id.* at 15, permitting Lenny & Larry's to launch its marketing campaign with free product samples strategically to new locations and new customers. Further, Lenny & Larry's agreed not to challenge class counsel's fee request up to $1.2 million, with any reduction in fees to be added to this marketing campaign, *id.* at 17, effectively creating a kicker to benefit Lenny & Larry's. The Seventh Circuit holds that there is no "justification" for such "kicker" provisions and reflects a "selfish deal" between class counsel and defendants. *See Pearson*, 772 F.3d at 786-87.

Another red flag is the Settlement's overbroad release and the Settlement's expansion from an Illinois class in the operative complaint, *see* Dkt. 72 at 12, to a nationwide class for settlement, *see* Settlement, Dkt. 94-1 at 8-10. And finally, the class notice seeks to depress objections by requiring objectors to agree to deposition and other hurdles. *See* Long Form Notice, Dkt. 97 at 15.

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

As his accompanying declaration demonstrates, Objector Theodore H. Frank is a member of the settlement class. Frank's mailing address is 1629 K Street NW, Suite 300, Washington, DC 20006. *See* Declaration of Theodore H. Frank ("Frank Decl." attached at Exhibit 1) ¶ 2. Frank purchased Lenny & Larry's Cookies at a GNC store in Washington, D.C. on July 13, 2018. Frank Decl. ¶ 5. Frank is thus a class member.

Frank's counsel, Frank Bednarz of the non-profit Competitive Enterprise Institute's Center for Class Action Fairness ("CCAF") will appear at the Fairness Hearing, currently scheduled for March 19, 2019, at 10:00 a.m. As required under the Notice, Frank agrees to be deposed in this action subject to court approval. (Frank nevertheless objects to this provision in the Notice. *See* Section V below.) Frank reserves the right to cross-examine any witnesses put forward in support of the settlement. Frank also joins any government statement of interest not inconsistent with this objection. Frank objects to any provisions of the settlement purporting to limit appellate rights of class members or creating new burdens beyond those imposed upon appellants in Federal Rules of Appellate Procedure.

CCAF, established in 2009, represents class members *pro bono* in class actions where class counsel employs unfair class-action procedures to benefit themselves at the expense of the class. *See e.g., In re Southwest Airlines Voucher Litig.*, 898 F.3d 740, 746 (7th Cir. 2018) (lauding CCAF for "negotiating…a tripling of relief for the class and a significant cut to [class counsel's] fees"); *Pearson*, 772 F.3d at 787 (7th Cir. 2014) (observing that CCAF "flagged fatal weaknesses in the proposed settlement" and demonstrated "why objectors play an essential role in judicial review of proposed settlements of class actions"); Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 13, 2013, at A12 (calling CCAF's founder Ted Frank "[t]he leading critic of abusive class-action settlements"). CCAF has won more than $200 million for class members. Andrea Estes, *Critics hit law firms' bills after class-action lawsuits,* BOSTON GLOBE (Dec. 17, 2016).

II. The objection deadline is unfair because objections are due ***before*** the fee motion and ***before*** the claims period ends: this schedule prevents absent class members from assessing the fairness of the fee motion and Settlement.

The deadlines contained in the proposed preliminary approval order, *see* Dkt. 94-1 at 66, and adopted by the Court, *see* Dkt. 97 at 5, are unfair because (1) the fee motion is due after the objections deadline in violation of Rule 23(h); and (2) the claims period ends simultaneous with the objection deadline, preventing objectors from assessing the fairness of the settlement under Rule 23(e).

A. There is "no excuse" for the Rule 23(h) violation of filing the fee motion after the objection deadline.

The Preliminary Approval Order provides that objections must be received by January 29, 2019. *See* Dkt. 97 at 5. But class counsel's deadline to file a motion for fees falls *after* the objection deadline on February 5, 2019 in violation of Rule 23(h). Rule 23(h) authorizes the Court to award "reasonable" attorneys' fees only when notice of the fee request is "directed to class members in a reasonable manner." Fed. R. Civ. P. 23(h), (h)(1); *Redman v. RadioShack Corp.*, 768 F.3d 622, 637-38 (7th Cir. 2014). In *Redman*, the Seventh Circuit held that the attorneys' fee motion violated Rule 23(h) because "[c]lass counsel did not file the attorneys' fee motion until after the deadline set by the court for objections to the settlement had expired." 768 F.3d at 637-638; *In re Mercury Interactive Corp. Secs. Litig.*, 618 F.3d 988, 993 (9th Cir. 2010) ("The plain text of the rule requires a district court to set the

deadline for objections to counsel's fee request on a date after the motion and documents supporting it have been filed."). The Seventh Circuit found "no excuse for permitting so irregular, indeed unlawful, a procedure." *Redman*, 768 F.3d at 638.

It is also no excuse that the notice here indicates generally that class counsel will seek $1,200,000 in attorneys' fees and costs. *See* https://www.llcookiesettlement.com/Home/Faq#faq14. In *Redman*, the Seventh Circuit noted that while the objectors knew the attorneys would seek $1 million, without the fee motion, objectors "were handicapped in objecting because the details of class counsel's hours and expenses were submitted later, with the fee motion, and so they did not have all the information they needed to justify their objections." 768 F.3d at 638. The Seventh Circuit further held that "objectors were also handicapped by not knowing the rationale that would be offered for the fee request, a matter of particular significance in this case because of the invocation of administrative costs as a factor warranting increased fees." *Id.* at 638. Indeed, the rationale offered for the attorneys' fees in this case is also of particular significance because of the in-kind relief offered to class members. "Compensation in kind is worth less than cash of the same nominal value." *Synfuel Techs. v. DHL Express (USA)*, 463 F.3d 646, 654 (7th Cir. 2006) (quoting *In re Mexico Money Transfer Litig.*, 267 F.3d 743, 748 (7th Cir. 2001)).

The Settlement here permits class members to choose between cash from a paltry $350,000 cash fund and millions of cookies. *See* Settlement, Dkt 94-1 at 12-13. "If less than $350,000 is claimed, the unclaimed cash shall be returned to Defendant, and value of the free cookie distribution will be increased by like amount." *Id.* at 14. Checks not cashed in 60 days will likewise be treated as "unclaimed" and returned to the defendant in exchange for retail-priced cookies. *Id.* at 14-15. This provision amounts to a cash reversion to the defendant, which normally sells cookies for only a fraction of their retail price.

Because the Settlement provides mostly in-kind relief, the Class Action Fairness Act governs the Settlement. *See Redman*, 768 F.3d at 635 (holding that the term "coupon," as used in the section of the Class Action Fairness Act (CAFA) governing coupon settlements, is not defined narrowly as a discount off the full price of an item, but applies to offers of an entire product). The Class Action

Fairness Act permits attorneys to seek fees on a lodestar basis or as a percentage of coupons actually redeemed. *In re Southwest Airlines Voucher Litig.*, 799 F.3d 701, 710 (7th Cir. 2015). Absent class members cannot respond to class counsel's fee request without knowing the method on which class counsel is basing their request.

The Rule 23(h) violation is independent reason to reject the Settlement.

B. Because the claims deadline is the same day as the objection deadline, objectors are handicapped from assessing Rule 23(e) fairness regarding how the Settlement relief is allocated between the attorneys and the class members.

Absent class members have no information regarding the real settlement value (claims submitted) because the objection deadline and the deadline to submit claims is the same day: January 29, 2019. *See* Preliminary Approval Order, Dkt. 97 at 5. Without knowing what class members will actually receive from the Settlement, it is impossible to assess the fairness of the Settlement. *Pearson*, 772 F.3d at 780-81 (finding error in district court decision to value settlement "at the maximum *potential* payment class members could receive"). A settlement can be unfair even when negotiated at arms' length when it confers preferential treatment upon class counsel to the detriment of class members. *Id.* at 787 (nixing "selfish deal"). "Such inequities in treatment make a settlement unfair," for neither class counsel nor the named representatives are entitled to disregard their "fiduciary responsibilities" and enrich themselves while leaving the class behind. *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718-21 (6th Cir. 2013) ("*Pampers*") (reversing settlement where class counsel received $2.73 million and absent class members were offered a money-back refund program with a likely small claims rate, prospective labeling changes, and a *cy pres* donation).

A fair settlement requires a fair allocation of the proceeds between the attorneys and the class members. Because "the adversarial process" between the settling parties cannot safeguard "the manner in which that [settlement] amount is *allocated* between the class representatives, class counsel, and unnamed class members," it is no surprise that the most common settlement defects are ones of allocation. *Pampers*, 724 F.3d at 717 (emphasis in original). In assessing whether the proceeds are fairly allocated, "[t]he ratio that is relevant is the ratio of (1) the fee to (2) the fee plus what the class members

received." *Redman*, 768 F.3d at 630; *Pearson*, 772 F.3d at 781 (same); *see also In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013) ("*HP Inkjet*") ("Where both the class and its attorneys are paid in cash … [t]he district court can assess the relative value of the attorneys' fees and the class relief simply by comparing the amount of cash paid to the attorneys with the amount of cash paid to the class."); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 170 (3d Cir. 2013) ("*Baby Products*") ("[C]ourts need to consider the level of direct benefit provided to the class in calculating attorneys' fees.").

The *Redman* ratio (fees compared to fees plus relief) requires a court to determine what the class *actually* received. In *Pearson v. NBTY,* the Seventh Circuit rejected a settlement where claims totaled $865,284, the attorneys' fees were $1.93 million, and $1.13 million went to *cy pres* recipients. 772 F.3d at 781-82. The district court had approved fees based on a maximum potential payment to class members of $14.2 million as if "every one of the 4.72 million class members who had received postcard rather than publication notice of the class action would file a $3 claim." *Id.* at 781. The Seventh Circuit reversed, finding that the $14.2 million potential benefit was a "fiction." *Id.* The Court reasoned that "[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. The Seventh Circuit found that the real ratio in *Pearson* was a "selfish deal," an "outlandish 69%" ($1.93 compared to $1.93 + $865,284). *Id.* at 781, 787.

Here, class counsel argued in their memorandum supporting preliminary approval that their request for "24% of the Settlement Payment fall[s] within the range courts have found to be reasonable." *See* Memorandum in Support of Preliminary Approval of Class Action Settlement ("PAO Memo"), Dkt. 94 at 13. But 24% is a "fiction" based on a $5 million Settlement Payment, the majority of which will not be paid to the class. *Pearson*, 772 F.3d at 781. Without knowing how much the class will actually receive—and class counsel's proposed deadlines prevent objector Frank from knowing how much the class will receive—it is impossible to determine whether the ratio is fair and how selfish exactly is the deal class counsel has structured. (We know already that it is selfish given that the

settlement caps the cash distribution to class members at $350,000 while class counsel seek a fee of $1.2 million. Settlement, Dkt. 94-1 at ¶¶ 2.6, 2.11).

Even without such precise claims information, there are guiding legal principles that must be applied in calculating the ratio that class counsel ignores here.

1. Notice and administrative costs must be excluded in the *Redman* ratio.

Class counsel argue that they are seeking a reasonable 24% of the Settlement Payment. *See* PAO Memo at 13. The term "Settlement Payment," however, includes notice and administration costs, *see* Settlement, Dkt. 94-1 at 11, which costs cannot be counted in the *Redman* ratio. The Seventh Circuit explained that notice and administration costs should not be "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." *Redman*, 768 F.3d at 630. Settlement notice is only valuable to the class to the extent that it causes the class to realize benefits—and those benefits are already counted in the settlement fund that class counsel is seeking credit for. Settlement notice is a benefit to the defendant, because without it, the defendant does not meet due-process standards for enforcing the settlement release. *See e.g., Hecht v. United Collection Bureau*, 691 F.3d 218 (2d. Cir. 2012) (permitting relitigation of class action because of inadequacy of class notice in previous settlement); *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1226-29 (11th Cir. 1998) (same); *Besinga v. United States*, 923 F.2d 133, 137 (9th Cir. 1991) (same) (citing cases).

Refusing to count notice costs is just one instantiation of the general principle that costs imposed on the defendant—divorced from class benefits—are not the measure of compensable class value. *See In re Bluetooth Headset Prods. Liab. Litig.,* 654 F.3d 935, 944 (9th Cir. 2011) ("[T]he standard [under Rule 23(e)] is not how much money a company spends on purported benefits, but the value of those benefits to the class." (quoting *In re TD Ameritrade Accountholder Litig.*, 266 F.R.D. 418, 423 (N.D. Cal. 2009)). As *Redman* noted, to award class counsel a commission on notice and administrative costs creates perverse incentives to overspend on the third parties. 768 F.3d at 630. Here, notice and administration costs are estimated at "$295,781.82 for the 10,000 claims and $ 4,530 in costs for each

additional 1,000 claims." Settlement, Dkt. 94-1 at 16. Those costs should be excluded when assessing the allocational fairness of fees compared to class relief.

2. Fluid recovery or *cy pres* awards must be excluded in the *Redman* ratio.

The Settlement here provides for $350,000 in cash and $3.15 million in cookies. Settlement, Dkt. 94-1 at 11. Any unclaimed cash or cookies will be distributed as cookies to retail locations for distribution to the retail store's customers. *Id.* at 15-16. Because nothing ensures that these customers are class members, the retail stores distribution is fluid recovery or *cy pres* award, benefitting non-class members. *Pearson*, 772 F.3d at 784 (holding that *cy pres* awards—distributions to beneficiaries other than class members—should be limited to those funds that "can't feasibly be awarded" to class members). Courts have treated fluid recovery and *cy pres* as fungible concepts. *See, e.g., Mirfasihi v. Fleet Mortg. Corp.,* 356 F.3d 781, 784 (7th Cir. 2004) ("There is no indirect benefit to the class from the defendant's giving the money to someone else. In such a case the 'cy pres' remedy (badly misnamed, but the alternative term—"fluid recovery"—is no less misleading) is purely punitive."). Typically fluid recovery seeks to provide relief to future customers, while *cy pres* awards designate a portion of unused settlement funds to a charitable use related to the subject of the lawsuit. *See* Martin H. Redish *et al.*, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 662-63 (2010) (distinguishing the concepts and describing the "checkered history" of fluid recovery in which several federal appellate courts rejected the concept as unauthorized by law and constitutionally problematic in any event).

Non-class third-party awards, whether fluid recovery to future customers or *cy pres* distributions to unrelated charities, must be excluded in calculating the settlement value when assessing fairness. In *Pearson*, the Seventh Circuit affirmed the district court's exclusion of the *cy pres* award "in calculating the benefit to the class, for the obvious reason that the recipient of that award was not a member of the class." 772 F.3d at 781; *see Baby Products*, 708 F.3d 163, 178 (3d Cir. 2013) (holding that class members are "not indifferent to whether funds are distributed to them or to *cy pres* recipients,

and class counsel should not be either"). The same is true here. The "free cookies" distribution to non-class members must be excluded in calculating the benefit to the class.

Indeed, the "free cookies" distribution is much *worse* than the non-party *cy pres* relief discounted in *Pearson*. While *cy pres* relief at least forces the defendant to provide hard cash to a reputable charity, the giveaway program at issue here instead appears calculated to provide samples for defendant's retailers to encourage sales and awareness of the brand. This is not a class benefit; it's a marketing program for defendant's allegedly mislabeled products.

> As it stands now, the giveaway is a generalized proposal to hand out Millennium's products to consumers who happen upon a distribution location. Despite the efforts to emphasize the class action purpose of the giveaway, the Court notes that such a plan will inevitably benefit Millennium's marketing and sampling agenda, rather than any member of the Class.

Retta v. Millennium Products, Inc., No. 15-cv-1801PSGAJWX, 2016 WL 6520138, at *6 (C.D. Cal. Sept. 21, 2016). The program is especially useless to class members like Frank, who were effectively duped by the misleading protein claims on the front of defendant's packaging and cannot, for dietary reasons, even eat such sugary cookies. Frank Decl. ¶ 8; *id.* ¶ 11 ("I will never purchase or consume these formulations of Lenny & Larry's cookies, so the offer of free product is worthless to me.").[1]

While the claims figures are unknown to Frank due to the strategic and unlawful timing of the objection deadline, it seems likely that the bulk of purported "relief" from the Settlement will come in the form of cookies aimed to assist the defendant in acquiring new customers. The value of these cookies should be treated as $0 for the purpose of evaluating the Settlement. Otherwise, "the attorneys are effectively getting a giant commission on a million dollar advertising campaign for the cookies,

[1] In their motion seeking preliminary approval of the Settlement, class counsel argued that this fluid recovery distribution had been approved in other cases. PAO Memo, Dkt. 94 at 11-12. The settlement in *Careathers v. Red Bull GmBh*, cited by class counsel, did not offer fluid recovery. *See* case No. 1:13-cv-00369 (S.D.N.Y. May 12, 2015). The other three cases cited by class counsel—all in California and not bound by the Seventh Circuit's decision in *Redman* and *Pearson*—did not consider whether settlement fairness should be assessed based on relief to non-class members. *Azizian v. Federated Dep't Stores, Inc.*, No. 4:03-cv-3359-SBA (N.D. Cal. March 30, 2005); *Soualian v. International Coffee & Tea, LLC*, No. CV 07-00502 RGK (C.D. Cal. July 23, 2008); *Bateman v. American Multi-Cinema, Inc.*, Case No. CV07-171 JHN (AJWx) (C.D. Cal. Oct. 11, 2011).

which are being valued at full retail value for being given away to non-class members, though the cost to Lenny & Larry's is likely less than a third of that, while waiving any number of consumer fraud complaints relating to the labeling of the cookies, including consumer fraud complaints that the attorneys had no reason to investigate given the complaint." Frank Decl. ¶ 13; *see also* 28 U.S.C. 1712(e) (permitting court to award unclaimed coupons to charitable organization under Class Action Fairness Act but prohibiting calculation of attorneys' fees based on coupons distributed to charitable organizations). When calculating the value of the Settlement (once the amount of claims is known), the value must exclude any amount of fluid recovery distributions to the retail stores.[2]

III. The Settlement's "clear sailing" and *de facto* "kicker" provisions show self-dealing and unfairly prevent decreases in fees from returning to the class.

The Settlement has a "clear sailing" provision providing that Lenny & Larry's will not challenge class counsel's fee request up to $1,200,000 (24% of the $5 million Settlement Payment). Settlement, Dkt. 94-1 at 11, 16-17. A clear-sailing clause stipulates that attorney awards will not be contested by opposing parties. "Such a clause by its very nature deprives the court of the advantages of the adversary process." *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 525 (1st Cir. 1991). The clear-sailing clause lays the groundwork for lawyers to "urge a class settlement at a low figure or on a less-than-optimal basis in exchange for redcarpet treatment on fees." *Id.* at 524; *accord Bluetooth*, 654

[2] Finally, when the real settlement value is calculated with actual claims information, Objector Frank predicts that fees will greatly exceed the amount actually going to the class. In this case, with limited direct notice (40,000 class members) and where the maximum amount available without proof of purchase is $10, the claims rate will most likely be well below 1%. *Pearson*, 772 F.3d at 782 (0.25% claims rate overall where maximum claim was $12 without proof of purchase and $50 with proof of purchase); *In re Carrier IQ Inc. Consumer Privacy Litig.*, No. 12-md-02330-EMC, 2016 WL 4474366, at *4 (N.D. Cal. Aug. 25, 2016) (prominent settlement administrator found a median claims rate of 0.023% in settlements with publication-only notice); *see generally Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006) ("Given the tiny sum per person, who would bother to mail a claim."). Class counsel cannot argue that they did all they could to deliver relief to the class. Class counsel made no attempt to obtain customer information (from retailers such as GNC or Vitamin Shoppe) to provide direct notice to additional class members. For example, after CCAF objected to a similarly-structured settlement, 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 in the original claims-made structure), and paid an additional $5.84 million to the class. *In re Bayer Corp. Litig.*, No. 09-md-2023, Doc. 254 at 4 (E.D.N.Y. Nov. 8, 2013).

F.3d at 947. As such, a clear-sailing clause must be considered a "questionable feature" that "at least in a case…involving a non-cash settlement award to the class…should be subjected to intense critical scrutiny." *Redman*, 768 F.3d at 637. Here, class counsel put its own fees ahead of the interests of the class by negotiating a provision that insulated those fees from challenge by defendant. Class counsel provide no justification for this self-serving clause.

Not only does the settlement contain a "clear sailing" provision forbidding Lenny & Larry's from appealing a $1.2 million fee award, there is an effective "kicker" agreement providing that any reduction in the fee award reverts to the retail store fluid recovery distribution. *See* Settlement, Dkt. 94-1 at 17. Indeed, this retail store distribution—providing free product to new potential customers—is nothing more than a marketing campaign for Lenny & Larry's. The Settlement provides that the free cookies will be distributed in "retail locations [that] will include 50 states, and retail locations for The Vitamin Shoppe, GNC, and additional retailers to be identified by Defendant." *See* Settlement, Dkt. 94-1 at 15. Lenny & Larry's chooses where it wants to launch this marketing campaign, the perfect opportunity to offer free samples to new customers in new locations. The defendant's marketing constitutes neither a class benefit nor even *cy pres*, but is "a reversion to Defendant." *Valdez v. Neil Jones Food Co.*, No. 11-cv-00519, 2015 WL 11109826, at *2 (E.D. Cal. Dec. 3, 2015) (rejecting preliminary approval of settlement where unclaimed funds directed toward "*cy pres*" award to make building improvements to defendant's facility).

Thus, any reduction in fees redounds to Lenny & Larry's benefit. A "kicker arrangement reverting unpaid attorneys' fees to the defendant rather than to the class amplifies the danger" that is "already suggested by a clear sailing provision." *Bluetooth*, 654 F.3d at 949. "The clear sailing provision reveals the defendant's willingness to pay, but the kicker deprives the class of that full potential benefit if class counsel negotiates too much for its fees." *Id.* In a typical common-fund settlement, the district court may, at its discretion, reduce the fees requested by plaintiffs' counsel—and when it does so, the class will benefit from the surplus. Settlements like the one here, however, are an inferior settlement structure for one principal reason: the Court cannot remedy allocation issues by reducing fee awards or named-representative payments. *See Pearson*, 772 F.3d at 786; *Bluetooth*, 654 F.3d at 949. This

constitutes a red flag of a lawyer-driven settlement and begets a "strong presumption of…invalidity." *Pearson*, 772 F.3d at 787; *accord Redman*, 768 F.3d at 637 (kicker is a "defect"); *Eubank v. Pella Corp.,* 753 F.3d 718, 723 (7th Cir. 2014) (kicker is a "questionable provision").

Indeed, a court has more incentive to scrutinize a fee award because the kicker combined with the clear-sailing agreement means that any reversion benefits only the defendant that had already agreed to pay that initial amount. Charles Silver, *Due Process and the Lodestar Method: You Can't Get There From Here*, 74 TUL. L. REV. 1809, 1839 (2000) (such a fee arrangement is "a strategic effort to insulate a fee award from attack"); Lester Brickman, LAWYER BARONS 522-25 (2011) (same; further arguing that reversionary kicker should be considered per se unethical). A clear-sailing agreement with a kicker to defendants is presumptive evidence of unfair self-dealing by class counsel. *Bluetooth*, 654 F.3d at 948-49; *Pearson*, 772 F.3d at 787 (finding no justification for a kicker provision and holding that there should be a strong presumption that a "kicker" clause is invalid). The problem is not merely hypothetical. If this Court decreases the $1.2 million excessive fee award, the excess instead funds Lenny & Larry's marketing campaign rather than returning to the class members. The Settlement should be rejected until and unless the kicker agreement is removed so that any fee reduction instead returns to the class. *See Eubank*, 753 F.3d at 723 (suggesting that the district court should have deleted the kicker provision to allow any fee excess to return to the class).

IV. The Settlement's overbroad release and expansion to a nationwide class reflects a selfish settlement and is independent reason to reject the Settlement.

The Settlement's overbroad release and expansion of the settlement class reflects a selfish deal that should be rejected. *See* Settlement, Dkt. 94-1 at 9-10. Under the Settlement, class members release claims "of every kind and nature whatsoever" relating to allegations in the Lawsuit "or otherwise concerning The Complete Cookie or any other Lenny & Larry's baked goods product." *Id.* While the claims here relate solely to the label's accuracy regarding the nutrient content (protein, fat, calories) of Lenny & Larry's The Complete Cookie, Third Amended Complaint, Dkt. 72 at 2, the release extends to any and all types of claims regarding anything related to any of its baked good products. This exceeds the permissible scope of a settlement release: claims that share an "identical factual predicate."

E.g., *Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010); *Boyd v. Avanquest N. Am. Inc.*, 2015 WL 4396137, at *5-*6 (N.D. Cal. Jul. 17, 2015) (release must track complaint's allegations of wrongdoing, not merely be tied to the product at issue).

Further, the class definition expanded from an Illinois class under the operative complaint, to a nationwide class. *Compare* Third Amended Complaint, Dkt. 72 at 12, *with* Settlement, Dkt. 94-1 at 10. In *Allen v. Similasan*, the district court rejected a settlement based on a similar overbroad release. 318 F.R.D. 423, 428 (S.D. Cal. Aug. 10, 2016). There, plaintiffs filed an action for a California class with claims regarding labeling of homeopathic drugs. *Id.* The settlement expanded to a nationwide class that released all claims in any way related to "Defendant's advertising, marketing, manufacturing, packaging, labeling, promotion, sale, or distribution of the Products." *Id.* at 425. The district court concluded: "When the broad release provisions in this Settlement Agreement are coupled with a large broadening of the class description so that now a nationwide class of users is releasing its claims instead of a California-only class, it appears that this Settlement is crafted to provide protection to Similasan and not to benefit the unnamed Plaintiffs." *Id.* at 428; *accord* Howard M. Erichson, *Aggregation as Disempowerment*, 92 NOTRE DAME L. REV. 859, 895-97 (2016) (designating an expanded class definition as a red flag for an unfair settlement); *Eubank*, 753 F.3d at 723 (recognizing that expansion from six statewide subclasses to nationwide settlement class was one of red flags of unfair settlement). The same is true here. The overbroad release coupled with the expanded class reflect a deal for Lenny & Larry's, negotiated by class counsel who receives red-carpet treatment of their $1.2 million fee request in exchange for selling their clients, the class members, down the river.

The class definition is also improper because it includes anyone who purchased a Lenny & Larry's baked product at "any time up to the date of Final Settlement Approval." Settlement, Dkt. 94-1 at 10. At the very least, every class definition should "identify a particular group, harmed during a particular time frame, in a particular location, in a particular way." *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 660 (7th Cir. 2015). These principles are violated by a class definition that has no definite end date and is only bounded de facto by the issuance of a final approval order at an indeterminate future date. An open-ended class period is "untenable." *Rodriguez v. It's Just Lunch Int'l*, No. 07-CV-

9227 (SHS), 2018 WL 3733944, at *6 (S.D.N.Y. Aug. 6, 2018). Consumers who purchased cookies after the notice program will be deprived of their due process right to notice. And, even if the late-purchasing class members were somehow to learn of the settlement, the objection and opt-out deadline may have passed by that time. These class members would be deprived of their Rule 23(e)(5) right of objection and Rule 23(c)(2)(B) right to exclude themselves. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.,* 827 F.3d 223, 242 (2d Cir. 2016) (Leval, J., concurring) ("Because the terms of this settlement preclude all future merchants that will accept the Defendants' cards (the (b)(2) class) from bringing claims without their having had an opportunity to opt out (or even object), the Supreme Court's rulings in *Shutts* and *Dukes* make clear that a court cannot accept it."). The open-ended class period here is independent reason to reject the Settlement.

V. The settling parties have artificially burdened the right of objection and opt-out; no inference should be drawn from a small number of dissenters.

Almost any given class-action settlement, no matter how much it betrays the interests of the class, will produce only a small percentage of objectors. The predominating response will always be apathy because objectors without counsel must expend significant resources on an enterprise that will create little direct benefit for themselves. *See Vought v. Bank of Am.*, 901 F. Supp. 2d 1071, 1093 (C.D. Ill. 2012) (citing, inter alia, a 1996 FJC survey that found between 42% and 64% of settlements engendered no filings by objectors). Another common response from non-lawyers is the affirmative avoidance, whenever possible, of anything involving a courtroom.

Without *pro bono* counsel to look out for the interests of the class, filing an objection is economically irrational for any individual. It is "naïve" to infer class approval from a low objection rate." *Redman*, 768 F.3d at 628. Moreover, "where notice of the class action is, again as in this case, sent simultaneously with the notice of the settlement itself, the class members are presented with what looks like a fait accompli." *Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 680-81 (7th Cir. 1987).

"[T]he absence or silence of class parties does not relieve the judge of his duty and, in fact, adds to his responsibility." *Amalgamated Meat Cutters & Butcher Workmen v. Safeway Stores, Inc.*, 52 F.R.D.

373, 375 (D. Kan. 1971). The Court should draw no inference in favor of the settlement from the number of objections, especially given the vociferousness of the objectors that do appear. *In re GM Pick-Up*, 55 F.3d at 812-13; *Vought*, 901 F. Supp. 2d. at 1093. "One good objector may be worth many frivolous objectors in ascertaining the fairness of a settlement." *Richardson v. L'Oreal USA, Inc.*, 991 F. Supp. 2d 181, 205 (D.D.C. 2013).

"One hallmark of a reasonable settlement agreement is that it makes participation as easy as possible, whether class members wish to make a claim, opt out, or object." *McClintic v. Lithia Motors*, No. C11-859RAJ, 2012 U.S. Dist. LEXIS 3846, at *17 (W.D. Wash. Jan. 12, 2012) (critiquing comparable opt-out and objection process and ultimately rejecting settlement). Together, the hurdles imposed on exclusion and objection in this Settlement do not appropriately respect class members' Rule 23 rights. Moreover, the Court loses the benefit of valuable adversarial perspectives that objectors can bring to the evaluation of a settlement's fairness. Not only do the hurdles constitute a reason to reject the Settlement in this case, they provide an added reason to discredit any argument that the lack of objectors signals the class members' approval of the settlement. The settling parties have added unnecessary burdens to objections in several respects.

First, under the Notice approved by the Preliminary Approval Order, objectors must state "[t]hat by objecting, you may be deposed in this action, subject to court approval." *See* Preliminary Approval Order, Dkt. 97 at 15; *see* https://www.llcookiesettlement.com/Home/Faq#faq15. Without indicating where the deposition would take place, potential objectors may be dissuaded from objecting because they fear that they would have to travel to Chicago at great expense to comply with this requirement. Including this provision unnecessarily discourages objections. *Cf. In re Chiron Corp. Sec. Litig.,* 2007 U.S. Dist. LEXIS 91140 (N.D. Cal. Nov. 30, 2007) ("Frustrating the settlement is exactly what class members are entitled to do, if they think the settlement is not fair. The class' 'frustration rights' should not themselves be frustrated."). Indeed, just as objectors must be made available, the settling parties should make the class representatives available for depositions. It is unclear whether the adequacy of the representatives was ever tested by Lenny & Larry's and those representatives should be made available to Frank for deposition.

Second, the Preliminary Approval Order approved a Notice that permitted objection to be submitted electronically but the settlement website does not include that option. *Compare* Preliminary Approval Order at 15 (FAQ14) *with* https://www.llcookiesettlement.com/Home/Faq#faq14. The settlement website permits exclusion (opt outs) and claims to be submitted electronically on the website. *See* https://www.llcookiesettlement.com/Request; https://www.llcookiesettlement.com/Home/SubmitClaim. There is no justification for permitting opt outs and claims forms to be submitted electronically, but requiring objections to be mailed.

Rather than requiring class members to snail-mail an objection, other cases—and this Court's Preliminary Approval Order—permit the relatively efficient (indeed, close to costless) method of transmitting objections and opt-outs by a single electronic submission. *See e.g., In re Motor Fuel Temperature Sales Practices Litig.*, No 07-md-01840-KHV-JPO, Order (Dkt. No. 3019), at 2 (D. Kan. Nov. 10, 2011) ("If Costco plans to proceed with email notification, it must allow class members to opt out of the class and object to the settlement electronically"); *Hefler v. Wells Fargo & Co.*, 2018 WL 4207245, at *12 (N.D. Cal. Sept. 4, 2018) (finding paper service "unnecessary, as electronic filing of an objection on the case docket constitutes service on the parties."). Class members must further mail their objections well before the deadline because the Preliminary Approval Order that parties drafted needlessly requires that the administrator to *receive* objections by January 29, 2019. Dkt. 97 at 5. This would be no problem if the administrator had set up online objections as their proposed order promised, but Frank is required to file before January 29 and use FedEx overnight service to ensure timely receipt. Apart from contradicting class notice, which suggest only objections need only be *postmarked* by January 29, the mailing requirement is entirely unnecessary for filed objections. *See Boring v. Bed Bath & Beyond,* No. 12-cv-05259-JST, 2013 WL 6145706, *9 (N.D. Cal. Nov. 21, 2013) ("The Court notes that the filing of objections with the Court constitutes service upon counsel for the parties, as the parties' counsel are registered to receive filings through the Court's Electronic Case Filing system.").

Here, objectors must print and sign their objection and mail them to the administrator. *See* https://www.llcookiesettlement.com/Home/FAQ#faq14. Such requirement is outdated in 2019.

Likewise, there is no valid reason why a class member in this settlement should receive notice via email but have to print, sign, and mail an objection in this day and age. Where electronic modes of opting-out and objecting are available, the "vast majority" of participating class members will use those avenues. *Motor Fuel Temperature*, No. 07-md-1840-KHV, 2012 WL 1415508, at *6 (D. Kan. Apr. 24, 2012); *id.* at *74 n.13 (nearly three times more people opted-out electronically than by mail); *Fraley v. Facebook, Inc.*, No. 11-cv-01726 RS (N.D. Cal. Jun. 7, 2013), Declaration of Jennifer M. Keough Regarding Settlement Administration (Dkt. 341) at ¶12 (6,884 of 6,946 opt-out requests (99.1%) were submitted electronically via the settlement website when that option was available). Imposing a costly, inefficient alternative over affordable, seamless electronic processes can only give rise to the inference that the parties wished to undermine the autonomous decisions of class members. It has been known for over a decade that "the ease and cost-efficiency of such direct internet submissions increases the likelihood of absent class member participation." Robert H. Klonoff, *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. PITT. L. REV. 727, 766 n. 251 (2008); Christopher R. Leslie, *The Significance of Silence*, 59 FLA. L. REV. 71, 128-29 (2007). Class counsel is not licensed to consign objectors to second-class status.

Third, an objector who has retained counsel must still sign the objection personally. Under Rule 11, the attorney signing the paper is attesting that it is not filed for an improper basis and that there is a basis for the legal and factual contentions therein. *See* Fed. R. Civ. P. 11(b). Indeed, Rule 11 specifically provides that "unless a rule or statute specifically state otherwise, a pleading need not be verified." *See* Fed. R. Civ. P. 11(a). This requirement is unnecessary based on counsel's Rule 11 obligations and is unduly burdensome as it places a higher standard on objectors than most parties.

CONCLUSION

The Court should deny approval until the actual number and amount of claims is known to ensure that the "$5 million" Settlement Payment ascribed to class relief is not illusory. Class counsel should not be allowed to harass objectors with unnecessary depositions.

Dated: January 28, 2019.

/s/ M.Frank Bednarz

M. Frank Bednarz, (ARDC No. 6299073)
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Attorneys for Theodore H. Frank

Dated: January 28, 2019.

THEODORE H. FRANK
Objector

CERTIFICATE OF SERVICE

The undersigned certifies he electronically filed the foregoing Objection via the ECF system for the Northern District of Illinois, thus effecting service on all attorneys registered for electronic filing. Additionally he caused to be served via overnight courier a copy of this Objection upon the following:

Lenny & Larry's Claims Administrator,
P.O. Box 6727,
Portland, OR 97228-6727

Additionally, he caused to be delivered a courtesy copy of the foregoing to:

Hon. Robert W. Gettleman
United States District Court for the Northern District of Illinois
Eastern Division
Everett McKinley Dirksen United States Courthouse
219 South Dearborn Street
Chambers 1788
Chicago, IL 60604

Dated: January 28, 2019. /s/ M. Frank Bednarz

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LORI COWEN et al., Plaintiffs, v. LENNY & LARRY'S, INC., Defendant.	Case No. 1:17-cv-01530 Judge Robert W. Gettleman
THEODORE H. FRANK, Objector.	

DECLARATION OF THEODORE H. FRANK

I, Theodore H. Frank, declare as follows:

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

2. My business address is Hamilton Lincoln Law Institute, 1629 K Street NW, Suite 300, Washington, DC 20006. My telephone number is (703) 203-3848. My email address is tfrank@gmail.com.

3. I am an attorney who has argued and won seven cases in the Seventh Circuit.

My class membership

4. In preparation for my October Term 2018 Supreme Court oral argument, I decided that I needed to lose substantial weight. In June 2018, my personal trainer put me on a high-protein and low-calorie diet of 1694 calories a day, with a minimum of 154 grams of protein. In other words, over 36% of my calories were to come from protein. This required me to change my eating habits, and in July 2018, I went to a GNC store to explore high-protein products I hadn't previously purchased.

5. On July 13, 2018, I purchased three Lenny & Larry's Cookies at a GNC store in Washington, D.C. A true and correct copy of my receipt is attached as Exhibit 1. I filed a claim in the litigation on December 24, 2018, with the confirmation code JIU73ITX. A true and correct copy of the claim form receipt is attached as Exhibit 2.

6. I was attracted to the Lenny & Larry's Cookies because they were advertised as high-protein, and there were not other cookie-like products being offered. The front label prominently displayed that the cookie was 16 g of protein and 8 g to 10 g of fiber, and a quick glance at the nutrition label said the product was 180 to 200 calories a serving. I was quickly purchasing a variety of products to experiment what I wanted to include in my diet, and a 180-calorie cookie with 16 grams of protein would have 32 to 35% of its calories from protein, so would fit reasonably within my diet.

7. Because I was not wearing my glasses and was scanning labels quickly, I did not notice until I got home with the purchased products that the fine print revealed that the labels were misleading. In fact, "180 calories" referred to a "two-ounce serving" of ***half*** of a cookie, and a whole

cookie would have 22 g to 24 g of sugar, and only 16-18% of calories came from protein.

8. As such, the cookie was completely inappropriate for my diet, since a single cookie would effectively have to serve as a meal, but would provide insufficient protein for the calories consumed. The three cookies I purchased are still in my pantry unopened. One of them has passed the expiration date, and I am unlike to consume the other two ever. I would not have purchased the cookies at all if I had not been fooled by the misleading labels.

9. It was not unreasonable for me to believe the product was 16 g of protein and 8-10 g of fiber for 180-200 calories, because several other products I purchased, such as the Quest and One bars, had similar or better ratios of proteins to calories.

10. According to the complaint, the cookies do not even contain 16 g of protein.

11. I will never purchase or consume these formulations of Lenny & Larry's cookies, so the offer of free product is worthless to me.

12. The waiver in the settlement waives all claims of consumer fraud relating to the labeling, including claims such as mine, which were not raised in the complaint.

13. If the complaint's allegations are true, Lenny & Larry's will continue to defraud consumers. If the complaint's allegations are false, the attorneys are getting paid for bringing a meritless lawsuit. As it is, the attorneys are effectively getting a giant commission on a million dollar advertising campaign for the cookies, which are being valued at full retail value for being given away to non-class members, though the cost to Lenny & Larry's is likely less than a third of that, while waiving any number of consumer fraud complaints relating to the labeling of the cookies, including consumer fraud complaints that the attorneys had no reason to investigate given the complaint.

Center for Class Action Fairness

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

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

16. The Center has been successful, winning reversal or remand over a dozen federal appeals decided to date. *E.g., In re Subway Footlong Mktg. Litig.*, 869 F.3d 551 (7th Cir. 2017); *In re Target Corp. Customer Data Sec. Breach Litig.*, 847 F.3d 608 (8th Cir. 2017); *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718 (7th Cir. 2016); *In re EasySaver Rewards Litig.*, 599 Fed. Appx. 274 (9th Cir. 2015) (unpublished); *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060 (8th Cir. 2015); *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014); *Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014); *In re MagSafe Apple Power Adapter Litig.*, 571 Fed. Appx. 560 (9th Cir. 2014) (unpublished); *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013); *In re HP Inkjet Printer Litigation*, 716 F.3d 1173 (9th Cir. 2013); *In re Baby Products Antitrust Litigation*, 708 F.3d 163 (3d Cir. 2013); *Dewey v. Volkswagen*, 681 F.3d 170 (3d Cir. 2012); *Robert F. Booth Trust v. Crowley*, 687 F.3d 314 (7th Cir. 2012); *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011). Several of these appeals centered around *cy pres*. *E.g., Pearson*; *BankAmerica*; *Baby Products*; *Nachshin*. This October, I argued the first *cy pres* case ever to be heard by the Supreme Court, *Frank v. Gaos*, No. 17-

961. While, like most experienced litigators, we have not won every appeal we have litigated, CCAF has won the majority of them.

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

Pre-empting *Ad Hominem* Attacks

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

19. CEI pays me on a salary basis that does not vary with the result in any case; I expect my HLLI contract will have the same structure. CEI, HLLI, and CCAF attorneys do not receive a contingent bonus based on success in any case, a structure that would be contrary to I.R.S. restrictions.

20. Class counsel often try to tar CCAF as "professional objectors," and then cite court opinions criticizing for-profit attorneys who threaten to disrupt a settlement unless plaintiffs' attorneys buy them off with a share of attorneys' fees. But this is not the non-profit CCAF's *modus operandi*, so the court opinions class counsel rely upon to tar CCAF are inapposite. *See* Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. Chi. Legal F. 403, 437 n. 150 (public interest groups are not professional objectors); Paul Karlsgodt & Raj Chohan, *Class Action Settlement Objectors: Minor Nuisance or Serious Threat to Approval*, BNA: Class Action Litig. Report (Aug. 12, 2011)

(distinguishing CCAF from professional objectors). CCAF refuses to engage in *quid pro quo* settlements, and has never withdrawn an objection in exchange for payment. Instead, it is funded entirely through charitable donations and court-awarded attorneys' fees. The difference between a for-profit "professional objector" and a public-interest objector is a material one. As the federal rules are currently set up, "professional objectors" have an incentive to file objections regardless of the merits of the settlement or the objection. In contrast, a public-interest objector such as myself has to triage dozens of requests for *pro bono* representation and dozens of unfair class action settlements, loses money on every losing objection (and most winning objections) brought, can only raise charitable donations necessary to remain afloat by demonstrating success, and has no interest in wasting limited resources and time on a "baseless objection." CCAF objects to only a small fraction of the number of unfair class action settlements it sees.

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

22. Indeed, CCAF feels strongly enough about the problem of bad-faith objectors profiting at the expense of the class through extortionate means that it has initiated litigation to require such objectors to disgorge their ill-gotten gains to the class. *See Pearson v. Target Corp.*, 893 F.3d 930 (7th Cir. 2018); *see generally* Jacob Gershman, *Lawsuits Allege Objector Blackmail in Class Action Litigation*, WALL ST. J., Dec. 7, 2016.

23. Before I joined CEI, I had a private practice unrelated to my non-profit work. One of my former clients, Christopher Bandas, is a professional objector who has settled objections and withdrawn appeals for cash payments. I withdrew from representation of Mr. Bandas in 2015 when he undertook steps that interfered with my non-profit work. Mr. Bandas was criticized by the Southern District of New York after I ceased to represent him, and class counsel in other cases often cites that

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

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

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

about $40,000 in attorneys' fees for increasing the class benefit by $2 million. *Lonardo*, 706 F. Supp. 2d at 813-17.

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

27. While I am often accused of being an "ideological objector," the ideology of CCAF's objections is merely the correct application of Rule 23 to ensure the fair treatment of class members. Likewise, I have often seen class counsel assert that I oppose all class actions and am seeking to end them, not improve them. The accusation—aside from being utterly irrelevant to the legal merits of any particular objection—has no basis in reality. I have been writing and speaking about class actions publicly for nearly a decade, including in testimony before state and federal legislative subcommittees, and I have never asked for an end to the class action device, just proposed reforms for ending the abuse of class actions and class-action settlements. That I oppose class action abuse no more means that I oppose class actions than someone who opposes food poisoning opposes food. As a child, I admired Ralph Nader and consumer reporter Marvin Zindler (whose autographed photo was one of my prized childhood possessions), and read every issue of *Consumer Reports* from cover to cover. I have focused my practice on conflicts of interest in class actions because, among other reasons, I saw a need to protect consumers that no one else was filling, and as a way to fulfill my childhood dream of being a consumer advocate. I have frequently confirmed my support for the principles behind class actions in declarations under oath, interviews, essays, and public speeches, including a January 2014 presentation in New York that was broadcast nationally on C-SPAN and in my certiorari petition filed in 2015 in *Frank v. Poertner*. On multiple occasions, successful objections brought by CCAF have resulted in new class-action settlements where the defendants pay substantially more money to the

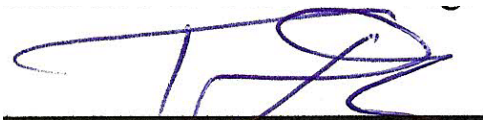
plaintiff class without CCAF objecting to the revised settlement. And I am the class representative in a pending federal class action, represented by a prominent plaintiffs' firm. *Frank v. BMOCorp., Inc.*, No. 4:17-cv-870 (E.D. Mo.).

28. Some class counsels have accused us of improper motivation because CCAF has on occasion sought attorneys' fees. While CCAF is funded entirely through charitable donations and court-awarded attorneys' fees, the possibly of a fee award never factors into the Center's decision to accept a representation or object to an unfair class-action settlement or fee request. Indeed, numerous class members asked if I wanted to represent them in this objection; because I am instead representing myself as an objector, I will be unable under current law to ask for attorneys' fees for any work I perform writing this objection, no matter how much I win for the class.

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

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

Executed on January 12, 2019, in Arlington, Virginia.



Theodore H. Frank

Frank Decl.

EXHIBIT 1

GNC LIVE WELL

GENERAL NUTRITION CENTER
1728 L STREET NW
1728 L STREET NW
WASHINGTON, DC 20036
202-457-0097

Trans #: 36870 (07/13/2018 02:20 PM)

Store #: 02910 **Register #:** 001 **Consultant:** ALLEN **SPSN:** 00000004630

Member #: 150131503908 (FT F)

GNC LIVE WELL	**MYGNC REWARDS FREE MEMBE** 000000600654 *1 @ .00*	**$0.00** Quantity: 1
GNC LIVE WELL	**PROTEIN POPCORN WH CHED** 000000544710 *1 @ 1.99*	**$1.99N** Quantity: 1
GNC LIVE WELL	**PROTEIN POPCORN WH CHED** 000000544710 *1 @ 1.99*	**$1.99N** Quantity: 1
GNC LIVE WELL	**PROTEIN POPCORN WH CHED** 000000544710 *1 @ 1.99* 1.99 - 1.99: BOGO Discount, Mix & Match:	**$0.00N** Quantity: 1
GNC LIVE WELL	**COMPLETE COOKIE LEMON** 000000424814 *1 @ 2.29*	**$2.29N** Quantity: 1
GNC LIVE WELL	**COMPLETE COOKIE SNICKER** 000000424809 *1 @ 2.29*	**$2.29N** Quantity: 1
GNC LIVE WELL	**ONE MAPLE GLAZED DOUGHNU** 000000972132 *1 @ 2.49*	**$2.49N** Quantity: 1
GNC LIVE WELL	**NOCOW BAR MINT CHOC CHIP** 000000517302 *1 @ 2.99*	**$2.99N** Quantity: 1

	COMPLETE COOKIE CHOC CHI 000000424802 *1 @ 2.29*	**$2.29N** Quantity: 1
	ONE BIRTHDAY CAKE 000000972108 *1 @ 2.49*	**$2.49N** Quantity: 1
	ONE MAPLE GLAZED DOUGHNU 000000972132 *1 @ 2.49*	**$2.49N** Quantity: 1
	BASIX CKIE DGH CHOC CHNK 000000972152 *1 @ 2.49*	**$2.49N** Quantity: 1
	ONE CHOCOLATE-BROWNIE BA 000000972128 *1 @ 2.49* 2.49 - 2.49: BOGO Discount, Mix & Match:	**$0.00N** Quantity: 1
	**RASPBERRY KETONE CHEWS** 000000402914 *1 @ 24.99*	**$24.99N** Quantity: 1
	QUEST CHOCO CHIP CO DOU 000000476462 *1 @ 2.49*	**$2.49N** Quantity: 1
	QUEST PB SUPREME BAR 000000476438 *1 @ 2.49*	**$2.49N** Quantity: 1
	HERO VAN CARAMEL-BAR 000000476574 *1 @ 2.49*	**$2.49N** Quantity: 1
	OATMEAL CHOCLATE CHIP BA 000000476496 *1 @ 2.49*	**$2.49N** Quantity: 1
	QUEST CINN ROLL BR 000000476452 *1 @ 2.49*	**$2.49N** Quantity: 1

	QUEST CINN ROLL BR	**$0.00N**
	000000476452	Quantity: 1
	1 @ 2.49	
	2.49 - 2.49:	
	BOGO Discount, Mix & Match:	

Sub-Total	$61.24
Total	$61.24

Payment Information

Visa **********9201	$61.24
Auth Num: 08086I	
Total Paid	$61.24
Change Due	$0.00

*** YOU SAVED 6.97 ***
Points Earned Today = 122
Total Points Available = 122

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IAD:06010A03A02002
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App Label:VISA CREDIT
CHName:FRANK/THEODORE
CID:80
Issuer Cntry Code:0840

036870029100010713 2018

Frank Decl.

EXHIBIT 2

Cowen v. Lenny & Larry's Inc. (/)

Case No. 1:17-cv-01530

Submit a Claim - Confirmation

Thank you for your submission. Your Confirmation Number is: **JIU73ITX**.

Please keep this code for your records, and refer to it if you ever have questions about your Claim Form for the Claim Administrator.

What Happens Next?

Now that your Claim is submitted, it will be reviewed for validity by the Claim Administrator. If your Claim is deemed to be eligible, you may receive benefits, depending on the results of the Final Approval Hearing and any appeals that might occur.

The Court in charge of this case still has to decide whether to approve the Settlement. Payments will not be made until the Court grants Final Approval and after any appeals are resolved.

Accurate processing of Claims may take significant time. Thank you, in advance, for your patience.

It is your responsibility to update the Claim Administrator if you move or your contact information changes. You can provide your updated contact information by sending the information to the Claim Administrator at the following address:

Lenny & Larry's
Claim Administrator
P.O. Box 6727
Portland, OR 97228-6727

Please include this Confirmation Number and Unique ID (if applicable) with your correspondence.