NO. 20-6097

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE: SAMSUNG TOP-LOAD WASHING MACHINE MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION

JOHN DOUGLAS MORGAN,
Objector-Appellant.

On Appeal from the United States District Court for
the Western District of Oklahoma
Case No. 5:17-md-02792-D
The Honorable Timothy D. DeGiusti, Presiding

Opening Brief of Appellant John Douglas Morgan

ORAL ARGUMENT REQUESTED

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Corporate Disclosure Statement (FRAP 26.1)

Pursuant to the disclosure requirements of FRAP 26.1, Objector-Appellant John Douglas Morgan states his is a natural person, and, as such, not a subsidiary or affiliate of a publicly owned corporation and no publicly held corporation that owns ten percent or more of any stock issued by them.

Dated: September 10, 2020

By: */s/ Theodore H. Frank*

Certificate of Service

I hereby certify that on September 10, 2020, I electronically filed the foregoing Corporate Disclosure Statement with the Clerk of the United States Court of Appeals for the Tenth Circuit using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

/s/ Theodore H. Frank

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Statement of Related Cases

Two appeals pending before the Third Circuit appear stayed pending resolution of this appeal, Nos. 18-2386 & -2387. These appeals were taken from the "*Kennedy*" actions that the JPMDL consolidated with the proceedings below. Dkt. 125. Prior to consolidation, the District of New Jersey entered an order for the *Kennedy* plaintiffs to enforce a putative unexecuted settlement agreement against Samsung. *Kennedy v. Samsung Elecs. Am., Inc.*, No. 2:14-4987, 2018 U.S. Dist. LEXIS 84442 (D.N.J. May 21, 2018). Samsung appealed this order, and the Third Circuit appeals were stayed pending resolution of the Settlement below, which would presumably extinguish all claims of the *Kennedy* plaintiffs.

On August 31, 2020, Samsung advised the Third Circuit that the agreement between Samsung and *Kennedy* plaintiffs approved by the court below (A253-A254) would moot their appeal and asked "that the stay in this matter be maintained until the Tenth Circuit appeal has been resolved and the full settlement payment has been made by the terms of the parties' agreement, as approved by the MDL Court." No. 18-2386, Dkt. 36 (3d Cir.). No further activity has occurred in these appeals.

Glossary of Terms

A:	Appendix.
Dkt.:	Docket in No. 5:17-ml-02792-D (W.D. Okla.).
HLLI:	Hamilton Lincoln Law Institute (counsel for appellant Morgan)
Kennedy Dkt.:	Docket in *Kennedy v. Samsung Elecs. Am., Inc.*, No. 2:14-cv-04987 (D.N.J.).
JPMDL:	Joint Panel on Multidistrict Litigation.
Samsung:	Samsung Electronics America, Inc., the primary defendant.
Settlement:	Settlement Agreement between named plaintiffs and Samsung filed June 1, 2018. Dkt. 92-1 (A27-A87).

Statement of Subject Matter and Appellate Jurisdiction

The district court likely had diversity jurisdiction under 28 U.S.C. § 1332(d)(2)(A), because named plaintiffs' pleaded claims that exceed $5,000,000 exclusive of interest and costs, there are over 100 members in each of the proposed classes, and defendant Samsung is a citizen of a state different from that of at least one class member. For example, plaintiff Wagner in one of the consolidated actions is a citizen of Pennsylvania, while Samsung Electronics America, Inc. is a New York corporation with its headquarters in New Jersey. No. 17-cv-1099, Dkt. 1 at 4-5 (W.D. Okla.). (The court approved settlement of this multidistrict litigation without a consolidated complaint ever being filed in the docket below, which is why no complaint or answer appears in Appellant's Appendix. The absence of a consolidated complaint may defeat jurisdiction, but could be corrected below. 28 U.S.C. § 1653.)

This court has appellate jurisdiction under 28 U.S.C. § 1291. The district court ordered final approval of the Settlement on May 22, 2020, and issued a separate judgment the same day that satisfies Rule 58. A217; A262. On June 11, 2020 it entered a fee order and again entered judgment the same day. A264; A286. Objector John Douglas Morgan filed notice of appeal as to both orders and judgments on June 21. A287. This notice is timely under Fed. R. App. P. 4(a)(1)(A).

Morgan, as a class member who objected to settlement approval below, has standing to appeal a final approval of a class action settlement without the need to intervene formally in the case. *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

Standard of Review

A district court's approval of class-action settlements is reviewed for abuse of discretion. *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1287 (10th Cir. 1999). An "abuse of discretion occurs when the district court bases its ruling on an erroneous conclusion of law or relies on clearly erroneous fact findings." *Hackett v. Barnhart*, 475 F.3d 1166, 1172 (10th Cir. 2007). "When the district court errs in deciding a legal issue, it necessarily abuses its discretion." *In re Qwest Commc'ns Int'l Inc.*, 450 F.3d 1179, 1184 (10th Cir. 2006). For a district court's settlement approval to "survive appellate review," the district court "must give a reasoned response to all non-frivolous objections." *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012).

Statement of the Issues

The Settlement here included a $6.65 million clear-sailing agreement where Samsung would not oppose fees, costs and service awards for named plaintiffs *and* the "gimmick" of a "kicker" where unawarded fees would return to Samsung to deter objectors and courts from scrutinizing this award. *Pearson v. NBTY, Inc.*, 772 F.3d 778, 786 (7th Cir. 2014). "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 ***no apparent reason*** the class should not benefit from the excess allotted for fees." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 949 (9th Cir. 2011) (emphasis added).

Class member Morgan objected and correctly predicted that the "kicker" would cost class members over a million dollars in the event of a fee reduction unless the court

required the settling parties to "delete" it before settlement approval. *Eubank v. Pella Corp.*, 753 F.3d 718, 723 (7th Cir. 2014).

To resolve Morgan's objection to the Settlement's fairness, Morgan and Samsung reached a side agreement that would have required Samsung to return much of their reversionary benefit to the class as cash. The side agreement would have increased the class's cash benefit from about $0.1 million to $1.4 million, but was not executed. The only record evidence is that Morgan withdrew from the side agreement because class counsel characterized it as "misconduct" and a "violation" of the Settlement's fee agreement, and refused to represent that they would not sue Morgan if he executed the side agreement.

The questions of first impression in this appeal are:

1. Did the district court err when it refused to disqualify class counsel under Rule 23(g)(4) for its breach of fiduciary duty in obstructing a side agreement that would have provided an additional $1.3 million in cash benefit to the class?

2. Does a settlement fail to satisfy Rule 23(e)(2)(C) as a matter of law when it contains self-dealing clauses to protect class counsel's fees that ultimately costs the class millions of dollars that a defendant was willing to pay to settle a case?

Statement of the Case

This is an appeal of the district court's approval of a class-action settlement resolving consumer claims against Samsung over their washing machines, where class counsel negotiated clauses in the settlement agreement for the benefit of their fee request, ultimately costing class members over $2 million that Samsung was willing to pay to settle the case. Over appellant John Douglas Morgan's objection, the district court approved a settlement whereby the attorneys received $4.08 million fees and costs; absent class members stand to receive coupons, $106,881.40 and a claims process that might pay a similar amount over the next three years; and Samsung keeps $2.5 million that it otherwise agreed to pay for the settlement.

A. Samsung top-loading washers explode, and Samsung offers to replace them. Samsung agrees with the CPSC for voluntary remediation and a nationwide recall.

In October and November 2015, a North Carolina TV station examined reports of consumers whose Samsung top-loading washing mashing "exploded" during use. Diane Wilson, *Consumers claim some Samsung washing machines explode* (Oct. 29, 2015),[1] *More consumers claim Samsung washing machines explode* (Nov. 20, 2015).[2] That is, while the washing machine was running, the top broke free, and components of the machine flew out and damaged the surrounding area. *Id.* The TV segment summarized similar events that other consumers had reported to the Consumer Product Safety Commission (CPSC). In some reports, the machine was said to be in the spin cycle when it

[1] Online at: https://abc11.com/samsung-washing-machine-explode/1056429/.

[2] Online at: https://abc11.com/samsung-washing-machine-explode/1092584/.

"exploded," with the top separation causing the machine to crash violently against nearby walls and appliances. *Id.* A Jacksonville TV station ran a similar segment in January 2016. Nikki Kimbleton, *News4Jax investigates: Exploding washing machine* (Jan. 11, 2016).[3] The segment concludes with a statement from Samsung that such incidents were rare and "we provide our customers with a new washer or refund and cover any expenses related to the incident." *Id.* Consumers in all three stories reported that Samsung "offered to refund the washer and dryer and they said they would fix the repairs. We just had to let them know how much." *Id.*

In November 2016, the CPSC announced a voluntary recall program, which allows owners of affected Samsung machines to either: (1) request a free ***repair*** to strengthen the top of the washer, (2) claim a ***recall rebate*** on the purchase of a new washing machine, or (3) a full refund of machines purchased in the prior 30 days. CPSC, *Samsung Recalls Top-Load Washing Machines Due to Risk of Impact Injuries*.[4] The recall rebate required owners to "certify that the recalled washer is no longer in use, that it has been discarded, and that . . . it is a violation of federal law to sell or distribute [the] recalled machine." Samsung, *Voluntary Recall of Certain Top-Load Washers*.[5] The size of the recall rebate would be "determined by the model and age of your washer." *Id.*

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[3] Online at: https://www.news4jax.com/consumer/2016/01/12/news4jax-investigates-exploding-washing-machine/.

[4] Online at: https://www.cpsc.gov/Recalls/2016/samsung-recalls-top-load-washing-machines.

[5] Online at: https://pages.samsung.com/us/tlw/.

Following announcement of the voluntary recall negotiated with CPSC, Samsung almost immediately sought to resolve pending top separation litigation. *E.g.*, Dkt. 23-3 at 2; Dkt. 224-1 at 10, 177. However, mediation of the pending suits was stymied by a deluge of cases filed in the wake of the well-publicized voluntary recall. *Id.* In June 2017, Samsung moved to stay the multiplying cases and sought relief from the JPMDL, which consolidated dozens of pending cases to the court below. *In re Samsung Top-Load Washing Mach. Mktg. Litig.*, 278 F. Supp. 3d 1376 (J.P.M.L. 2017).

B. The *Kennedy* plaintiffs move to settle their non-MDL case.

In 2014 and 2015 one law firm filed two putative class actions alleging only that the *drain pumps* of certain Samsung top-loading washers were defective and prone to fail and flood consumers' homes. Nos. 14-04987 & 15-04054 (D.N.J.) (collectively the "*Kennedy*" actions). On February 26, 2016, these suits were ordered into mediation before any other suit later consolidated in the MDL was filed. *Kennedy* Dkt. 35.

In June 2017, *Kennedy* plaintiffs reached what they later alleged to be an agreement-in-principle to settle with Samsung. *Kennedy v. Samsung Elecs. Am., Inc.*, No. 2:14-4987, 2018 U.S. Dist. LEXIS 84442, at *4 (D.N.J. May 21, 2018). The *Kennedy* plaintiffs moved to enforce the June 13 unsigned draft redline agreement. *Kennedy* Dkt. 65. In response, Samsung disputed that any meeting of the minds ever occurred with the *Kennedy* plaintiffs because parties continued to make "material changes" to the potential agreement. *Kennedy* Dkt. 48 at 24. For example, *Kennedy*'s counsel asserted that the settlement should provide "an $800,000 legal fee" rather than the $600,000

previously drafted. *Id.* Samsung regarded this as a material change and insisted on deletion. *Id.*

In May 2018, the *Kennedy* court granted Kennedy's motion to enforce the unsigned June 2017 agreement against Samsung. 2018 U.S. Dist. LEXIS 84442, at *26. But in June, it also granted Samsung's motion to stay while the JPMDL considered the case for consolidation. *Kennedy* Dkt. 81. In October 2018, the JPMDL consolidated the action with the MDL below. Dkt. 125.

C. The MDL parties settle.

A year earlier, following the initial consolidation of the MDL before Judge DeGiusti on October 4, 2017, attorneys for 26 of the 27 actions agreed to a leadership structure on October 9. Dkt. 3. An initial case management conference occurred on November 15, and plaintiffs' unopposed leadership structure was approved December 6. Dkt. 52.

Mediation resumed almost immediately, with the first post-MDL mediation occurring on December 19, 2017. Dkt. 224-1 at 208. The parties jointly moved the Court to suspend all short-term deadlines in March 2018, Dkt. 73, and filed a fully-executed settlement agreement on June 1, 2018. A23-A87 ("Settlement").

The Settlement provided defendants would pay "pay attorneys' costs and fees in the total, all-inclusive amount of $6,550,000.00, subject to approval of the Court." A68. The Settlement further provided $100,000 to be paid as incentive awards to named plaintiffs. A69. Samsung agreed to what is known as clear sailing: it would not oppose a total request less than $6.65 million. *Id.* If the Court did not award the entire request,

the Settlement did not require Samsung to pay the agreed money. *Id.* Thus, any money not awarded to MDL class counsel would remain with Samsung. This reversion clause is known as a "kicker." *E.g.*, *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 949 (9th Cir. 2011).

In contrast with the concrete defined benefits for attorneys' fees and costs, the Settlement provides four types of *conditional* claims-made relief for the class:

Benefit	Description of Relief
Rebate Coupons	Coupon entitling claimant or immediate household member to $25 rebate off purchase of new Samsung microwave or $50-85 off purchase of new Samsung major appliance (maximum $85 only available for appliances costing more than $1500), within one year of final approval. A49-A50.
Enhanced Minimum Recall Rebate	Claimants who already received a rebate for buying a new washing machine under Samsung's voluntary recall—if the rebate was less than 15.5% the estimated price of the recalled machine—receive an additional rebate to make a total of 15.5% the price of the recalled washing machine. A46-A47.
Top Separation Relief	Claimants who can photographically prove top separation of their washing machine may receive a full refund (to the extent not already provided) and up to $400 in expenses, capped at $50 in cleanup costs, available until each machine is 7 years old. A52-A53.
Drain Pump Failure Relief	Claimants who own "Selected Washers" (about 7% of the class) and can document expenses related to a drain pump failure can receive up to $400 in expenses, capped at $50 in cleanup costs. Past repair costs of up to $150 can also be paid, if documented. Drain pump repairs will be performed by Samsung for three years. A56-A57.

A fifth purported form of relief was even more conditional—it would require Samsung to give class members a $50 gift card as a sort of penalty if Samsung could not fix a washing machine within fourteen days under its longstanding voluntary recall. A54.

This provision would only become effective after final approval—which was over three years after Samsung began its voluntary recall. *Id.*

During the preliminary approval hearing on November 29, 2018, class counsel told the district court that the first-listed benefit of the Settlement—the Rebate Coupons—would be worth a "minimum" or "floor" to the class of $65 million and up to $162 million. Dkt. 135 at 15, 22.

The district court inquired about valuing the Top Separation and Drain Pump Failure benefits, and class counsel replied "we were not comfortable giving the Court an estimate… Because unless you know how many are going to break in the future, you don't have a way to reliably estimate what that's going to be worth to people." *Id.* at 27-28. The Settlement did not suggest that these claims-made benefits constitute a "warranty"—the Settlement simply allows class members to claim payments from Samsung for Top Separation until each machine (sold between 2011 and 2016) is seven years old, A52, and for a subset of the class with "Selected Washers," Drain Pump Failures until three years after the notice date of March 9, 2019. A55; A216.

The district court granted preliminary approval to the Settlement January 8, 2019. Dkt. 138.

On April 15, 2019, Plaintiffs moved for less than they were entitled to under the Settlement: attorneys' fees of $5,996,079.46 and costs of $242,764.47. Dkt. 142. Class counsel claimed that their fee agreement with Samsung "greatly reduc[ed] the Court's fiduciary role in overseeing the award." Dkt. 142 at 14-15. On April 16, *Kennedy* plaintiffs filed a table purporting to show their attorneys had lodestar of $803,029. Dkt. 143.

D. Morgan objects to the proposed Settlement.

Morgan filed his timely objection to the proposed Settlement on June 7, 2019, through his *pro bono* non-profit counsel, the Hamilton-Lincoln Law Institute (HLLI). Dkt. 163. Morgan is a class member who submitted a valid claim under the Settlement. Dkt. 177.

Morgan raised one primary objection to granting final approval: that the Settlement prioritizes the interests of class counsel over absent class members, in violation of Rule 23(e). Dkt. 163 at 4-18. Morgan argued that the Settlement's benefits were conditional and meager. *Id.* at 5. For example, "[a]bout 95%" of the claims that had been reported by the claims administrator were for Rebate Coupons or the Enhanced Minimum Recall Benefit—both forms of rebates, which require class members to buy a new major appliance to receive any benefit. *Id.*. Morgan further argued few people could likely receive the Enhanced Minimum at all because only class members who had participated in the voluntary recall *and* chose to scrap their washing machine for less than 15.5% of its value could be paid under this provision. *Id.*

Morgan argued the disproportion between the attorneys and their ostensible clients could not be corrected by the court, because class counsel's fee request was protected by "clear sailing" and "kicker" clauses. *Id.* at 15 (citing *Bluetooth*). "Rule 23(e)[(2)(C)(iii)] requires courts to consider the terms and timing of the proposed fee award." *Id.* at 16. These provisions are a valuable agreement *for class counsel* because they forbid Samsung from objecting to an award of attorneys' fees and costs less than $6.5 million. *Id.* But class members cannot benefit from the valuable arrangement class counsel struck for themselves: any reduction in attorneys' fees redounds or "kicks back"

to Samsung alone. *Id.* Because these provisions locked in a disproportionate division of attorneys' fees, Morgan argued that final approval of the Settlement itself must be denied unless the reversionary structure was "deleted." *Id.*

Morgan's objection also argued that the fee award should be reduced, but this argument was subordinate to his primary objection. Morgan observed that the vast majority of the Settlement resembles coupon relief, and argued that attorneys' fees cannot be based on hypothetical face value of coupon relief under 28 U.S.C. § 1712 of the Class Action Fairness Act, but only redeemed value to the class. *Id.* at 18-21.

E. Plaintiffs change their theory of the Settlement's value.

Following Morgan's objection, the court granted the settling parties two extensions to postpone the fairness hearing, originally scheduled to occur on August 22, 2019. Dkts. 171, 176.

Sixteen weeks after the objection deadline, and just ten days before the new fairness hearing, class counsel filed a reply in support of final approval on September 27. Dkt. 186. Class counsel argued that the repair provisions of the Settlement constituted a "warranty extension" and were the *most valuable* portion of the Settlement—allegedly worth $6.23 to $12 million. *Id.* at 3. In support of this valuation, class counsel attached the declaration of consultant Lucy P. Allen, who opined that the value of future claims under the Settlement could be calculated based on the retail value of secondary extended consumer warranties, adjusted downward because the Settlement only compensates for two types of failure. Dkt. 186-7 at 14-18.

On October 4, 2019, Morgan moved to strike this belated declaration, which was not provided to class members prior to the objection deadline and had glaring legal and economic errors. Dkt. 191. Morgan pointed out that the Settlement does not provide a warranty, and even if it did, the claims received to date suggested the repair provisions were worth only a few hundred thousand dollars at most. *Id.* at 1. A rational consumer would not agree to value a "warranty" at over $6 million for three years when, based on the most charitable reading of the claims data, it had paid at most $386,700 in claims over the first seven years. *Id.* at 11.

(It turned out only $94,118.31 worth of failure claims would be paid, A165, so Morgan further criticized Allen's declaration on December 13. A177-A186. Morgan argued that the $4.5-7.4 million valuation for the so-called "warranty" could not withstand scrutiny given that only $94,118.31 worth of claims stood to be paid for all claims for Top Separation and Drain Pump Failures from 2011 through 2019. A180. Morgan also argued that retail warranties are famously overpriced, and it would be absurd to value a three-year warranty on a seven-year-old machine at hundreds of dollars as plaintiffs' expert did. A181. "It's unthinkable that class members would pay $294 for coverage of their seven-year-old machines, and doubly so that they would pay $22-37 to prevent something that caused on average 24 cents of damage over the first 7 years." A181-A182.)

At the October 2019 fairness hearing, the court required plaintiffs to provide updated claims figures and required all parties to disclose any side agreements. Dkt. 194 at 5.

Plaintiffs filed their response to the court's topics on November 14, which included more accurate claims figures. Dkt. 206. For the Top Separation and Drain Pump benefits, $94,118.31 worth of valid and payable claims had been filed by 462 claimants (A164-A165), and an additional $12,763.09 would be paid for 218 Enhanced Minimum Recall Rebates. A167. Therefore, a total of $106,881.40 stood to be paid to 680 claimants under the Settlement. A167.[6]

F. Samsung negotiates proposed separate agreements with objectors.

Morgan attempted to negotiate a side-agreement with Samsung to resolve his primary objection by (partially) "deleting" the kicker arrangement. As required by the district court, Morgan disclosed the agreement-in-principle with Samsung to the court on December 13, 2019, and described it as follows:

> The agreement-in-principle unwinds the kicker. In broad strokes, Samsung agrees that if it must pay plaintiffs' counsel substantially less than the $6.65 million it agreed not to oppose, it will deposit 70% of the difference with the settlement administrator for supplemental distribution to the class. Such payment will constitute a gross payment from which all administration costs and fees for Morgan's counsel will be deducted. (Morgan will apply for a reasonable attorney fee award if and only if his side-agreement actually benefits class members, as he contends it will.) Objector and Samsung will jointly present this side agreement to the Court once it is finalized, which depends on Samsung reaching a separate agreement with the [*Kennedy*] plaintiffs-objectors.

A187.

[6] An April 2020 revision adding ten paid claims will not materially alter these totals of slightly more than $100,000. Dkt. 246-1.

Samsung forwarded the term sheet to MDL plaintiffs on December 22. A193 On December 31, Samsung advised the district court that the final agreement had still not been reached, but explained how the side-agreement could only possibly benefit class members. A194. Essentially, Samsung committed to spend its own money to fund a supplemental distribution if plaintiffs (including *Kennedy* plaintiffs) secured less than $6.65 million in attorneys' fees, costs, and incentive awards. A193. In particular, Samsung would provide 70% of any reduction from the $6.65 million fee allocation to fund payments to the class, as long as this new distribution would be at least $600,000. *Id.* Morgan could apply to the court for fees from the fund, but not only if the class received a net distribution from Samsung of at least $600,000. A194.

1. Plaintiffs allege that Samsung's proposed side-agreement with Objector Morgan would constitute "misconduct" and refuse to agree not to sue Morgan or his *pro bono* counsel.

Instead of welcoming this development, class counsel's January 21, 2020 response to the tentative agreement suggested that Samsung, Morgan, and HLLI had committed misconduct. A200. Class counsel characterized the agreement as "misconduct by HLLI and Samsung," "misbehavior," (A200) and a "direct violation of the Settlement." A201.

Both Morgan and Samsung sought leave to file a reply to plaintiffs' filing, arguing it was misleading (Dkts. 219, 221), but the district court denied leave on January 29, and instead required Samsung and Morgan to disclose full terms of the side-agreement "by February 12, 2020. No further briefing on this issue will be allowed." Dkt. 223 at 5.

HLLI was concerned that plaintiffs' accusations "seriously rais[ed] the possibility that HLLI and its client could be dragged into meritless collateral litigation over inducing a supposed breach of the underlying Settlement." A207. An HLLI attorney averred that "[t]he risk seemed especially high because at the time HLLI was slated to itself be a party to the side agreement." A212. Therefore, Morgan sought assurance that MDL plaintiffs would assent to the side-agreements. *Id.* Counsel for the MDL plaintiffs, Jason Lichtman, instead responded that "Plaintiffs' position is that we would have welcomed the opportunity to negotiate with Samsung and HLLI to resolve the various issues between the Parties, and we find it regrettable that they did not provide us that opportunity." *Id.*.

Because Plaintiffs refused to cooperate or withdraw their implicit threats, Morgan and Samsung advised on February 12 that no agreement could be reached. A207; Dkt. 226. The record shows class counsel's implicit threats and refusal to agree not to sue Morgan as the only reason why the agreement was not reached. A211-A212. Morgan argued that the side-agreement would not lead to a delay of the Settlement as plaintiffs claimed on January 21, but would accelerate administration by years because it would eliminate the need to appeal the kicker. A208. That is, the side-agreement would have eliminated the need for ***this appeal***. *Id.*

Morgan and Samsung both requested more time to resolve the side-agreements. *Id.*; Dkt. 226. On February 18, the district court granted leave for the parties to resolve their impasse and file an executed side-agreement by March 2. Dkt. 227. The same day as this order, Morgan contacted class counsel with a simple proposition: "We simply need an assurance that you will not sue Morgan or HLLI for executing a substantially-

identical agreement to the one [Samsung] shared with you last week." Dkt. 230-1 at 2. Class counsel refused to respond for six days, and then replied on February 24: "As you know, we've never threatened to sue your client. You have represented to the court otherwise. We do not believe any further engagement with you would be productive." A213. Class counsel's response failed to disclaim any intent to sue Morgan and HLLI or withdraw their characterization of HLLI's and Samsung's negotiations as "misconduct." *Id.*

2. Morgan moves to disqualify class counsel for obstructing an agreement to resolve Morgan's objection that could only benefit class members.

On February 26, Morgan moved for leave to file a motion to decertify the class and disqualify class counsel for breaching their duty under Rule 23(g)(4) to "fairly and adequately represent the class." Dkt. 230.

Morgan explained this was necessary because plaintiffs had declined several opportunities to withdraw the legal threat against Morgan and HLLI implied by plaintiffs' "misconduct" accusation, and so obstructed an unambiguously beneficial settlement for the class. Dkt. 230-1 at 5. On February 12, class counsel refused to provide such assurance, but claimed "we would have welcomed the opportunity to negotiate with Samsung and HLLI." *Id.* Morgan obtained exactly this opportunity from the district court, but, Morgan argued, MDL plaintiffs instead demonstrated bad faith by continuing to refuse to negotiate or disclaim their implicit threats. *Id.* at 1.

Morgan argued that if class counsel's attorneys' fee award was substantially reduced, the side-agreement could have been worth over a million dollars to the class.

Id. at 4. Because class counsel had numerous opportunities to simply agree they would not sue Morgan or HLLI, and because they refused to do so, Morgan argued this was a disqualifying breach of duty by class counsel. *Id.* at 11.

Plaintiffs opposed Morgan's motion on February 27, and again would not represent that they would not sue Morgan or HLLI if the side-agreement was entered, instead simply repeating their claim that "Class Counsel did not threaten either [HLLI] or its client with legal action." Dkt. 231 at 2.

G. The court denies the motion to disqualify and grants final approval.

On May 22, 2020, the district court granted final approval to the Settlement, but reserved the attorneys' fee award for later decision. A227. The order approving the Settlement did not discuss Morgan's disproportion objection: it does not cite *Bluetooth*, nor does it mention the clear sailing and kicker clauses, nor the disproportionate attorneys' fees. A240-A254.

The court denied Morgan's motion to disqualify, finding that "Class Counsel never threatened to sue Objector Morgan, there was never any certainty that the side agreement would have, in fact, materialized had it not been for Class Counsel's briefing." A229-A230. The court agreed with plaintiffs the side-agreement may have not benefited class members at all. A229. "Any purported benefit to the Class that may have come from a side agreement which may (or may not) have come to fruition was far from certain—especially given that the award of attorneys' fees is left to the Court's broad discretion." *Id.* The district court found "[p]erhaps Class Counsel's terse briefing indicated nothing more than an attempt to avoid endless ancillary litigation about the

litigation, which would delay the resolution of these matters and work to the detriment of the Settlement Class." A230. The court also found "Class Counsel took no position as to the side agreement" (A230), although on the previous page it noted class counsel "alluded to the fact that the side agreement's terms constituted misconduct." A229.

The district court considered factors under the recently-amended Rule 23(e)(2). As to (e)(2)(A) & (B), it found adequate representation because the case had been "vigorously negotiated" after being "vigorously litigated," that the negotiations were at arm's length, and that no collusion was alleged. A241-A243. As for Rule 23(e)(2)(C)(i), the district court found the Settlement favorable given the risk of further litigation. A245. In passing, the district court asserted that "all Class Members are entitled to future warranty protection with an estimated value of $6.44–11.31 million," but did not address Morgan's objections to this valuation nor explain why the claims process even constitutes a "warranty." A246. The district court decided that the rebate benefits did resemble "promotional coupons," but distinguished other coupon cases because this form of relief was "not the primary relief afforded." A247.

As to Rule 23(e)(2)(C)(iii), the district court deferred consideration of the fee award (A251) and did not consider the "terms of any proposed award" as the rule requires. Instead, the district court found "facts relevant to how the fees were negotiated" favored final approval, namely that "Parties negotiated attorneys' fees after finalizing the substantive terms of the Settlement Agreement" and that the requested award "does not reduce the recovery to the class." A252. The district court did not note clear sailing, kicker, and disproportionate fees—terms that Morgan argued militated against final approval.

Finally, under Rule 23(e)(2)(C)(iv), the district court approved the side-agreement between Samsung and *Kennedy* plaintiffs. A253. This side-agreement provides no direct benefit to the class, and essentially only guarantees that the *Kennedy* attorneys would receive $750,000 from Samsung if not awarded by the district court. Dkt. 234-1. The court concluded without elaboration that this side-agreement was "to the ultimate benefit of the Settlement Class" and would "not diminish the benefits to the Settlement Class." *Id.*

H. The district court awards $3.8 million in attorneys' fees.

On June 11, 2020, the district court awarded class counsel approximately $2.1 million less than it had requested (and $2.5 million less than Samsung was obligated under the Settlement not to oppose). A282. Although the court appeared to defer some consideration of Rule 23(e)(2)(C)(iii) from its final approval order (A251), it did not mention the rule in its fee order.

The district court addressed Morgan's *Bluetooth* and kicker arguments in the fee order. A271. The district court claimed the parties "adequately refute" this objection because when the Ninth Circuit remanded *Bluetooth*, the district court there "adhered to its initial findings but more carefully addressed several factors." *Id.* (In fact, the *Bluetooth* district court on remand reduced fees and costs 64%. *In re Bluetooth Headset Prods. Liab. Litig.*, No. 07-ML-1822 DSF (Ex), 2012 U.S. Dist. LEXIS 168324, at *36 (C.D. Cal. July 31, 2012).)

As for clear sailing, the district court noted "it is reasonable to assume that a defendant will not agree to a clear-sailing clause without compensation. Presumably,

this compensation takes the form of a reduction in the part of the settlement that goes to the class members." *Id.* at 12 (*citing Redman v. RadioShack Corp.*, 768 F.3d 622, 637 (7th Cir. 2014)). But the district court found "a persuasive counterpoint" in *Malchman v. Davis*, 761 F.2d 893, 905 n.5 (2d Cir. 1985) ("defendants want to know their total maximum exposure and the plaintiffs do not want to be sandbagged."). A272. The district court found "[s]uch is the case here," and further observed that "[C]lass [C]ounsel has lost the benefit of the clear sailing agreement" through Morgan's objection. A273.

The district court again assumed the value of the Settlement to be "$6.55 to $11.42 million," without discussion of Morgan's objections to this valuation. *Id.* at 19. Based on this figure, the district court found that its reduced attorneys' fee award of $3.8 million was perhaps 33.6%-58.4% of the Settlement value, which it found not extensively disproportionate "given that the valuation of the Settlement considers only readily quantifiable benefits." *Id.* at 20.

The Court entered final judgment for the final approval order under Rule 58 on May 22, 2020 and the fee order on June 11. A259, A283. Morgan filed a timely notice of appeal to both orders and judgments on June 21. A284.

Summary of Argument

This Court has stated that it finds "merit in an approach that ties attorney recovery to the amount actually paid to class members." *Fager v. CenturyLink Comms.*, 854 F.3d 1167, 1177 (10th Cir. 2016). In this Settlement, while the class received rights to a claims process that ultimately paid them a bit over $100,000, class counsel dealt

themselves plum terms: a $6.65 million clear-sailing agreement where Samsung would not oppose fees, costs and service awards for named plaintiffs *and* the "gimmick" of a "kicker" where unawarded fees would return to Samsung to deter objectors and courts from scrutinizing this award. *Pearson v. NBTY, Inc.*, 772 F.3d 778, 786 (7th Cir. 2014). As a result, when the district court reduced the excessive fee request by over $2 million, the only beneficiary of the reduction was the accused wrongdoer—Samsung.

The combination of clear-sailing, kicker, and disproportionate fees are each warning signs of an attorney-driven settlement. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011) ("*Bluetooth*"). Morgan raised the *Bluetooth* flaws in his objection, and correctly predicted that the self-dealing would cost the class dearly. Though the new Fed. R. Civ. Proc. 23(e)(2)(C) requires a court to consider the terms and timing of a proposed fee award, the district court never addressed the effects of the reversion on the fairness of the settlement or even addressed *Bluetooth*. The district court's interpretation of Rule 23(e)(2)(C) renders it meaningless to protect class members and was reversible error. The settlement should not have been approved until the parties agreed to "delete" the kicker provision. *Eubank v. Pella Corp.*, 753 F.3d 718, 723 (7th Cir. 2014).

Class counsel not only breached their fiduciary duties in negotiating self-dealing terms, but then affirmatively acted to obstruct correcting the problem. Samsung and Morgan were ready to resolve Morgan's objection with a side agreement that would have required Samsung to return a substantial portion of any of its reversionary benefit to the class. Class counsel scuttled the side agreement's execution by calling it "misconduct" and a "violation" of the Settlement. When Morgan sought assurances

that class counsel would not sue Morgan or his attorneys for what they were calling "misconduct," class counsel refused, forcing Morgan to withdraw from the agreement. This successful obstruction ultimately cost the class over $1.3 million that they would have received from Samsung under the side agreement to resolve Morgan's objection.

There must be consequences for such a breach of fiduciary duty, or future class counsels will continue to self-deal and continue to cost their putative clients millions. Rule 23(g)(4) requires class counsel to adequately represent the class. Because class counsel stood in the way of a $1.3 million class benefit, they "can't be trusted to represent the interests of the class." *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 725 (7th Cir. 2016). "[I]f at any time the trial court realizes that class counsel should be disqualified, the court is required to take appropriate action." *Id.* It was legal error for the district court to refuse to disqualify class counsel and appoint new class counsel.

Argument

I. Class counsel breached their fiduciary duty to the class and thus failed to provide adequate representation under Rule 23(g)(4) by obstructing a side-agreement between Morgan and Samsung that would have provided over $1.3 million cash benefit to class members.

Class counsel dealt themselves plum terms in the Settlement: a $6.65 million clear-sailing agreement where Samsung would not oppose fees, costs and service awards for named plaintiffs *and* the "gimmick" of a "kicker" where unawarded fees would return to Samsung to deter objectors and courts from scrutinizing this award. *Pearson*, 772 F.3d at 786. The only beneficiary of a fee reduction would be the accused

wrongdoer—Samsung. The combination of clear-sailing, kicker, and disproportionate fees are each warning signs of an attorney-driven settlement. *Bluetooth*, 654 F.3d at 947.

The district court failed to consider these signs in its final approval order, and improperly disregarded the disqualifying conduct of counsel in opposing a valuable deal to improve class recovery that Samsung and Morgan had agreed to in principle. A230. (This alone is independent grounds for reversal and remand, as the court failed to provide a reasoned response to Morgan's objection. *Dennis*, 697 F.3d at 864.)

Objector Morgan—with just a fraction of the leverage and manpower of class counsel—got Samsung to agree to partially unwind the kicker. A187. Under the agreement, if the court awarded less than $6.65 million in fees and costs, Samsung would have sent 70% of the unawarded fees back to the class. A194. The district court *did* award less—over $2.1 million less than plaintiffs had requested, and over $2.5 million less than Samsung had agreed not to oppose. A282. Given the district court's fee award, if class counsel had not obstructed Morgan's deal with Samsung, Samsung would have deposited over $1.3 million in cash for the class.

Instead, class counsel implicitly threatened Samsung and Morgan, calling the supplemental agreement to provide additional benefits to the class "misconduct" and a violation of the Settlement. This succeeded in intimidating the side agreement from happening. In so doing, class counsel breached their duties to the class, and confirmed that the Settlement itself was negotiated to favor attorneys over their absent clients. For this reason, certification of the underlying Settlement violated Rule 23(g)(4), and final approval must be reversed and the class decertified. Then plaintiffs with new representation can structure a deal eliminating the kicker term.

A. Because class-action settlements are predisposed to agency problems, courts recognize the need for scrutiny to prevent class counsel from self-dealing at the expense of absent class members.

Courts have a duty to make sure that class counsel have not bargained away the rights of the rest of the class. "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 the unnamed class members who by definition are not present during the negotiations." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013) ("*Pampers*"). To combat the omnipresent "danger that the parties and counsel will bargain away the interests of the unnamed class members in order to maximize their own," the district court must also itself act as a fiduciary of the class and apply zealous scrutiny to the proposed settlement. *Id.*; *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015).

A settlement may not be approved as fair, reasonable, and adequate merely because it provides some benefits to class members. The benefits of the settlement must also be *allocated* fairly between class and counsel to satisfy Rule 23.

The incentives of the class and counsel conflict because every dollar the defendant agrees to pay class members is a dollar that class counsel cannot collect. Defendant companies have no interest in policing this conflict: "Ordinarily, a defendant is interested only in disposing of the total claim asserted against it, and the allocation between the class payment and the attorneys' fees is of little or no interest to the defense." *Bluetooth*, 654 F.3d at 949 (cleaned up); *see also Redman v. RadioShack*, 768 F.3d 622, 629 (7th Cir. 2014); *Pampers,* 724 F.3d at 718. Thus, while class counsel and

defendants have proper incentives to bargain effectively over the *size* of a settlement, they have no such constraints on *allocating* it between the payments to class members and the fees for class counsel—unless courts police that allocation. *Pampers*, 724 F.3d at 717.

The court's role in approving settlements is the last and only hope of the unnamed class members to protect their rights from being bargained away. The value of a class action depends upon unconflicted counsel's zealous advocacy for their clients, especially where those clients are absent class members who do not get to choose their counsel for themselves and may not even know their legal rights are at stake. *Cf. Radcliffe v. Experian Info. Solutions Inc.*, 715 F.3d 1157, 1167 (9th Cir. 2013). Courts should demand rigorous adherence to the safeguards of Rule 23 to ensure that counsel is not self-dealing at the class's expense. Where, as here, class counsel favor themselves over their clients, a district court has a legal obligation to reject the proposed settlement. *Bluetooth*, 654 F.3d at 948-49; *see also Pampers*, 724 F.3d at 721; *Pearson*, 772 F.3d at 786-87.

1. Class counsel bears a fiduciary duty and Rule 23(g)(4) requires them to "fairly and adequately represent the class."

Rule 23(a)(4), grounded in the Due Process Clause of the Constitution, conditions class certification upon a demonstration that "the representative parties will fairly and adequately protect the interests of the class." Class representatives may not "put their own interests above those of the class." *Carpenter v. Boeing, Co.*, 456 F.3d 1183, 1204 (10th Cir. 2006). Rule 23(g)(4) imparts an equivalent duty on class counsel, and carries special importance "when the class members are consumers, who ordinarily lack both the monetary stake and the sophistication in legal and commercial matters that

would motivate and enable them to monitor the efforts of class counsel on their behalf." *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 917 (7th Cir. 2011). Together these provisions demand that the representatives manifest "undivided loyalties to absent class members." *Broussard v. Meineke Discount Muffler Shops*, 155 F.3d 331, 338 (4th Cir. 1998).

Class counsel's fiduciary duty "forbids a lead lawyer from advancing his or her own interests by acting to the detriment of the persons on whose behalf the lead lawyer is empowered to act." American Law Institute, *Principles of the Law of Aggregate Litig.*, § 1.05, cmt. f. Class counsel may not sacrifice class recovery for "red-carpet treatment on fees." *Pampers*, 724 F.3d at 718.

2. Class counsel can create the illusion of valuable class relief to rationalize a disproportionate fee request.

Class counsel can structure a settlement to obscure the relative allocations between lawyers and class members by artificially inflating the settlement's apparent value. The illusion of a large settlement benefits both class counsel and a defendant: "The more valuable the settlement appears to the judge, the more likely the judge will approve it. And the bigger the settlement, the bigger the fee for class counsel." *See* Howard Erichson, *How to Exaggerate the Size of Your Class Action Settlement*, Daily Journal (Nov. 8, 2017).[7] Without judicial oversight to weed out such practices, class members are left with disproportionate settlements in which class counsel recovers far more than

[7] Online at: https://www.dailyjournal.com/articles/344700-how-to-exaggerate-the-size-of-your-class-action-settlement.

the class. *See* Howard Erichson, *Aggregation as Disempowerment*, 92 Notre Dame L. Rev. 859 (2016).

Consider the likelihood of settlement approval if class counsel openly sought approval of a common-fund cash settlement of $6.9 million, which paid the lawyers and named plaintiffs up to $6.65 million, but paid absent class members perhaps $250,000, as this settlement optimistically may. Imagine further that unawarded fees would remain with Samsung rather than benefit the class. Few judges would approve such a deal, slanted 26-to-1 in favor of the attorneys and named plaintiffs, and precedents foreclose it. *See, e.g.*, *Dennis*, 697 F.3d at 868 (class counsel receiving even 38.9% of settlement benefit is "clearly excessive"); *Bluetooth*, 654 F.3d at 947-49 (disproportionate fee award is a hallmark of an unfair settlement); *cf. also Fager v. CenturyLink Comms.*, 854 F.3d 1167, 1177 (10th Cir. 2016) (finding "merit" in this argument in dicta, but holding that objectors forfeited it). For the deal to have any chance of court approval, it has to conceal this result. So, settling parties create hypothetical class recoveries and difficult-to-calculate "benefits" that ultimately have little value to the class but are cheap for defendants to provide. Hypothetical recoveries garner a high price tag that inflates the overall "value" of the settlement package that goes to the judge, but do nothing for the class.

Courts can too easily adopt dubious settlement valuations, and may reflexively view objectors as only flies in the ointment. 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. For this reason, "objectors play an essential role in judicial review of proposed settlements of class

actions." *Pearson*, 772 F.3d at 787 (rejecting view that judiciary should not scrutinize settlements closely).

Where courts fail to insist that settling parties compensate the class for their injuries, settlements will look like the one here: a claims process that dispenses very limited sums to class members; that sends most claimants coupons only beneficial with the purchase of a new Samsung appliance; and attorneys' fees wildly disproportionate to the actual payout to the class, shielded from meaningful review by self-dealing "clear-sailing" and "kicker" clauses. *E.g., Pampers*; *Bluetooth*; *Pearson*.

3. "Clear-sailing" and "kicker" agreements earmark fees for class counsel, making it impossible for class members to benefit from money the defendant agreed to pay.

The Settlement includes a "clear-sailing" clause whereby Samsung agrees not to challenge the attorneys' fees as well as a "kicker" such that any reduction in fees remains with Samsung rather than the class. A47. 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 red-carpet treatment on fees." *Id.* at 524; *accord Bluetooth*, 654 F.3d at 947. "Because it's in the defendant's interest to contest [the attorney-fee] request in order to reduce the overall cost of the settlement, the defendant won't agree to a clear-sailing clause without compensation—namely a reduction in the part of the settlement that goes to the class members." *Redman*, 768 F.3d at 637.

Worse, this Settlement also includes a "kicker" structure, where unawarded attorneys' fees do not redound to the class, but rather revert ("kick back") to Samsung. A "kicker arrangement reverting unpaid attorneys' fees to the defendant rather than to the class amplifies the danger … 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.* The kicker, along with a disproportionate allocation of fees and the clear-sailing agreement, is a sign "that class counsel have allowed pursuit of their own self-interests … to infect the negotiations." *Id.* at 947.

When attorneys demand disproportionate fees from a common fund, a district court can correct any settlement unfairness problem by denying the Rule 23(h) request in part, and reallocating the excess to the class. *E.g., In re Citigroup Sec. Litig.,* 965 F. Supp. 2d 369 (S.D.N.Y. 2013) (reducing excessive fee request by $26.7M for benefit of shareholders). But courts cannot rectify a settlement encumbered by a kicker because the clear-sailing fees remain segregated outside of the class's reach—unless the court requires the parties to "delete" the "questionable" provision. *Eubank*, 753 F.3d at 723; *accord Pearson*, 772 F.3d at 786

In this case, the combination of clear sailing and kicker resulted in plaintiffs leaving $2.5 million on the table. The district court awarded a total of $4.08 million in attorneys' fees and costs to plaintiffs—over $2.5 million less than Samsung agreed to pay and not oppose. "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 ***no apparent reason*** the class should not benefit from the excess allotted for fees."

Bluetooth, 654 F.3d at 949 (emphasis added). And neither plaintiffs nor the district court provided a reason here.

The district court turned *Bluetooth* on its head in its final approval order, which did not address the case at all. Morgan had argued the warning signs—and the disproportion between class benefits and $6.65 million clear sailing fees and costs—were cause to reject approval of the Settlement itself under Rule 23(e). Dkt. 163 at 5, 15-18; A186-A187. The district court instead found "facts relevant to how the fees were negotiated," namely (1) that "the Parties negotiated attorneys' fees after finalizing the substantive terms of the Settlement," and (2) that the "fee award does not reduce the recovery to the class." A252. As for the first finding, the order of fee negotiations does not make the resulting terms fair because the parties negotiated a single Settlement and the defendant only cares about total cost and can back out of a deal if the fees are too high—as Samsung did with *Kennedy* plaintiffs in this very litigation. *See* Section II below. As for the fee award "not reducing" recovery to the class, this misunderstands the harm of the kicker structure. In a normal common-fund structure, reductions in fee awards redound to the class, but in this Settlement the fee term is *worse*—money that Samsung agreed to pay would be (and was) left on the table due to the kicker. It would be more accurate to say that class counsel negotiated an excessively large fee for themselves and that this agreement "cannot benefit" class members to the extent the court properly reduces the award—as it did.

Class counsel breached their fiduciary duty to the absent class and their responsibilities under Rule 23(g)(4) by crafting a Settlement that earmarked $6.55 million for their *sole* benefit—against the interests of class members—where any

unawarded fees would kick back to Samsung rather than the class. Then, when Objector Morgan got Samsung to agree in principle to substantially unwind this kicker—pay more money to class members—class counsel implicitly threatened Samsung and the objector to disrupt a manifestly beneficial deal for the class because it might have undermined their fee petition. An agent putting its own interests ahead of those of its principal is the very definition of a breach of fiduciary duty.

B. The settlement between Morgan and Samsung could have only benefited class members and in fact would have provided over $1 million in cash.

The side-agreement between Morgan and Samsung could only benefit class members—or at worst simply expedite administration by resolving all objections to the Settlement itself. The goal of the agreement-in-principle was to resolve Morgan's primary objection to the Settlement itself—that protecting the agreed $6.65 million award with a "kicker" unfairly froze class members out from Settlement value that class counsel negotiated for itself in violation of Rule 23(g)(4). Because it was a compromise, Morgan's agreement would not have completely unwound the kicker—but effectively only 70% of it—and only if more than a *de minimus* amount ($600,000) could be distributed to class claimants. Dkt. 211 at 11.[8] This money would be used to pay for

[8] The formula of the agreement-in-principle required Samsung to pay 70% of the difference between $6.65 million and the sum of fees, costs, incentive awards, also counting 70% of the value that Samsung agreed to pay *Kennedy*'s counsel outside of the district court's fee orders. A194. This latter amount turned out to be $750,000 in a side-deal between Samsung and *Kennedy*'s counsel that the district court approved. A253-A254.

the administration of checks to tens of thousands of class members who filed claims in the Settlement. Dkt. 215 at 4.

For comparison, the settlement administrator swore in November 2019 that at that time only 680 class members might receive payments worth a total of $106,881.40, covering *all* claims for the "Enhanced Rebates" and claims for "Drain Pump" and "Top Separation" defects discovered through 2019. A164-A170. Thus, had the side-agreement reached even its minimum $600,000 threshold, it would have greatly enhanced the value of the Settlement to the class and ameliorated the disparity between attorneys' fees and class benefits.

Rather than welcome this development, class counsel obstructed the deal, labelling it as "misbehavior" and "misconduct by HLLI and Samsung." A200. Because the side-agreement-in-principle contained a $600,000 minimum, class counsel asserted they had no obligation to "support a … side deal that may not provide any additional benefit to the Class." Dkt. 231 at 2. And the district court denied Morgan's motion to disqualify in part for the same reason: "Any purported benefit to the Class that may have come from a side agreement which may (or may not) have come to fruition was far from certain—especially given that the award of attorneys' fees is left to the Court's broad discretion." A229.

As it turned out, the deal would have been worth ***over $1.3 million***. The district court awarded only $3.8 million in attorneys' fees to class counsel, so the formula of

the side-agreement would have required Samsung to deposit an additional $1.36 million for direct distribution to class claimants.[9]

But even before the district court awarded fees, the side-agreement represented a manifestly valuable conditional benefit for class members. The agreement conditionally required Samsung to ***pay more money to class members*** in exchange for nothing except *objector Morgan* surrendering his right to appeal approval of the underlying Settlement. A196. Any faithful fiduciary to the class would have eagerly assented to this deal because there was no reason to leave on the table *any* potential funds for class members. Indeed, a $1.36 million fund would have lapped the Settlement's current cash payouts, which total $106,881.40.

The value of option agreements is well understood in law. *E.g., Kham & Nate's Shoes No. 2 v. First Bank,* 908 F.2d 1351, 1360 (7th Cir. 1990) (Easterbrook, J.). Indeed, class counsel assigns tendentious value to conditional payments provided in this very Settlement. Plaintiffs preposterously claim that the claims process provided to about 7% of class members under the Settlement is worth $22.72 to $37.57 for *every covered machine* even though few class members will suffer the relevant failures and fewer still will know to claim funds from Samsung. A180. Here, Samsung extended a conditional but valuable offer to put potentially millions of additional dollars in class members' pockets, a conditional payment worth vastly more that the Settlement's so-called

[9] $6.65 million - $3,836,387.75 (fee award) - $242,764.47 (awarded costs) - $100k (incentive awards) - 70%*($750,000 side deal with *Kennedy*'s counsel) = $1,945,847.78 savings under the formula, times 70% = $1,362,093.45.

"warranty," which resulted in less than $100,000 worth of claims for all defects through 2019.

Class counsel would have secured this additional benefit for their putative clients by simply agreeing ***not to sue Morgan or his counsel***. With the possibility of millions more for the class, if class counsel had been faithful fiduciaries, not only would they not have obstructed the side-agreement, they would have taken *affirmative* steps to ensure the execution of an agreement that would secure over a million in cash for their clients.

C. Plaintiffs antagonized class interests, and none of the district court's characterizations support its finding of adequacy.

By making implicitly threatening characterizations, and then refusing to assent to the side-agreement—refusing even to represent they would ***not sue*** Morgan and HLLI for the side-agreement—class counsel disregarded the interests of the absent class members, to whom class counsel owes a fiduciary duty. Instead, class counsel chose to protect their self-dealing clear sailing and kicker terms even though "there is no apparent reason the class should not benefit from the excess allotted for fees." *Bluetooth*, 654 F.3d at 949.

Class counsel betrayed this fact themselves on January 21, when they responded to the agreement in principle: "*the Settlement contains a provision specifically designed to prevent Samsung from collaborating with an objector to reduce Class Counsel's fees.*" A201 (emphasis in original). But Samsung did not join Morgan's objection to fees. A193. Instead, Samsung had agreed to send the majority (70%) of any fee reversion into a fund for its customers' benefit just to settle Morgan's objection. A194. That class counsel calls the partial

elimination of the kicker "collaboration" with a fee objection and a "violation of the Settlement" demonstrates the fundamental problem with the kicker.

Class counsel recognized that clear sailing and kicker provisions tend to insulate attorneys' fee awards. Oftentimes, courts loathe to reduce fee awards that defendants *agreed to pay* because only the putative wrongdoer—the defendant—benefits from such reduction. *E.g., McBean v. City of New York,* 233 F.R.D. 377, 392 (S.D.N.Y. 2006). Class counsel explicitly argued this to the Court. Dkt. 142 at 14-15. Class counsel further tacitly acknowledges this psychological value of kicker by arguing "HLLI uses the side agreement to argue (incorrectly) that class counsel's fees should be lower and to launch extensive litigation about those fees." A201. True, HLLI opposed the entire Settlement because of the clear sailing and kicker provisions. But had the agreement-in-principle been finalized, the imbalance between class and counsel could be corrected because the class would receive more benefit to the extent that attorneys' fees were properly reduced.

The district court erred in misapprehending the nature of this conflict. Morgan had pointed out that HLLI had been adverse to co-lead counsel Lieff Cabraser in other matters. Dkt. 247 at 8 (citing cases). The district court misunderstood that to think Morgan was arguing "that because HLLI and Class Counsel are adverse in other pending matters, the Court should disqualify Class Counsel." A231. But the disqualifying conflict is not between HLLI and Lieff Cabraser, but between class counsel and their own putative clients. *Class counsel harmed the* ***absent class*** by saber-rattling that a beneficial deal embodied "misconduct," and then refusing to disclaim its

intention to litigate against Morgan's non-profit *pro bono* counsel. Morgan simply offered a theory to suggest why class counsel refused to agree not to sue HLLI.

The district court also incorrectly found that "there was never any certainty that the side agreement would have, in fact, materialized had it not been for Class Counsel's briefing." A229-A230. The record forecloses this conclusion. Samsung and Morgan executed a term sheet, which was shared with class counsel on December 22, 2019. A193. The terms imposed one condition: that Samsung also execute a side-agreement with the *Kennedy* plaintiffs/objectors, which they did, and which the district court approved. A253-A254.[10] Morgan's counsel averred that they could not execute the side-agreement due to the perceived litigation risk against their non-profit public interest law firm. A211-A212. No record evidence contradicts HLLI's sincere concern, which prevented execution of the side-agreement.

Most preposterously, the district court found that "Class Counsel took no position on the side agreement." A230. Of course they did! Plaintiffs called it misconduct in "direct violation of the Settlement" (A201)—an emphatically clear position. In fact, the district court endorses this position: "Class Counsel filed a response to Objector Morgan's briefing, and therein alluded to the **fact** that the side agreement's terms **constituted misconduct**." A229 (emphasis added). This implies

[10] In approving the *Kennedy* side-deal, which provides no additional recovery to the class, the district court found without explanation it was nevertheless "to the ultimate benefit of the Settlement Class." A253. Perhaps the district court concluded this because the side-deal ensured the *Kennedy* objectors would not appeal settlement approval. The Morgan side-agreement then would have been at least as beneficial because it would have avoided *any* possible appeal of settlement approval.

that Morgan and/or HLLI (then a party to the agreement, A212) might be liable for inducing breach of Settlement terms class counsel negotiated for their sole benefit. The district court speculated "[p]erhaps Class Counsel's terse briefing indicated nothing more than an attempt to avoid endless ancillary litigation about the litigation," A230, but if this were an idle expression of annoyance at delay, class counsel could have proved it by disclaiming their interest in suing Morgan or his counsel.

Class counsel repeatedly refused. Facing a court-imposed deadline, Morgan sought a covenant on February 11, 2020, and class counsel provided a non-answer only the next evening: "Plaintiffs' position is that we would have welcomed the opportunity to negotiate with Samsung and HLLI to resolve the various issues between the Parties, and we find it regrettable that they did not provide us that opportunity." A208. The district court extended the time for Samsung and Morgan to execute their agreement, so on February 14 Morgan sought simply an "assurance that you will not sue Morgan or HLLI for executing a substantially-identical agreement to the one [Samsung] shared with you last week." Dkt. 230-5. Class counsel again refused, proving their original statement disingenuous: "While we do wish that you'd included us in the discussion with Samsung over these past months to attempt to resolve your concerns in a mutually agreeable way, we do not believe a dialogue at this time would be productive." A212.

Then Morgan moved for leave to file a motion to disqualify class counsel. Dkt. 230. Class counsel could have defeated the motion very simply by assuring the district court they would not sue HLLI or his counsel. They did not, instead arguing that their January filing "did *not* threaten either [HLLI] or its client with legal action"—but doing nothing to disclaim the actual threat. Dkt. 231 at 2. After the court granted

Morgan leave to file the motion to disqualify on March 24 (Dkt. 244), class counsel could have assured the court at any time they would not sue Morgan or his counsel for executing the side-agreement. They did not.

"[I]t is unfathomable that the class's lawyer would try to sabotage the recovery of some of his clients." *Pierce v. Visteon Corp.*, 791 F.3d 782, 787 (7th Cir. 2015). When class counsel is "motivated by a desire to grab attorney's fees instead of a desire to secure the best settlement possible for the class, it violate[s] its ethical duty to the class." *Tech. Training Assocs., Inc. v. Buccaneers Ltd. P'ship.*, 874 F.3d 692, 694 (11th Cir. 2017). Class counsel has flunked its Rule 23(g)(4) duty to "fairly and adequately represent the class." The class representatives have similarly put the interests of class counsel ahead of the class in violation of Rule 23(a)(4). For these reasons, the final approval must be vacated and the class decertified.

Disqualification may seem a harsh sanction, but there are no other tools available to prevent class counsel from acting against the interests of absent class members. This Court cannot require plaintiffs (much less plaintiffs' counsel) to agree not to sue HLLI any more than it can rewrite the settlement agreement to remove the kicker provision (as opposed to reject a settlement with a kicker until the parties delete it). *Evans v. Jeff D.*, 475 U.S. 717, 726-27 (1986). Once disqualified, the district court could select new lead counsel capable of putting the interested of absent class members ahead of their own. *See Eubank*, 753 F.3d at 723. Given the number of parallel class actions that were consolidated here, there should be no shortage of applicants.

The district court held that there were "no issues that compare to those addressed in *Eubank*" (A231), but in fact the conflict here was much more

straightforward. Though *Eubank* involves quite different facts supporting the disqualification of lead counsel, Morgan cited it as an example of how a court should proceed when class counsel does not serve the interests of the class. This case does not hinge on family relationships with representative plaintiffs as in *Eubank*, but instead class counsel scuttling a deal that would have unquestionably benefited class members. And class counsel apparently did so for no reason other than to discourage the district court from reducing its fee award.

Because class counsel stood in the way of a $1.3 million class benefit, they "can't be trusted to represent the interests of the class." *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 725 (7th Cir. 2016). "[I]f at any time the trial court realizes that class counsel should be disqualified, the court is required to take appropriate action." *Id.* The district court erred in refusing to act to protect the class, and must be reversed.

II. The reversion of over $2.5 million to defendants because of class counsel's excessive fee request makes the Settlement *per se* unfair.

Class counsel put its own fees ahead of the interests of the class by negotiating a provision that insulated those fees from challenge. These pernicious Settlement terms "arrange[d] for fees not awarded to revert to defendants rather than be added to the class fund." *Bluetooth*, 654 F.3d at 947.

All three *Bluetooth* warning signs of self-dealing existed here, which create a special obligation for the district court "to assure itself that the fees awarded in the agreement were not unreasonably high … for if they were, 'the likelihood is that the defendant obtained an economically beneficial concession with regard to the merits provisions, in the form of lower monetary payments to class members or less injunctive

relief for the class than could otherwise have been obtained.' " *Id.* at 947 (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 964, 965 (9th Cir. 2003)). The district court appropriately scrutinized the attorneys' fees—awarding $2.1 million less than plaintiffs requested and $2.5 million less than Samsung agreed not to oppose.

In short, the district court provided deficient review under Rule 23(e)(2), because it did not consider clear sailing, mischaracterized the kicker as a benefit, and ignored Morgan's disproportion arguments. The court deferred consideration of the fee award (A251), but Rule 23(e)(2)(C)(iii) requires review of "the terms of any proposed award of attorney's fees, including timing of payment" *prior to* settlement approval. This alone would be reversible error for failing to provide a "reasoned response" to a material objection to the settlement. *Dennis*, 697 F.3d at 864.

Even if the court had intended to defer consideration entirely, the subsequent fee order does not cite Rule 23(e), and misunderstands several of Morgan's arguments. For example, the court writes that "the Settlement Agreement does not contain a true kicker agreement, as kicker agreements usually involve money that was initially allocated to the class, which is never claimed and therefore reverts to the defendant." Dkt. 256 at 11 n.5. But *Bluetooth* itself characterized an identical reversionary structure as a "kicker," as Morgan had pointed out. Dkt. 163 at 15. The district court also makes finding against a straw man, that kicker was not "not unlawful per se." *Id.* at 12. But Morgan did not argue otherwise. Instead he pointed out that kicker, given the gross ***disproportion*** between fee terms and class benefits render the Settlement unfair. Dkt. 163 at 15.

The district court could not short circuit this analysis by pointing to efficient settlement administration (A248-A251), or the four factors from *Rutter & Wilbanks Corp. v. Shell Oil, Co.*, 314 F.3d 1180, 1188 (10th Cir. 2002), which it found to "largely overlap" with the new rules. A240-A247. These tests provide one helpful means to an end: determining the adequacy of the size of the payment by defendants to the class relative to the value of the release by plaintiffs. These cannot substitute for Rule 23(e)(2)(C)(ii) & (iii). "[A] list of factors without a rule of decision is just a chopped salad." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 719 (7th Cir. 2001); *see also Pampers*, 724 F.3d at 718 (looking beyond Sixth Circuit's seven-factor test to find settlement unfair when it constitutes "preferential treatment" for class counsel); *Bluetooth*, 654 F.3d at 946 (consideration of eight-factor test "alone is not enough to survive appellate review").

At minimum, given the existence of unfavorable clear sailing and kicker provisions, and given the extensive argument about the Settlement's actual value to class members, the district court was required to consider *Bluetooth* factors under Rule 23(e)(2)(C)(iii). If the analysis provided in this case satisfies Rule 23(e)(2)(C), then every supposedly "separately negotiated" fee award with clear sailing and a kicker could be approved, no matter how strong the evidence of self-dealing and disproportion. All kicker arrangements, no matter how costly to the class, will meet the low bar created by the district court. Approval must be reversed as an error of law: the district court did not examine the disproportion, and Rule 23(e)(2)(C)(ii) and (iii) become a dead letter if approval is affirmed.

But, after determining the kicker arrangement did not evince *explicit* collusion, the district court failed to account for the unfairness of the Settlement that the proposed

oversized award to the attorneys demonstrates. The fee reduction imposed by the district court simply left the remainder in the pockets of the defendants. This is wrong. "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 ***no apparent reason*** the class should not benefit from the excess allotted for fees." *Bluetooth*, 654 F.3d at 949 (emphasis added). The reversion of an oversized fee request to the defendant is *per se* self-dealing that makes the Settlement inherently unfair under Rule 23(e). If "class counsel agreed to accept excessive fees and costs to the detriment of class plaintiffs, then class counsel breached their fiduciary duty to the class." *Lobatz v. US West Cellular of California, Inc.,* 222 F.3d 1142*,* 1147 (9th Cir. 2000); *cf. also Creative Montessori*, 662 F.3d at 917.

Here, actual prejudice to the class occurred. Samsung was willing to put up $6.9 million in cash to settle the case. By attempting to shield their fees, class counsel ended up leaving $2.5 million on the table to be reclaimed by Samsung, when that money could have gone to the class without opposition from the defendants had the parties used a conventional common fund.

The settling parties argued that the kicker clause should be excused (or did not count as a kicker at all) because they did not structure a common fund where any money could revert. But the terms of the clause do not excuse class counsel's breach of duty—the terms *confirm* the breach. Samsung does not have an allergy or religious objection to establishing funds for the benefit of its customers. Like all corporate defendants, it simply hopes to resolve litigation in a manner favorable to its business and shareholders, and the agreement-in-principle with Morgan confirms this. Samsung agreed to deposit

cash for the benefit of class claimants to resolve Morgan's objection even though Morgan has a fraction of the named plaintiffs' leverage.

Other courts have recognized that the lack of a common fund is a problem of class counsel's own creation. *Bluetooth* itself established no common fund. Nor did the claims-made settlement in *Eubank*, but the Seventh Circuit nevertheless remarked that the provision would need to be "delete[d]" before final approval could be granted. 753 F.3d at 723.

Simply put: class counsel bargained for the terms of the Settlement and the fact they chose to establish no monetary fund for the class does not excuse their self-dealt clear sailing and kicker fee provisions. To the contrary, there was no reason to segregate benefits as they did: the Settlement sends coupons to tens of thousands of claimants, it could have just as easily sent checks should the reduction in fees warrant it. Morgan's agreement-in-principle would have sent checks. Class counsel also could have bargained to disburse unawarded fees to the hundreds of class members who stand to be paid under the Settlement if the difference was too small to justify sending tens of thousands of checks. This breach of fiduciary duty to the class cannot be tolerated.

Plaintiffs may argue that the Settlement does not disproportionately favor fees because the district court found it to be worth $6.44–11.31 million. A246. But the district court committed legal error in uncritically accepting an expert declaration premised on the false assumption the Settlement provides a warranty. It does not; the word "warranty" does not appear in the Settlement at all. Instead, the Settlement allows class members to file claims with Samsung until up to 7 years after the purchase of the covered washing machine in the case of "Top Separation" (A51) and three years after

the 2019 notice date in the case of "Drain Pump" failure (A54). Most of the claims period has already elapsed because the machines at issue date between 2011 and 2016, and **just $94,118.31 worth of benefits stand to be paid for all past failures**. A165. More claims would be paid over the remaining years of the claims process, but not many more. Morgan repeatedly pointed out that the Settlement did not define a warranty, and elaborated on many of the declaration's other shortcomings. Dkt. 191 at 4-12; A139-A140, A147; A178-A183; Dkt. 247 at 4. The district court does not address these criticisms—*at all!*—nor explain why, as a matter of law, a Settlement that does not provide a warranty can be credited for creating "future warranty protection with an estimated value of $6.44–11.31 million." A246.[11]

Rational class members would not value the future claims process at a sum 64 to 113 times greater than their compensable claims over the first seven years. The expert declaration provides a vivid example of how injunctive relief is "easily manipulable by overreaching lawyers seeking to increase the value assigned to a common fund." *Staton*, 327 F.3d at 974. The Settlement should only be credited for results actually achieved. *Fager*, 854 F.3d at 1177 (finding "merit in an approach that ties attorney recovery to the

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[11] The district court earlier decided that *Daubert* did not apply at a fairness hearing, and denied Morgan's motion to strike on that basis. A174. But the Federal Rules of Evidence apply to all "civil cases and proceedings." Fed. R. Evid. 1101(b). The district court thus violated Fed. R. Evid. 702 by adopting the report without any of the gatekeeping required by *Daubert*. *Mars Steel Corp. v. Cont'l Bank N.A.*, 880 F.2d 928, 938 (7th Cir. 1989); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 354 (2011) ("we doubt" district court conclusion that *Daubert* does not apply to certification decisions).

Moreover, testimony contrary to the black letter terms of the Settlement was "fantastic" and "methodologically flawed." *United States v. Allegheny Ludlum Corp.*, 366 F.3d 164, 184 (3d Cir. 2004).

amount actually paid to class members"). The claims process might be optimistically worth about $190,000 if claims *double* over the next three years. Total benefits under the settlement—including $12,763.09 for "Enhanced Minimum Recall Rebates" and rebate coupons that might be redeemed—likely total less than $250,000—one sixteenth of class counsel's fees and costs, and one twenty-sixth the award Samsung agreed not to challenge. The Settlement disproportionately benefits attorneys.

In any event, even if disproportional fees were permissible, or even if the other relief in the Settlement was worth $11 million, it does not excuse the expensive breach of fiduciary duty in the kicker.

Nor does the district court's finding that the settlement was "vigorously negotiated" (A242) forgive class counsel for prioritizing their own fees. Arm's-length negotiations protect the interests of the class only with respect "to the amount the defendant will pay, not the manner in which that amount is allocated between the class representatives, class counsel, and unnamed class members." *Pampers*, 724 F.3d at 717. "[T]he defendant cares only about the size of the settlement, not how it is divided between attorneys' fees and compensation for the class. From the selfish standpoint of class counsel and the defendant, therefore, the optimal settlement is one modest in overall amount but heavily tilted toward attorneys' fees." *Eubank*, 753 F.3d at 720.

Nor does it matter that the parties allegedly negotiated fees last. A252. It is not "realistic" for separation of fee negotiations to make a disproportionate fee proposal fair. *Pearson*, 772 F.3d at 786-87. Postponing discussion of fees "would not allay our concern." *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 308 (3d Cir. 2005); *accord Bluetooth*, 654 F.3d at 948. Because fees and benefits come from the same pot, reduced benefits

necessarily allows higher fees, as the *Kennedy* litigation proves. In *Kennedy*, the parties likewise represented that fees had been negotiated last (2018 U.S. Dist. LEXIS 84442, at *4), yet the fees were a point of contention and Samsung refused to finalize the deal. *Kennedy* Dkt. 66 at 24. Whether fees are negotiated first, second, or last, either party can walk away from the deal—so fee terms must be considered integral to the Settlement, as Rule 23(e) requires.

If there had been a single common fund, and Samsung offered to put $6.9 million in it, and class counsel had responded by asking Samsung to pay only $4.4 million, that would be self-evident malpractice. Why is it not a *per se* breach of fiduciary duty when class counsel effectively says "Instead of $6.9 million, pay a few hundred thousand worth of benefits, and then we will have a *de facto* free roll of whether we receive an excessive $6.65 million award or something smaller"? The Settlement has this effect because of the segregated fee payment protected with clear sailing and kicker. For this reason, *Pearson* said "Neither can we think of a justification for a kicker clause; at the very least there should be a strong presumption of its invalidity." 772 F.3d at 786-87. And a leading book on the ethics of contingency fees argues that such clauses should be considered *per se* unethical. Lester Brickman, *Lawyer Barons* 522-25 (2011).

Aside from the "no apparent reason" *dicta* in *Bluetooth* (654 F.3d at 949), Morgan is unaware of any appellate court that has considered this particular scenario. However, this Court should hold that, in the absence of extraordinary circumstances, such self-dealing that actually costs the class money requires a Rule 23(e) finding that a settlement is unfair. Class counsel should never be allowed to shield their fee requests with these

clauses; at a minimum, they demonstrate *per se* unfairness when they actually result in reversion to the defendant instead of the class.

Conclusion

Settlement approval must be reversed. On remand, new class counsel must be appointed.

Oral Argument Statement

Morgan respectfully requests oral argument. The appeal presents novel issues of public importance.

Dated: September 10, 2020

Respectfully submitted,

/s/ Theodore H. Frank

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Certificate of Service

I hereby certify that on September 10, 2020, I electronically filed the foregoing Appellants' Brief and Exhibits with the Clerk of the United States Court of Appeals for the Tenth Circuit using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

/s/ Theodore H. Frank
Theodore H. Frank

Certificate of Compliance

1. This brief complies with the type-volume limitation of Fed. R. App. Proc. 32(a)(7)(B) because this brief contains 13,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. Proc. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Garamond font.

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I hereby certify that a copy of the foregoing Opening Brief, as submitted in Digital Form via the court's ECF system, is:

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/s/ Theodore H. Frank

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE: SAMSUNG TOP-LOAD WASHING MACHINE MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	MDL Case No. 17-ml-2792-D District Judge Timothy D. DeGiusti
This document relates to: ALL CASES	

O R D E R

Before the Court is a Motion by Plaintiffs and Class Counsel [Doc. No. 152], asking for final approval of the proposed Settlement Agreement. After a hearing, a series of supplemental briefs, and subsequent disclosures of side agreements, the matter is fully briefed and at issue.[1]

BACKGROUND

This is a consolidated multidistrict class action lawsuit. Plaintiffs filed suit in various jurisdictions (the "Consolidated MDL Lawsuit") against Defendants Samsung Electronics America, Inc., and Samsung Electronics Co., Ltd., ("Defendants"), and in some cases also against Defendant Retailers Best Buy Co., Inc., The Home Depot, Inc., Home Depot U.S.A., Inc., Lowe's Companies, Inc., Lowe's Home Center, LLC, and Sears Holdings Corporation ("Defendant Retailers").

[1] Capitalized terms undefined in this Order are given the definition reflected in the Settlement Agreement.

Plaintiffs, as defined by the Settlement Agreement, refers to the named plaintiffs asserting claims on behalf of themselves and all or part of the Settlement Class. The Settlement Class includes every resident of the United States or its territories who was the original purchaser of certain washing machines for household use. *See* Settlement Agreement [Doc. No. 92-1], at 15. The full definition of the Settlement Class draws certain, well-defined and narrow exclusions[2] and identifies the relevant washer models. *Id*. The Settlement Class consists of approximately 2.8 million people.[3]

Plaintiffs alleged that certain Samsung top-load washing machines had experienced detachment of their tops from the washing machine chassis, and/or drain-pump failure during operation. After negotiations before a skilled mediator, on June 1, 2018, Plaintiffs, Defendants, and Defendant Retailers (collectively, the "Parties") filed a Settlement Agreement with the Court to fully resolve the Consolidated MDL Lawsuit. The Court held a preliminary approval hearing on November 29, 2018. On January 8, 2019, the Court entered an Order [Doc. No. 138] granting preliminary approval of the Settlement Agreement and provisionally approving certification of a nationwide Settlement Class.

[2] The Settlement Class excludes: (1) officers, directors, and employees of Defendants and Defendant Retailers; (2) insurers of Settlement Class Members; (3) subrogees or all entities claiming to be subrogated to the rights of a Washer purchaser or a Settlement Class Member; and (4) all third-party issuers or providers of extended warranties or service contracts for the Washers. Settlement Agreement at 10 ¶ 3.

[3] Defendants originally reported a Settlement Class size of 2.9 million purchasers. Plaintiffs have since informed the Court that, after correcting an error, the updated Settlement Class size is approximately 2.8 million. *See* Pls.' Suppl. Br. [Doc. No. 206] at 7 n.1.

The Settlement Administrator began effectuating the notice plan after the Court entered its order granting preliminary approval on January 8, 2019. Notice was to be sent out not later than March 9, 2019 (the "Notice Date").

Plaintiffs' Unopposed Motion for Final Approval of Settlement and Motion for Attorneys' Fees [Doc. No. 152], along with all supporting and opposing briefs and documentation, followed. The Court scheduled a hearing on the matter (the "Fairness Hearing"). Two objectors timely filed objections with the Court and indicated their intent to appear at the Fairness Hearing. First, John Douglas Morgan objected to both the Motion for Final Approval and the Motion for Attorneys' Fees [Doc. No. 163]; Colleen Kennedy then objected to the same [Doc. No. 179].

The Fairness Hearing took place on October 7, 2019. From the hearing's outset, the Court noted certain concerns with the Settlement Agreement and asked the Parties to preliminarily address them. The Court then heard arguments from Plaintiffs, Defendants, Objector Morgan (through counsel, M. Frank Bednarz), and Objector Kennedy (through counsel, Robert H. Solomon).

Subsequently, the Court issued an Order [Doc. No. 194] requiring the Parties and Objectors to submit briefs in order to more deliberately address the Court's concerns. All have since submitted their briefs and all related filings.[4] The Court's task is now to

[4] A number of filings followed the October 2019 Fairness Hearing, and various collateral disputes ensued regarding, *inter alia,* disclosure of attorney billing records, adequacy of expert declarations, disclosure of side agreements, requests for additional briefing, and an objector's motion to decertify/disqualify Class Counsel. Briefing on these and other matters persisted through April 1, 2020.

determine whether the Settlement Agreement merits final approval under the Federal Rules of Civil Procedure.

SETTLEMENT AGREEMENT

Negotiation of the Settlement Agreement[5] followed a recall of the same washing machines at the center of this litigation. *See* Settlement Agreement at 16. Samsung Electronics America, Inc., and the United States Consumer Product Safety Commission initiated the voluntary recall on November 4, 2016, to address the circumstances where a washer's top detaches from the washer's chassis during operation. The ongoing voluntary recall offers those who participate two alternative forms of relief: a rebate or repair. *See Samsung Recalls Top-Load Washing Machines Due to Risk of Impact Injuries*, U.S. CONSUMER PROD. SAFETY COMM'N (Nov. 4, 2016), https://www.cpsc.gov/recalls/2017/samsung-recalls-top-load-washing-machines.

First, the voluntary recall offers a free in-home repair that includes reinforcement of the washer's top and a free one-year extension of the manufacturer's warranty (the "Recall Repair"). As a second option, it offers a rebate to be applied toward the purchase of a new Samsung or other brand washing machine, along with free installation of the new unit and removal of the old unit (the "Recall Rebate").

As previously noted, after the voluntary recall program was instituted, and following extensive negotiations, the Parties reached a nationwide, uncapped Settlement Agreement.

[5] The Settlement Agreement consists of the originally filed Settlement Agreement [Doc. No. 92-1], as modified by the Addendums to the Settlement Agreement [Doc. No. 137-1]; Doc. No. 148-1].

The Settlement Agreement specifically does not release property damage or personal injury claims [Doc. No. 92], at 18. It provides compensation or other relief to the millions encompassed by the Settlement Class, depending on their specific circumstances. In some instances, the relief provided by the Settlement Agreement is explicitly tied to the relief provided for by the voluntary recall detailed above. An overview of the terms of both the voluntary recall and the Settlement Agreement, and how they relate to one another, is therefore worth stating here. The Settlement Agreement[6] affords five forms of relief to those who have submitted a valid claim form (the "Claimants"):

1. **Enhanced Minimum Recall Rebate**: This is an enhanced rebate for Claimants who have already received, or will receive, a Recall Rebate for buying a new washing machine under Samsung's voluntary recall. If the rebate they received was worth less than fifteen-and-a-half percent (15.5%) of the estimated price of the recalled machine, under the Settlement Agreement, these Claimants will receive an additional rebate to make up a total of fifteen-and-a-half percent (15.5%) of the price of the recalled washing machine. *Id*. at 24–25.
2. **Recall Repair Additional Benefit:** For Claimants who select a Recall Repair, this is a coupon entitling Claimants or an immediate household member to a $25.00 rebate, to be applied toward the purchase of new Samsung microwave. In the alternative, the Settlement Agreement offers between $50.00 and $85.00

[6] This summary includes concessions Defendants made in response to the Court's inquiries during the Fairness Hearing, as communicated by Plaintiffs' Supplemental Brief [Doc. No. 206].

off the purchase of a new Samsung major appliance (available for appliances which cost no less than $900.00), to be used within one year of final approval. *Id*. at 26–27.

3. **Commitment for Recall Repair:** For Claimants who select a Recall Repair under the voluntary recall program after they receive notice of the Settlement Agreement, Samsung must efficiently fulfill its voluntary recall within fourteen days of the request or send Claimants a one-time $50.00 cash-equivalent card. *Id*. at 30–32.
4. **Top Separation Relief:** For up to seven years after the date of purchase, Claimants who can document top separation of their washing machine can receive a full refund (to the extent not already provided) and up to $400.00 in expenses, capped at $50.00 in cleanup costs. *Id*. at 29–30.
5. **Drain-Pump Relief:** Claimants who can document expenses related to a drain-pump failure can receive up to $400.00 in expenses, capped at $50.00 in cleanup costs. Past repair costs of up to $150.00 can also be paid, if documented. Drain-pump repairs will be performed by Samsung for almost four years after the Notice Date. *Id*. at 32–34.

Defendants further agreed to pay for attorneys' expenses and fees without impacting the relief provided to the Settlement Class, and all administration and notice expenses related to the Settlement Agreement. *Id*. at 36.

STANDARD OF DECISION

The Court may approve a settlement upon finding that the settlement is "fair, reasonable, and adequate." FED. R. CIV. P. 23(e)(1)(C). The Court's main concern in evaluating the settlement is to ensure that the rights of passive class members are not jeopardized by the proposed settlement. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (noting that the Rule 23(e) inquiry "protects unnamed class members from unjust or unfair settlements affecting their rights"). Moreover, it is generally accepted that where settlement precedes class certification, district courts must be "even more scrupulous than usual" when examining the fairness of the proposed settlement. This is so where approval for settlement and certification are sought simultaneously, as is the case here. *In re Warfarin Sodium Antitrust Litig*., 391 F.3d 516, 534 (3d Cir. 2004); *accord Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1026 (9th Cir. 1998); *see also* MANUAL FOR COMPLEX LITIGATION § 21.612, at 313 (4th ed. 2004).

DISCUSSION

Before the Court reaches the fairness determination, it must first consider whether there are procedural issues impeding class certification. The Court must then determine whether the proposed Settlement Class meets the requirements of Rule 23 for certification purposes. *See Harper v. C.R. England, Inc.,* 746 F. App'x 712, 722 (10th Cir. 2018).[7] And, finally, if the Settlement is approved, the Court must set the proper award of attorneys' fees, a determination the Court will make in a separate order.

[7] All unpublished opinions in this Order are cited pursuant to FED. R. APP. P. 32.1(a) and 10TH CIR. R. 32.1.

I. The Court has jurisdiction over the Parties and has the power to grant final approval.

Defendants, together with Defendant Retailers, moved under 28 U.S.C. § 1407 to centralize twenty-four pending actions in the Western District of Oklahoma. *See* Transfer Order [Doc. No. 1], at 1. In light of the multitude of lawsuits filed in federal courts across the country, many of which were styled as class action lawsuits, the Judicial Panel on Multidistrict Litigation consolidated and transferred these suits to this Court, giving the Court jurisdiction over pretrial proceedings in the transferred actions. *See* 28 U.S.C. § 1407. A district judge exercising authority over cases transferred for pretrial proceedings "inherits the entire pretrial jurisdiction that the transferor district judge would have exercised if the transfer had not occurred." 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3866 (3d ed. 2010).

Settlement proceedings are commonly conducted before MDL courts, and such proceedings fall squarely under the umbrella of pretrial proceedings over which transferee courts have jurisdiction. *See In re Managed Care Litig.*, 246 F.Supp.2d 1363, 1365 (Jud. Pan. Mult. Lit. 2003) (stating that "[i]t is established Panel and court of appeals precedent that settlement matters are appropriate pretrial proceedings subject to centralization under § 1407").

The Court sits in diversity, with original jurisdiction over these actions pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d)(2) ("CAFA"). The requirements of minimal diversity are met. 28 U.S.C. § 1332(d)(2). Additionally, the

Parties and the Settlement Class Members have submitted to the jurisdiction of the Court for purposes of the Settlement.

II. Because the Settlement Class meets the requirements of Rule 23 for certification purposes, the Court grants final class certification.

As part of its preliminary approval of the Settlement Agreement, the Court has conditionally certified the Settlement Class. Order, [Doc. No. 138], at 10. Before addressing whether the Settlement Agreement merits final approval, the Court must address final certification for settlement purposes. *See Harper,* 746 F. App'x at 722 (vacating and remanding a district courts' approval of a class action settlement for failure to meaningfully explain its basis for class certification and noting that "[c]lass action settlements are premised upon the validity of the underlying class certification").

The Court may only certify a class for settlement purposes after being satisfied, following "rigorous analysis," that the prerequisites of Rule 23(a) have been met. *Comcast Corp. v. Behrend,* 569 U.S. 27, 33 (2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011)); *accord Shook v. El Paso Cty.*, 386 F.3d 963, 971 (10th Cir. 2004) (emphasizing that the court must "carefully apply the requirements of Rule 23"). Plaintiffs—as movants—bear the burden of showing, by a preponderance of the evidence, that the Rule 23 requirements are met. *Trevizo v. Adams*, 455 F.3d 1155, 1162 (10th Cir. 2006).

A. The Settlement Class has been carefully defined such that its members are readily identifiable.

Although not mentioned specifically in Rule 23 itself, a logical "prerequisite to class certification is an appropriate class definition." *See Troudt v. Oracle Corp.,* 325 F.R.D. 373, 375 (D. Colo. 2018). This aspect of the class certification inquiry is referred to as the question of "ascertainability." *Byrd v. Aaron's Inc.*, 784 F.3d 154, 162 (3d Cir. 2015). The Tenth Circuit has not expressly adopted the ascertainability requirement, but trial courts in this circuit have nonetheless found it prudent to address the issue. *See, e.g., Maez v. Springs Automotive Group, LLC*, 268 F.R.D. 391, 394 (D. Colo. 2010) (stating that a prerequisite to class certification is an adequate class definition).

The task, here, is straightforward; the Settlement Class is defined as every resident of the United States or its territories who was the original purchaser of certain washers for household use. The washer models at issue are discrete variables, defined and easily ascertainable. And the limited exclusions from the Settlement Class are narrow and well-defined. *See* Settlement Agreement at 15. The Settlement Class includes approximately 2.8 million people. There are no subclasses. There are neither disputes nor objections as to the ascertainability of the Settlement Class, and the Court finds that the proposed Settlement Class has been adequately defined.

B. The Settlement Class of 2.8 million members is sufficiently numerous to meet the requirements of Rule 23.

Federal Rule of Civil Procedure 23(a) calls for a judicial finding that the proposed class is "so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1); *see Peterson v. Okla. City Housing Auth.,* 545 F.2d 1270, 1273 (10th Cir. 1976).

It is undisputed that the Settlement Class is sufficiently numerous to warrant class certification. The Settlement Class includes 2.8 million members. The Court finds Plaintiffs meet their burden as to the numerosity requirement—joinder would clearly be impractical under the circumstances. *Cf. Trevizo,* 455 F.3d at 1162 (affirming a district court's finding that numerosity was not met in a class of eighty-four members), *with In re Nat'l Football League Players Concussion Injury Litig*., 821 F.3d 410 (3d Cir. 2016) (affirming a district court's class certification and final approval of a settlement involving a class of 20,000 members).

C. Common questions of law and fact are sufficient to meet the commonality requirement, and the resolution of these questions drives the resolution of the Class Members' claims.

Commonality asks whether "there are questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). A finding of commonality requires only a single common question of law or fact. *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1195 (10th Cir. 2010). "[E]very member of the class need not be in a situation identical to that of the named plaintiff" to meet Rule 23(a)'s commonality requirements. *Milonas v. Williams,* 691 F.2d 931, 938 (10th Cir. 1982) (citing *Rich v. Martin Marietta Corp.,*522 F.2d 333,

340 (10th Cir. 1975)). Factual differences between Class Members' claims do not necessarily defeat certification where common questions of law exist. *Id.* (citing *Penn v. San Juan Hosp., Inc.,* 528 F.2d 1181, 1189 (10th Cir. 1975)).

To demonstrate commonality, Plaintiffs must show that Class Members have suffered the same injury. *Dukes*, 564 U.S. at 349. "Their claims must depend upon a common contention . . . of such a nature that it is capable of class-wide 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." *Id*. At this stage, the Court focuses its inquiry on whether a class action will generate common answers that are likely to drive resolution of the lawsuit. *Id*.

As Plaintiffs indicate, there are a number of common questions of law and fact in this case, including: whether the washers at issue have material defects, whether Defendants knew or should have known of such defects when placing the washers into the stream of commerce, and whether the washers are merchantable. Plaintiffs assert claims of, *inter alia*, breach of implied warranty of merchantability, strict liability, and breach of express warranty. *See generally* Compl. [Doc. No. 1], CIV-17-0046. To prevail on their claims, Plaintiffs would have to successfully challenge the same conduct by Defendants in designing, manufacturing, marketing, and warrantying the washers, and the same conduct by Defendant Retailers in selling them. The standard that a single common question is required to certify a class is easily met. *See Devaughn*, 594 F.3d at 1195 (a finding of commonality requires only a single common question).

Resolution of these claims would—to be sure—drive the resolution of the lawsuit. After all, Plaintiffs' claims rise and fall on the resolution of the common questions. That there may exist factual differences between the claims of the Class Members and those of the named plaintiffs is not fatal to class certification. *In re Nat'l Football League.,* 821 F.3d at 427 ("Even if players' particular injuries are unique, their negligence and fraud claims still depend on the same common questions regarding the NFL's conduct.").

Under the present circumstances, the Court finds there exists commonality between the named plaintiffs' claims and those of the absentees. Any dissimilarities do not impede the generation of common answers. *See In re Whirlpool Corp. Front-Loading Washer Prod. Liab*. *Litig*., 722 F.3d 838, 852–53 (6th Cir. 2013) (finding commonality met where different washing machine models were involved, but a particular defect was alleged by all plaintiffs).

D. Plaintiffs' claims are typical of the Class Members' claims, as they challenge the same conduct by Defendants.

An analysis of commonality under Rule 23 tends to merge with the rule's typicality requirement. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 158 (1982). Under Rule 23, the Court must find the claims of the named plaintiffs are typical of those of the absentees. FED. R. CIV. P. 23(a)(3). Typicality is met if the class members' claims are "fairly encompassed by the named plaintiffs' claims." *Dukes*, 564 U.S. at 349; *accord Devaughn,* 594 F.3d at 1194. This requirement looks to the alignment of the representatives' interests with those of absentees. The Court must ensure that, by pursuing their own interests,

Plaintiffs also advocate for the interests of the absent class members. *Falcon*, 457 U.S. at 158 n.13.

Plaintiffs assert the typicality requirement is met, as the class representatives' and the Class Members' claims challenge the same conduct by Defendants in designing, manufacturing, marketing, warrantying, and selling the washers at issue. The Court agrees that the class representatives seek recovery under the same legal theories for the same wrongful conduct as the class they represent. This is sufficient to satisfy Rule 23's typicality requirement. *See Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988) ("Differing fact situations of class members do not defeat typicality under Rule 23(a)(3) so long as the claims of the class representative and class members are based on the same legal or remedial theory.").

This finding serves as further indication that "[C]lass [M]embers [have been] fairly and adequately protected in their absence." *Amchem*, 521 U.S. at 626.

E. The Settlement Class has been adequately represented, as the Court finds no debilitating conflicts among Class Members or between Class Members and Class Counsel.

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). To determine if the Class is being adequately represented, the Court should consider whether: (1) "the named plaintiffs and their counsel have any conflicts of interest with other class members"; and, (2) "the named plaintiffs and their counsel [have] prosecute[d] the action vigorously on behalf of the class." *Rutter & Wilbanks Corp. v. Shell Oil, Co.*, 314 F.3d 1180, 1187–88 (10th Cir.

2002).

As the Parties note, the Court has previously found that the Settlement Class was adequately represented, and "that the [S]ettlement does not grant preferential treatment to [P]laintiffs and [C]lass [C]ounsel." Order [Doc. No. 138], at 10. The requirement of adequate representation, however, is a continuing one. *Hansberry v. Lee*, 311 U.S. 32, 45 (1940). Further, when a class action settles, the idea of adequacy of representation as a performance standard for class counsel overlaps substantially with the inquiry into the fairness of the class settlement. *See Thorogood v. Sears, Roebuck & Co.*, 627 F.3d 289, 293–94 (7th Cir. 2010) (discussing a variety of ways that class actions may not protect the interests of the class); *see also In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. 351, 378 (E.D. Pa. 2015), *aff'd sub nom.,* 821 F.3d 410 (3d Cir. 2016) ("Objectors' challenges to the fairness of the Settlement Agreement overlap with their challenges to adequacy of representation."). Adequate representation, as required by Rule 23(a)(4), looks in part to the relationship between the class and class counsel. *Hansberry*, 311 U.S. at 45.

i. Objector Morgan's Motion to Disqualify [Doc. No. 247] Class Counsel is denied, as the Court finds no debilitating conflict between Class Counsel and the Settlement Class they represent.

There is no indication that Class Counsel did not perform competently or that any conflicts of interest surfaced after the Court issued preliminary approval. No objectors challenged the experience or qualifications of Class Counsel, nor did they flag any potential conflicts of interest. Objector Morgan, late in the proceedings, filed a Motion to Disqualify

Class Counsel [Doc. No. 247], claiming that Class Counsel failed to adequately represent the Settlement Class when it refused to agree to enter into a covenant not to sue the Hamilton Lincoln Law Institute Center for Class Action Fairness ("HLLI") should Objector Morgan enter into a side agreement with Defendants.

For a number of weeks, Objector Morgan and Defendants represented to the Court that a side agreement might be reached, which would re-allocate part of the funds set aside for attorneys' fees to the Settlement Class. *See* Defendants' Notice [Doc. No. 215] (filed on December 31, 2019 and stating Defendants and Objector Morgan were in the process of finalizing a side agreement); Defendants' Mot. Leave [Doc. No. 219] (requesting an extension of time on the matter, filed on January 22, 2020); Morgan's First Notice [Doc. No. 221] (subsequently stating that no agreement had been finalized, but giving no reason for the delay); Morgan's Second Notice [Doc. No. 225] (filed on February 12, 2020, and stating that "[n]o side agreement has been reached (yet) due to the risk that [C]lass [C]ounsel would sue Objector John Douglas Morgan and his counsel.").

Any purported benefit to the Class that may have come from a side agreement which may (or may not) have come to fruition was far from certain—especially given that the award of attorneys' fees is left to the Court's broad discretion. The Court ordered the Parties to disclose the agreement, and although its terms were never filed of record, Objector Morgan briefed its substantive content. Class Counsel filed a response to Objector Morgan's briefing, and therein alluded to the fact that the side agreement's terms constituted misconduct.

Ultimately, Class Counsel never threatened to sue Objector Morgan, there was never

any certainty that the side agreement would have, in fact, materialized had it not been for Class Counsel's briefing, and further, there was no indication that the side agreement would certainly benefit the Settlement Class. Perhaps Class Counsel's terse briefing indicated nothing more than an attempt to avoid endless ancillary litigation about the litigation, which would delay the resolution of these matters and work to the detriment of the Settlement Class. Class Counsel took no position as to the side agreement and at no point violated principles of adequacy of representation. Objector Morgan points to no authority that would indicate otherwise, and the Court can locate none.

Objector Morgan specifically asserts that Class Counsel, Leif Cabraser's representation is problematic and merits disqualification. According to Morgan, Cabraser regularly seeks fees in cases where HLLI represents an objector. There are now at least seven pending cases where HLLI and Cabraser represent adverse parties. *See* Mot. to Disqualify at 8 n.4 (collecting cases). Objector Morgan relies on non-binding authority in support of his assertions, namely *Eubank v. Pella*, 753 F.3d 718, 724 (7th Cir. 2014).

In *Eubank*, the appellate court reversed a district court's approval of a class action settlement; in that case, "despite the presence of objectors, the district court approved a class action settlement that is inequitable—even scandalous." *Id*. 753 F.3d at 721. The number of factors that distinguish *Eubank* from this case are plentiful. In *Eubank,* the Seventh Circuit concluded that "[t]he impropriety of allowing [counsel] to serve as class representative as long as his son-in-law was lead class counsel was palpable." *Id.* These facts are inapposite.

Moreover, the appellate court made several points directly contradicting Objector

Morgan's position. For example, the Seventh Circuit noted that "when an action has continued over the course of many years, the prospect of having those most familiar with its course and status be automatically disqualified whenever class members have conflicting interests would substantially diminish the efficacy of class actions as a method of dispute resolution." *Id*. (citing *In re "Agent Orange" Product Liab. Litig.,* 800 F.2d 14, 18–19 (2d Cir. 1986)).

Objector Morgan raises no issues that compare to those addressed in *Eubanks*, but rather essentially contends that because HLLI and Class Counsel are adverse in other pending matters, the Court should disqualify Class Counsel. And, of course, allow objectors to bid for the right to represent the Settlement Class. Mot. to Disqualify at 8 (citing to Geoffrey P. Miller, *Competing Bids in Class Action Settlements*, 31 HOFSTRA L. REV. 633 (2003)). The Court finds this insufficient to merit disqualification.

Because there exists no debilitating conflict between Class Counsel and the represented Settlement Class, Objector Morgan's Motion to Disqualify is DENIED.

ii. There are no debilitating intra-class conflicts to preclude class certification.

The lawyers for the Settlement Class, even when acting as faithful agents, cannot represent principals with divergent interests. The relationship between the class representatives and the absent class members is also important. *Amchem*, 521 U.S. at 591. The Court has considered and rejected the possibility that subclasses were necessary in this case, in response, particularly, to Objector Morgan's assertion that many of the claimants appear to be eligible only for the category of relief that provides the smallest benefit. *See* Morgan's Obj., [Doc. No. 163], at 14 ("about 95% of the claims fall into the two rebate

categories").

At the Fairness Hearing, Objector Morgan specifically conceded that sub-classing under these facts was unnecessary, and Plaintiffs addressed the issue in a supplemental brief. *See* Pls.' Suppl. Br. [Doc. No. 206], at 8. There is a recognized high cost to subclass Balkanization and fragmenting negotiations. The Settlement Agreement is uncapped, and there is no indication that disbursement of funds to one group robs from the others.

The Court concludes that no debilitating intra-class conflicts exist, and that the costs of sub-classing, in this case, outweigh the potential benefits. *See Sullivan v. DB Investments, Inc*., 667 F.3d 273, 326–27 (3d Cir. 2011) (subclasses had some appeal in remedying an unequal division of the settlement fund, though, the Third Circuit deferred to the district court's thorough explanation that the objectors had failed to show divergent or antagonistic interests between the three groups and had not established that these groups had claims of varying merit).

For purposes of class certification, the Court finds the Settlement Class to have been at all times adequately represented. Adequacy of representation will be further addressed, *infra*, in the context of the final fairness determination.

F. The predominance and superiority requirements of Rule 23(b)(3) are also satisfied under the facts.

i. Predominance

To meet their burden, Plaintiffs must also show that, under Rule 23(b), common questions subject to generalized, class-wide proof predominate over individual questions. "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently

cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 622–23. It is not necessary that all elements of the claim entail questions of fact and law that are common to the class, nor that the answers to those common questions be dispositive. *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S.Ct. 1184, 1196, 185 L.Ed.2d 308 (2013). Put differently, the predominance prong "asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *CGC Holding Co., LLC v. Broad & Cassel*, 773 F.3d 1076, 1087 (10th Cir. 2014).

Objector Kristina Pearson[8] contends that the Settlement Class should not be certified. But her assertions that "class counsel are not representing the class fairly," "the class representatives [did not] fairly represent[] the class," and "[i]ndividual claims predominate over common and factual issues" (Resp. Supp. Mot. Final Approval [Doc. No. 186], Ex. M at 28) are conclusory and lack any further explanation. *See, e.g.*, *DeHoyos v. Allstate Corp*., 240 F.R.D. 269, 293 (W.D. Tex. 2007) ("General objections without factual or legal substantiation do not carry weight."); 7B FED. PRAC. & PROC. § 1797.1 (3d ed. 2011) ("Only clearly presented objections by those who will be bound by the settlement will be considered."). This objection is overruled.

[8] Objector Pearson was among the objectors who filed objections with the Parties but did not timely submit any papers to the Court, and further did not indicate an intent to appear. The role of the Court in reviewing the Settlement Agreement is to act as a fiduciary of the Settlement Class. *Reynolds v. Beneficial Nat. Bank*, 288 F.3d 277, 288 (7th Cir. 2002) (Posner, J.). Though according to the Court's Order these absent Settlement Class members waived their objections, the merits of their arguments will nonetheless be considered by the Court in reviewing the fairness of the Settlement Agreement.

The predominance test is easily met in cases alleging consumer violations. *United Food & Commercial Workers Union v. Chesapeake Energy Corp.,* 281 F.R.D. 641, 655–56 (W.D. Okla. 2012) (quoting *Amchem*, 521 U.S. at 625). Here, there are many questions common to the Settlement Class. Key elements of Plaintiffs' claims are issues common to the Settlement Class, and the Settlement Class is thereby "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 622–23.

ii. Superiority

Finally, Plaintiffs must show that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 164 (1974). Class treatment is superior when it achieves "economies of time, effort, and expense, and promote[s] uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about undesirable results." *CGC Holding Co*., 773 F.3d at 1087 (quoting *Amchem*, 521 U.S. at 615).

The Court finds a class action to be the superior method of adjudication in light of: (1) the reasons the Judicial Panel on Multidistrict Litigation consolidated these cases; (2) Class Members' individual claims having limited worth compared to the high cost of litigation; (3) the Settlement Agreement promoting uniformity of decision as to those similarly situated.

All the requirements for class certification under Rule 23 are met. Plaintiffs' request that the Court certify the Settlement Class—as defined by the Settlement Agreement—under Rules 23(a) and 23(b)(3) is granted. The Court herein reaffirms class certification

for settlement purposes.

III. Notice was adequate and satisfies the requirements of Rule 23 and due process.

On January 8, 2019, the Court approved the Parties' proposed notice plan. Prelim. Approval Order [Doc. No. 138], at 10. The plan was then effectuated as follows: First, KCC, the Settlement Administrator, promptly launched the Settlement Website and mailed notice to the Settlement Class. Mot. Prelim. Approval [Doc. No. 108], Ex. B at 3–4 [hereinafter Peak Decl.]. Because Defendants provided the contact information of those who had participated in the voluntary recall, postal addresses were available for most Class Members. *Id*. at 5. Notices returned as undeliverable were re-mailed to any alternative address available through postal service information. *Id*.

To further extend the notice's reach, the Settlement Administrator also implemented an internet media effort. KCC purchased and administered internet impressions, strategically placed to target Class Members. These appeared as banner advertisements on both mobile and desktop devices. The ads linked directly to the Settlement Website. *Id*. at 6–7.

Through the Settlement Website, Class Members filed their claims online. They also had access to the Settlement Agreement, notice, any relevant Court documents, "Frequently Asked Questions," and any updates concerning the Settlement. *Id*. at 7. The Settlement Administrator also established a toll-free number. *Id*.

In response to the Court's concerns, Samsung has further agreed to add a link in the Settlement Website to its voluntary recall website. *See* Pls.' Suppl. Br., [Doc. No. 206], at

7. Samsung has also agreed to keep the Settlement Website and call center live through the end of the extended warranty[9] benefit periods in 2023. *Id*.

Under substantially similar safeguards, both Rule 23 and the Constitution's due process guarantees require the Court to confirm that unnamed Class Members received "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." FED. R. CIV. P. 23(c)(2)(B); *see DeJulius v. New England Health Care Emps. Pension Fund*, 429 F.3d 935, 944 (10th Cir. 2005). Neither Rule 23 nor due process "require actual notice to each party intended to be bound by the adjudication of a representative action." *In re Integra Realty Res., Inc.*, 262 F.3d 1089, 1110 (10th Cir. 2001) (citing *Mullane v. Cent. Hanover Bank & Trust*, 339 U.S. 306, 313 (1950)).

Objectors raised concerns as to the adequacy and efficacy of the notice campaign. *See, e.g.,* Cole Obj. [Doc. No. 186], Ex. M at 19 (complaining about the phone number provided for questions and stating that it "is a joke . . . no one there [sic] to answer questions, just recorded info already in the forms and website"); Mot. Strike, [Doc. No. 191], at 5 (noting the low number of valid claims recognized). The Court will consider these objections in its determination of whether the absent class was afforded adequate notice.

In this case, the notice itself included all the basic requirements of Rule 23(c)(2)(B), identifying:

[9] The extended warranty feature of the Settlement Agreement adds significant value for the Class, as discussed more *infra*.

> (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

See Notice, [Doc. No. 108], Ex. 3 at 2; Order, [Doc. No. 138], at 12–13. The notice further informed the Settlement Class of their right to opt out and object and directed them to the Settlement Website. *Id*. The Court granted the Settlement Class enough time—150 days—to file a claim, file an objection, or opt out. Order, [Doc. No. 138], at 14, 18. *Cf*. *DeJulius*, 429 F.3d at 944 (notice was adequate even where untimely for some plaintiffs); *Torrisi v. Tucson Elec. Power Co*., 8 F.3d 1370, 1375 (9th Cir. 1993) (approving notice sent 31 days before the deadline for objections).

Because Defendants agreed to provide, and did provide, names and addresses for consumers, 2,617,980 notices were mailed directly. Only 153,963 were returned as undeliverable. Peak Decl. ¶¶ 5–6. The Settlement Administrator supplemented this notice by distributing publication notice via millions of internet banner impressions, which linked directly to the Settlement Website. *Id*. at ¶ 6. As last reported to the Court, approximately 77,022 claims have been filed. Resp. Supp. Mot. Final Approval, [Doc. No. 186] Ex. 3, 4. Of these, less than half were valid claims. Pls.' Suppl. Br., [Doc. No. 206] at 5; Ex. 1 ¶¶ 15–17.[10]

[10] Defendants filed a Notice alerting the Court that the discovery of a reviewing error by the Settlement Administrator resulted in additional potentially valid claims being identified. The review process regarding these claims is underway and can be addressed as necessary in the course of administration of the Settlement relief. Because the information does not alter the Court's conclusions herein and would potentially only bolsters its

Although notice reached approximately 88% of the Settlement Class, there was a claims rate of about 3.1%. The Court has considered and rejected the possibility of pursuing claim stimulation measures. For example, in *Pollard v. Remington Arms Co*., a district court encountering "an appalling claims rate" ordered the parties to implement a supplemental notice plan. 320 F.R.D. 198, 205 (W.D. Mo. 2017), *aff'd*, 896 F.3d 900 (8th Cir. 2018). This supplemental plan included a social media campaign, radio advertising, email notices, direct mailings, and posters. *Id*. The supplemental plan successfully increased the claims rate. *Id*. at 209.

Upon review of the notice plan implemented by the Settlement Administrator, the Court is satisfied that additional measures will likely be to no avail. The initial claims rate in *Remington* was significantly lower than the one at issue here. *See Pollard*, 896 F.3d at 905–07 (affirming the final claims rate of 0.29%). The initial plan in this case, like the supplemental plan in *Remington*, incorporated outreach via both paper mail and electronic media. Notice, here, was substantially direct and reached a large portion of the Settlement Class.

It is possible—even likely—that Class Members received notice and yet decided against submitting a claim. This might be because, as Objector Morgan argues, a portion of the Class is entitled only to *de minims* benefits. Or, it could be that a substantial percentage of Class Members have not experienced problems with their Washers and remain satisfied with the product. In any event, certain benefits under the Settlement

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findings by increasing the valid claims rate, no response to the Notice or additional briefing is necessary. *See* Notice [Doc. No. 250].

Agreement remain available to many Class Members even though the claims submission deadline has passed. *See* Mot. Final Approval [Doc. No. 152], at 18.

As some circuits have noted, a low claims rate is neither indicative of poor notice nor a reason to necessarily deny settlement approval. *See, e.g.*, *Pollard*, 896 F.3d at 905–07 (affirming settlement with claims rate of 0.29%); *In re Domestic Airline Travel Antitrust Litig.*, 378 F. Supp. 3d 10, 24–25 (D.D.C. 2019) (noting that claims rates are frequently between 0.25% and 2%). At the fairness hearing, Objector Morgan attempted to distinguish the *Pollard* decision by indicating it did not involve notice directly issued to the Settlement Class. Fairness Hearing Transcript [Doc. No. 195], at 22. Quantitative studies conducted by the Federal Trade Commission, nevertheless, confirm that claims rates in class action settlements are typically low. *See* Fed. Trade Comm'n, *Administration of Settlements in* CONSUMERS AND CLASS ACTIONS: A RETROSPECTIVE AND ANALYSIS OF SETTLEMENT CAMPAIGNS 11 (2019) (finding the weighted mean claims rate was 4%). Most significant, however, are the conclusions reached by circuit courts that low claims rates are not necessarily indicative of a deficient notice plan. *Pollard*, 896 F.3d at 906.

Accordingly, objections as to the adequacy of notice are overruled. The Court finds the notice plan instituted by the Parties comports with the requirements of Rule 23 and due process. The Court also finds that notice to appropriate federal and state officials pursuant to CAFA has been timely sent and that such notice satisfies the requirements of 28 U.S.C. § 1715.

IV. The Court finds the Settlement Agreement is fair, adequate, and reasonable, and grants final approval.

Federal Rule of Civil Procedure 23(e)(2), states that a Court may approve a class action settlement "only on finding that it is fair, reasonable, and adequate." The Court is to ensure that the rights of passive Class Members are not jeopardized by the proposed Settlement Agreement. *See Amchem*, 521 U.S. at 623 (noting that the Rule 23(e) inquiry "protects unnamed class members from unjust or unfair settlements affecting their rights"). Where settlement precedes class certification, district courts must be "even more scrupulous than usual" when examining the fairness of the proposed settlement. *In re Warfarin Sodium Antitrust Litig.,* 391 F.3d at 534; *accord Hanlon,* 150 F.3d at 1026; *In re Motor Fuel Temperature Sales Practices Litig*., 271 F.R.D. 263, 270 (D. Kan. 2010).

In addition to the Rule 23 requirements, the Tenth Circuit in *Rutter & Wilbanks Corp. v. Shell Oil, Co*., 314 F.3d 1180, 1188 (10th Cir. 2002), set forth four factors relevant to the evaluation of a proposed settlement as fair, reasonable, and adequate:[11]

> (1) whether the proposed settlement was fairly and honestly negotiated; (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and (4) the judgment of the parties that the settlement is fair and reasonable.

[11] Although the *Rutter* factors predate the 2018 amendments to Rule 23, the considerations largely overlap, and the amended rule does not displace the earlier guidance. *See* FED. R. CIV. P. 23, advisory committee's note to 2018 amendment.

A. Class Counsel negotiated the Settlement Agreement at arm's length and, along with class representatives, adequately represented the Settlement Class.

From the outset, the Court must find that: (1) the class representatives and Class Counsel adequately represented the Settlement Class; and (2) the Settlement Agreement was negotiated at arm's length. FED. R. CIV. P. 23(e)(2)(A)-(B). Courts analyze the first procedural factor, adequacy of representation, in the same manner that they evaluate adequacy under Rule 23(a)(4). *See O'Connor v. Uber Techs., Inc*., No. 13-3826, 2019 WL 1437101, at *6 (N.D. Cal. Mar. 29, 2019); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig*., No. 05-1720, 2019 WL 359981, at *15 (E.D.N.Y. Jan. 28, 2019); *In re Crocs, Inc. Sec. Litig.,* 306 F.R.D. 672, 688 (D. Colo. 2014). This means that courts consider whether: (1) "the named plaintiffs and their counsel have any conflicts of interest with other class members"; and (2) "the named plaintiffs and their counsel [have] prosecute[d] the action vigorously on behalf of the class." *Rutter*, 314 F.3d at 1187–88.

i. Adequacy of Representation and Conflicts of Interest

First, no objector alleges, much less advances, any facts or evidence of fraud, collusion, or overreaching in connection with the Settlement Agreement. The Court, *supra,* made certain findings as to adequacy of representation, and those are likewise relevant here. Objector Morgan nevertheless points out that "[s]ettlements negotiated prior to formal class certification—such as this one—require the Court to be particularly vigilant not only for explicit collusion, but also for more subtle signs that [C]lass [C]ounsel have allowed pursuit of their own self-interests and that of certain [C]lass [M]embers to infect their negotiations." Morgan Obj. [Doc. No. 163] at 11.

There is ample evidence that the Settlement Agreement was vigorously negotiated. *See* Order [Doc. No. 138] at 10–11. The absence of adversity and counsel's inherent and unavoidable conflict in any class action settlement, however, complicate an ultimate determination on this point. The Settlement Agreement was reached after three months of negotiations. *See* Resp. Supp. Final Approval [Doc. No. 187], at 11. Before settlement discussions began, Plaintiffs' claims had been vigorously litigated. Following preliminary class certification for settlement purposes, there has been no indication that the claims the Settlement Class is being asked to relinquish are actually much stronger than was initially proposed, and thus worth more than the value the Settlement Agreement ascribes to them. Importantly, the Settlement Agreement explicitly does not release property damage or personal injury claims. *See* Settlement Agreement [Doc. No. 92], at 18.

The opt-out rate is low: it appears only 0.02% of the Settlement Class opted out. *See* Resp. Supp. Final Approval [Doc. No. 187], at 6; Peak Decl. ¶¶ 12–13.[12] Although the typical class action settlement notice is apt to yield a low response, the average opt-out rate for a products liability case is 0.1%. *See* Theodore Eisenberg & Geoffrey Miller, *The Role of Op-outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529 (2004). This gives some indication that the strength of the claims here has been accurately gauged. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813 (1985) ("If . . . the plaintiff's claim is sufficiently large or important . . . he will likely have

[12] Defendants have disclosed additional information on opt-outs that does not alter the Court's conclusions. *See* Notice [Doc. No. 246].

retained an attorney or have thought about filing suit, and should be fully capable of exercising his right to opt out.").

That the terms of the proposed New Jersey settlement were less favorable than the ones achieved here is further indication that the claims have been properly valued. *See* Prelim. Approval Order at 8. Objectors provide no direct evidence to the contrary, and all available data support the Court's preliminary determination that these claims have been vigorously litigated. This supports a finding of adequate representation. Any objections on this point are hereby overruled.

ii. Fair, Honest, Arm's-Length Negotiations

The second procedural factor—arm's-length negotiation—overlaps with the Tenth Circuit's consideration of "whether the proposed settlement was fairly and honestly negotiated." *Rutter*, 314 F.3d at 1188. The presence of the mediator weighs heavily in favor of this requirement being met. *See e.g., Poertner v. Gillette Co*., 618 F. App'x 624, 630 (11th Cir. 2015) (presence of a court-appointed mediator important to adequacy of representation).

Again, objectors raise no direct concerns on this issue. Plaintiffs assert, and the Court previously concluded, that the Settlement Agreement "is the product of extensive, non-collusive, arm's-length negotiations between experienced counsel who were thoroughly informed of the strengths and weaknesses of the case through discovery and motion practice, and whose negotiations were supervised by accomplished mediator Michael N. Ungar over the course of nine days of formal mediation sessions." Order [Doc. No. 138] at 10–11.

The Court therefore finds the Settlement Class was adequately represented by the class representatives and Class Counsel, who fairly and honestly negotiated the Settlement at arm's length.

B. The Settlement Agreement is substantively adequate.

The Parties, at the Court's request, have provided an approximate valuation for all forms of relief available under the Settlement Agreement. Since preliminary approval there have been several shifts in the deal's overall valuation. The Court acknowledged these discrepancies during the Fairness Hearing and the Parties have since addressed the substantive adequacy of the Agreement's terms in supplemental briefs. Nevertheless, several objectors raised concerns about substantive adequacy. *See, e.g.,* Hayes Obj. [Doc. No. 186], Ex. M at 20 ("The appliance rebate has no value to me.").

To merit final approval, a proposed settlement must comport with the following substantive factors: the relief provided for the Settlement Class must be adequate, and the Settlement must treat Class Members equitably. FED. R. CIV. P. 23(e)(2)(C)-(D).

Rule 23 sets out four criteria for assessing the substantive adequacy of the Settlement Agreement: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorneys' fees, including the timing of payment; and (iv) any agreement made in connection with the proposal. FED. R. CIV. P. 23(e)(2)(C)(i)-(iv).

i. The Settlement Agreement provides acceptable relief given the costs, risks, and delays of trial and appeal.

In granting final approval, the Court must consider "whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt" and "whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation." *Rutter*, 314 F.3d at 1188. These considerations overlap with Rule 23's requirement that the assessment of the Settlement Agreement's substantive adequacy be measured against the "the costs, risks, and delay of trial and appeal" of the underlying cases. FED. R. CIV. P. 23(e)(2)(C)(i).

If Class Members are forced to engage in continued litigation, there are serious questions of law and fact that place the ultimate outcome of such litigation in doubt. First, Plaintiffs would face the challenge of certifying claims under consumer protection laws across several states. *See, e.g., Porcell v. Lincoln Wood Prod.,* Inc., 713 F. Supp. 2d 1305, 1325 (D.N.M. 2010) (denying class certification where adjudication would require application of the law of nine jurisdictions to breach of warranty claims and the law of eight jurisdictions to unfair trade practices acts/consumer protection statutes claims); *Sec. Sys., Inc v. Alder Holdings, LLC*, 421 F. Supp. 3d 1186, 1197–98 (D. Utah 2019) (in a putative class action lawsuit, individualized issues of law and fact predominated on claims of fraudulent misrepresentation); *see also Amchem,* 521 U.S. at 591 (holding that a district court faced with a request for settlement-only class certification need not inquire whether case would present intractable problems of trial management) Whatever challenges these significant questions of law might pose, if Plaintiffs succeed in their claims, experts

estimate recoverable damages to be about seven percent (7%) of the purchase price, or about $50.00. *See* Mot. Att'y Fees, Lichtman Decl. [Doc. No. 142-2] ¶ 18. Incurred transaction costs in this case might therefore swallow any potential recovery. Plaintiffs would also have to wrestle against the reality that a voluntary recall meant to address the very injuries complained of here was already in place before many of the claims were brought. *See In re Aqua Dots Prods. Liab. Litig*., 654 F.3d 748, 753 (7th Cir. 2011) (affirming denial of class certification outside the settlement context due in part to product recall); *see also Conrad v. Boiron, Inc*., 869 F.3d 536, 539 (7th Cir. 2017) (affirming a denial of certification on grounds of adequacy of representation).

Under the Settlement Agreement, all Class Members are entitled to future warranty protection with an estimated value of $6.44–11.31 million. *See* Allen Decl. [Doc. No. 186-7]; *see also* Pls.' Suppl. Br. at 5. Class Members may also select an Enhanced Minimum Recall Rebate bringing their rebate payment to at least fifteen-and-a-half percent (15.5%) of their Washer's estimated purchase price (exceeding the estimated seven percent (7%) Plaintiffs would receive given a favorable jury verdict). Although the claims process is ongoing, the Enhanced Minimum Recall Rebate component has been valued at $12,763.09 based on 218 valid claims. *See* Pls.' Suppl. Br. [Doc. No. 206] at 1.

In addition, Class Members who experience Top Separation and Drain Pump Failures receive a full refund or full repair, respectively, plus up to $400.00 in consequential expenses. These components have been valued at $94,118.31 based on 462 valid claims. *Id*. Because the Settlement Agreement is uncapped, Defendants will pay the entire value of every eligible claim regardless of how many Class Members participate.

See, e.g., In re Nat'l Football League, 821 F.3d at 410 (affirming a district court's final approval of a class action settlement where the district court cited structural protections including uncapped monetary awards).

The most challenged aspect of the Settlement Agreement is a benefit entitled Recall Repair Additional Benefit. *See, e.g.,* Haynes Obj. ("The appliance rebate has no value to me. My experience with Samsung appliances includes this washing machine, a refrigerator, [and a hair dryer]. I do not plan to purchase additional Samsung appliances. Three strikes and you are out is an American tradition."); Morgan Obj. at 9 ("To receive any settlement value, Rebate Coupon claimants must complete two claims forms and spend hundreds or thousands of dollars on a Samsung appliance. This is not class relief. It's a Samsung sales program."); *see also* Cole, Oritz, Scher, Tischler Objs. [Doc. No. 186], Ex. M at 19, 20, 22, 29–31 (asserting that the rebate is insufficient).

It is an "[a]busive class action settlement in which plaintiffs receive promotional coupons or other nominal damages while class counsel receives large fees." *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995).

The Recall Repair Additional Benefit entitles claimants to a cash rebate of up to $85.00. Objector Morgan argues that this component of the Settlement Agreement makes it akin to those that have been set aside by appellate courts. *See,e.g., In re Gen. Motors Corp.,* 55 F.3d at 768 (proposed class action settlement set aside where the class would receive a coupon for discount on the purchase of new truck from manufacturer). The rebates here, however, are not the primary relief afforded to the Settlement Class. Claimants are entitled to a rebate in addition to other valuable benefits. *See Chambers v.*

Whirlpool Corp., 214 F. Supp. 3d 877, 895 (C.D. Cal. 2016) (approving a settlement where "in addition to coupon relief, the settlement provide[d] monetary and injunctive relief"). The benefit is transferrable to immediate family members, and the Settlement Class appears to be taking advantage of this: at least 1,237 claimants have already invoked the transferability feature. *See* Pls.' Suppl. Br. at 10.

Under these circumstances, the rebate benefit serves both the Settlement Class and Defendants, thereby increasing the overall value of the Settlement Agreement. *See In re Mexico Money Transfer Litig.*, 267 F.3d 743, 748 (7th Cir. 2001). It is not the sole benefit extended to the Settlement Class under the Settlement Agreement. Moreover, the Settlement Agreement specifically does not release property damage or personal injury claims. *See* Settlement Agreement [Doc. No. 92], at 18. This case is therefore unlike the coupon cases rejected by some circuits. All objections to the Settlement Agreement's substantive adequacy are overruled. The Court finds the value of immediate recovery here outweighs the "mere possibility of future relief after protracted and expensive litigation." *Rutter*, 314 F.3d at 1188.

ii. The Settlement Agreement's structure was designed for efficient claim processing and relief distribution.

Certain objectors have challenged the claims-processing procedure and relief-distribution methods instituted. *See, e.g.,* Martin Obj. [Doc. No. 186], Ex. M at 33 (claiming that the Settlement did not provide him a full refund even though he experienced Top Separation because he has no evidence documenting the event).

Although a claim form is meant to ensure that the claimant is entitled to compensation from a settlement fund, the claim process should be as simple, straightforward, and nonburdensome as possible. *See, e.g., Krakauer v. Dish Network, LLC*, No. 1:14-CV-333, 2017 WL 3206324, at *7 (M.D. N.C. July 27, 2017). In some cases, monies can be distributed without requiring class members to produce any proof. *In re Hydroxycut Mktg. & Sales Practices Litig.*, No. 09CV1088 BTM KSC, 2013 WL 6086933, *1 (S.D. Cal. Nov. 19, 2013) (noting that "[n]o proof of purchase is required to receive $25.00"). The Manual for Complex Litigation states that "[c]ompletion . . . of the claims forms should be no more burdensome than necessary," noting that "for purposes of administering a settlement . . . secondary forms of proof and estimates are generally acceptable." MANUAL FOR COMPLEX LITIGATION § 21.66 (4th ed. 2004).

The claims-administration process here allows for an efficient review of claims and swift distribution of benefits. As the Court noted in granting preliminary approval, it is significant that "no proof of purchase is required in order for Class Members to assert their rights under the [] Settlement." Prelim. Approval Order, [Doc. No. 138], at 11.

At the Fairness Hearing, the Court asked the Parties to address several claims-administration issues. The Court asked that the Parties address the fact that claimants for past Top Separation were less likely to have photographic evidence than those who experience future Top Separation. Those with future claims will be fully aware that, to facilitate the claims process, they may need to take a photo depicting the separation. Defendants have since made the concession to pay claims even without a photograph, and the Court agrees with Plaintiffs' assessment that "a Class Member who no longer owns

their Washer may be less likely to have a stray photograph of the Top Separation event but is no less likely to have submitted an insurance claim." Pls.' Suppl. Br. at 8. These flexible documentation requirements, assuring that the benefits of the Settlement Agreement are only distributed to proper and deserving claimants, favor final approval.[13]

Where claims are deficient, the process in place allows for those deficiencies to be cured. Mot. Final Approval, Ex. B ¶ 14. The claims period is thirty days long and begins to run once an email is sent to the claimant notifying her of the deficiency. Pls.' Suppl. Br. at 9. Defendants have further agreed to extend this period, instructing the Settlement Administrator to "accept any cured claims within 45 days irrespective of whether they would otherwise have been deemed untimely." *Id*. at 10.

In response to the Court's queries on the website and phone line through which claimants can learn about the claims process, Defendants have agreed to add links to the Settlement Website from its voluntary recall site and to keep the Settlement Website and call center live through 2023. *Id*.

The terms of the Settlement Agreement ensure efficient distribution of relief. For example, Settlement Class members who request a new Recall Repair are entitled to have that repair completed within fourteen days of the request. Otherwise, Samsung will provide a $50.00 equivalent card or replace the Settlement Class members' Washer.

[13] Objector Morgan comments on the requirement that Class Members who elect to receive the Recall Repair must attest that the machine will be operated in accordance with revised operating guidelines. *See* Morgan Obj. at 14. This requirement is reasonable and directly promotes public safety, by ensuring that Washers left in homes are operated in a way that minimizes the risk of Top Separation.

The Court finds that the Settlement Agreement asks that claimants fulfill only basic and flexible documentation requirements, which are no more burdensome than necessary. The claims-administration process involves no complex proofs or calculations and incorporates certain speed guarantees. The Court is satisfied that the Settlement structure was designed for efficient claim processing and relief distribution. Any objections on this point are hereby overruled.

iii. The proposed fee award, including the timing of the payment, weighs in favor of final approval.

Most objections in this consolidated case centered around the attorneys' fees requested. *See, e.g.*, Strass Obj. [Doc. No. 186], Ex. M at 3. The Court will defer the fee-award determination until after the detailed billing records have been carefully reviewed and will address pertinent objections at that time. *See, e.g., Martin v. Reid, 818* F.3d 302, 309 (7th Cir. 2016) (affirming a district court's decision to defer a fee award until after final approval and noting that "[n]othing in Rule 23 prohibits the deferral of the final fee award until after the agreement is approved, especially . . . where the fees are kept entirely separate from the funds that will be available for compensation"); *In re Petrobras Secs. Litig.,* 2018 WL 3091256, at *15 (S.D.N.Y. June 22, 2018) (deferring fifty-percent of the fee award because "counsel should not be paid in full before their clients have received any of their recovery, nor would it be helpful to eliminate an incentive for counsel to monitor the distribution agent and ensure that the settlement funds are distributed expeditiously"); *Averett v. Metalworking Lubricants Co.*, 2017 WL 4284748, at *7 (S.D. Ind. Sept. 27, 2017) (deferring fee to account for "improvements" fund that may never be spent).

Nevertheless, there are facts relevant to how the fees were negotiated, which favor final approval. Critically, because the Parties negotiated attorneys' fees after finalizing the substantive terms of the Settlement Agreement, the requested "fee award does not reduce the recovery to the class." *In re Sony SXRD Rear Projection Television Class Action Litig.*, No. 06-5173, 2008 WL 1956267, at *15–16 (S.D.N.Y. May 1, 2008) ("[R]egardless of the size of the fee award, class members who apply for recovery under the terms of the Settlement will receive the same benefit[.]").

Ultimately, "[c]ourts are charged with [] assessing the scope and size of any fee award." *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 786 (N.D. Ohio 2010); *see Stanton v. Boeing, Co.,* 327 F.3d 938, 964 (9th Cir. 2003) (agreement not to object did not relieve district court from obligation to review fee amount). Class Counsel will not be paid until after final approval of the Settlement, and after the Court is satisfied that the size of the award is reasonable under the law.

The proposed award, supported by detailed billing records, the Court's ultimate discretion in determining the size of the award, and the timing of the request and distribution of the fees all weigh in favor of approval. All objections on this point are hereby overruled, with the exception of those going to attorney fees to be addressed in a separate order awarding fees.

iv. Existing side agreements have been disclosed and do not suggest the Settlement Agreement is unfair.

Rule 23 contemplates that the Court should monitor any agreements to settle objector's claims. *See* FED. R. CIV. P. 23(e)(2)(C)(iv). This is because the outcome of these

side agreements may inform the Court as to whether the value of the Settlement Agreement is adequate. Assuming all other factors equal, where side agreements provide for the same per capita relief as has been afforded to the class, that tends to validate the adequacy of the class settlement. If side agreements resolve disputes for more than what is being offered to the class members, there should be adequate justification for the differential. After all, a higher settlement for objectors with similar damage claims might signify that the class members did not receive full value for their claims, and the Court has the authority to scrutinize the "buying out" of such objectors. *See* FED. R. CIV. P. 23(e)(2)(C)(iv) (one of the four factors in assessing the adequacy of the class relief is "any agreement required to be identified under Rule 23(e)(2), which requires settling parties to file a statement identifying any agreement made in connection with the settlement").

Certain Plaintiffs or Settlement Class Members, some with the assistance of Class Counsel, have independently negotiated with Defendants to receive direct compensation for property damage caused by Top Separation or Drain Pump Failure. *See* Mot. Final Approval, Ex. A ¶ 6. As the Settlement Agreement does not release property damage claims, and these negotiations are not required by, do not depend on, or otherwise impact the Settlement, they are not relevant here. *See id*.

There is another side agreement between Defendants and New Jersey Counsel. The Court has reviewed the side agreement and finds that: (1) its terms do not suggest the underlying Settlement Agreement is unfair; (2)this side agreement is to the ultimate benefit of the Settlement Class; and (3) the payments directed therein do not diminish the benefits to the Settlement Class under the Settlement Agreement. The side agreement between

Defendants and New Jersey Counsel is approved. All Parties have met their disclosure requirements under the rules.

C. The Settlement Agreement treats the Settlement Class equitably.

The fourth *Rutter* factor, and the only one not to directly overlap with the Rule 23(e)(2) inquiry, is "the judgment of the parties that the settlement is fair and reasonable." *Rutter*, 314 F.3d at 1189.

This Settlement Agreement builds on the structure established by the voluntary recall. All Settlement Class members benefit from the same relief options, although the relief for which they qualify depends on their specific circumstances: whether the claimant experienced Top Separation or Drain Pump Failure, and whether they selected the recall Rebate or the Recall Repair when participating in the voluntary recall.

The parties' view of a settlement as fair and reasonable is to be given considerable weight. *See Ashley v. Reg. Transp. Dist. & Amalgamated Transit Union*, No. 05-0156, 2008 WL 384579, *7 (D. Colo. Feb. 11, 2008) ("Counsel's judgment as to the fairness of the agreement is entitled to considerable weight."); *see also Wilkerson v. Martin Marietta Corp.*, 171 F.R.D. 273, 288–89 (D. Colo. 1997) ("[T]he recommendation of a settlement by experienced plaintiffs' counsel is entitled to great weight."); *Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540, 548 (D. Colo. 1989) ("Courts have consistently refused to substitute their business judgment for that of counsel and the parties."). "When a settlement is reached by experienced counsel after negotiations in an adversarial setting, there is an initial presumption that the settlement is fair and reasonable." *In re Molycorp, Inc. Sec. Litig.,* No. 12-CV-00292-RM-KMT, 2017 WL 4333997, at *4 (D. Colo. Feb. 15, 2017).

The Parties here agree that the Settlement Agreement is fair and reasonable, and—with the exception of objectors' concerns—the Motion for Final Approval remains largely unopposed. Mot. Final Approval at 13. Class representatives and Defendants, all highly familiar with the strengths and weaknesses of this litigation, support the terms of the Settlement Agreement. Objector Morgan states that he "does not contend that the Settlement did not extract enough value, in the aggregate, from [D]efendants." Resp. to Court's Questions [Doc. No. 211], at 1. To reiterate the Court's conclusions in granting preliminary approval, the Settlement "does not grant preferential treatment to Plaintiffs or Class Counsel." Prelim. Approval Order at 11.

The Court expressly finds that the Settlement Agreement is the result of extended, arm's-length negotiations among experienced counsel and is non-collusive. Any remaining objections as to this point are hereby overruled. The Court finds all the *Rutter* factors have been satisfactorily met.

CONCLUSION

Because the Settlement Class meets the requirements of Rule 23, the Court grants final class certification for settlement purposes. The Settlement Class is defined as:

> Every resident of the United States or its territories who was the original purchaser of a new Washer for household use. The Settlement Class excludes: (1) officers, directors, and employees of Defendants and Defendant Retailers, (2) insurers of Settlement Class Members, (3) subrogees or all entities claiming to be subrogated to the rights of a Washer purchaser or a Settlement Class Member, and (4) all third-party issuers or providers of extended warranties or service contracts for the Washers.

The release of claims under the Settlement Agreement is clear, easy to understand, and based on the same factual predicate as the underlying complaints. Further, the Court

finds that the Settlement Class has been provided with the best notice practicable and that notice to appropriate state and federal officials has been timely sent consistent with 28 U.S.C. § 1715. The Settlement is fair, adequate, and reasonable, satisfying all the Rule 23 requirements and the Tenth Circuit's additional guidance under *Rutter*. The Court therefore grants final approval.[14]

The Settlement Administrator has received, from certain members of the Settlement Class, requests for exclusion from the Settlement Class and has provided Class Counsel and Defendants' counsel copies of those requests. A list of the persons who have timely elected to be excluded from the Settlement has been submitted to the Court. *See* Perry Decl., [Doc. No. 246-1], Ex. A, at 6–23 (listing 797 valid requests for exclusion and providing the appropriate identifiers).

IT IS THEREFORE ORDERED that Plaintiffs' Unopposed Motion for Final Approval [Doc. No. 152] is **GRANTED**. An Order regarding attorneys' fees, representative fees, and expense reimbursements will follow, after review of counsels' detailed billing records is completed.

IT IS FURTHER ORDERED that Objector Morgan's Motion to Disqualify [Doc. No. 247] is **DENIED**.

[14] The Court has noted instances in which Defendants have made certain concessions having to do with the administration and logistical details of providing the relief set forth in the Settlement Agreement. These matters are included within the Court's express retention of jurisdiction set forth in the related Judgment to ensure performance under the Settlement Agreement.

IT IS FURTHER ORDERED that all persons named in the list submitted to the Court as having filed timely exclusions with the Settlement Administrator are hereby excluded from the Settlement Class and will not be bound by the terms of the Settlement Agreement. Otherwise, each individual or entity that falls within the definition of the Settlement Class shall be bound by the terms of the Settlement Agreement.

IT IS FURTHER ORDERED that, consistent with this Order and as required by the Settlement Agreement, the Parties shall carry out their respective obligations under the terms of the Settlement Agreement, to include Defendants' concessions having to do with the administration and logistical details of providing the relief set forth in the Settlement Agreement.

IT IS FURTHER ORDERED that Plaintiffs and Settlement Class Members have waived and relinquished claims, rights, and benefits as contemplated by the Settlement Agreement.

IT IS FURTHER ORDERED that upon entry of this Order and its accompanying Judgment, enforcement of the Settlement Agreement shall be the exclusive remedy for all Settlement Class Members, in accordance with the terms of the Settlement Agreement.

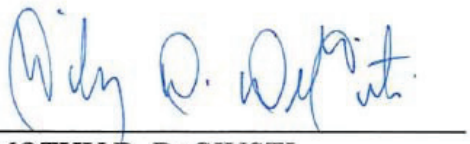
IT IS FURTHER ORDERED that, if after entry of this Order and its accompanying Judgment by the Court, a notice of appeal is timely filed, and an appellate court makes a final determination that this Order and accompanying Judgment are in any respect invalid, contrary to law, or unenforceable (save for such determinations that are limited to Attorneys' Fees and Expenses and/or Service Awards), except as the Parties may elect pursuant to rights set forth under the Settlement Agreement, this Order and the

accompanying Judgment shall be vacated, and Defendants may fully contest certification of any class as if no Settlement Class had been certified. In addition, the Parties may return to their respective positions in this lawsuit as they existed immediately before the Parties executed the Settlement Agreement, and nothing stated herein or in the Settlement Agreement shall be deemed an admission or waiver of any kind by any of the Parties or used as evidence against, or over the objection of, any of the Parties for any purpose in this action or in any other action.

IT IS FURTHER ORDERED that nothing contained in the Settlement Agreement, any documents relating to the Settlement, the Preliminary Approval Order, or this Order and its accompanying Judgment shall be construed, deemed, or offered as an admission by any of the Parties or any member of the Settlement Class for any purpose in any judicial or administrative action or proceeding of any kind, whether in law or equity.

IT IS FURTHER ORDERED that the Court shall dismiss with prejudice all claims alleged in the Consolidated MDL Lawsuit and in each of the consolidated Lawsuits against all Defendants and Defendant Retailers. A separate judgment will be entered accordingly.

IT IS SO ORDERED this 22nd day of May, 2020.



TIMOTHY D. DeGIUSTI
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE: SAMSUNG TOP-LOAD WASHING MACHINE MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	:	MDL Case No. 17-ml-2792-D
	:	District Judge Timothy D. DeGiusti
This document relates to: ALL CASES	:	

JUDGMENT

In a separate Order, incorporated herein by reference, the Court decided the Motion by Plaintiffs and Class Counsel [Doc. No. 152] asking for final approval of the proposed Settlement Agreement. Considering the Motion and related briefing, presentations at the fairness hearing, a series of supplemental briefs, and subsequent disclosures of side agreements, the Court certified the Settlement Class[1] and granted final approval of the Settlement Agreement.

Consistent with that Order, the Court hereby enters judgment effectuating the Parties' Settlement and dismissing with prejudice all claims alleged in the Consolidated MDL Lawsuit and in each of the consolidated Lawsuits against all Defendants and Defendant Retailers.

[1] Capitalized terms undefined in this Judgment are given the definition reflected in the Settlement Agreement.

In entering this Judgment the Court specifically refers to and invokes the Full Faith and Credit Clause of the United States Constitution and the doctrine of comity, and requests that any court in any other jurisdiction reviewing, construing, or applying the Court's Order and Judgment implement and enforce its terms in their entirety.

Without affecting the finality of the Order and this Judgment in any way, the Court hereby reserves jurisdiction over: (1) implementation of the Settlement Agreement; (2) all matters related to the administration and consummation of the Settlement Agreement; and (3) all Parties to the Consolidated MDL Lawsuit, including any and all Parties to the consolidated Lawsuits, for the purpose of implementing, enforcing, monitoring compliance with, effectuating, administering, and interpreting the provisions of the Settlement Agreement and the related Order and Judgment.

In its Order, the Court noted instances in which Defendants made certain concessions having to do with the administration and logistical details of providing the relief set forth in the Settlement Agreement. These matters are included within the Court's express retention of jurisdiction to ensure performance under the Settlement Agreement.

ENTERED this 22nd day of May, 2020.

TIMOTHY D. DeGIUSTI
Chief United States District Judge