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

IN RE SAMSUNG TOP-LOAD WASHING MACHINE MARKETING, SALES PRACTICS AND PRODUCT LIABILITY LITIGATION	)	
	)	MDL Case No. 17-ml-2792-D
	)	District Judge Timothy D. DeGiusti

JOHN DOUGLAS MORGAN'S NOTICE OF INTENTION TO APPEAR AND OBJECTION TO PROPOSED SETTLEMENT AND ATTORNEYS' FEE REQUEST

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules and Statutes

Other Authorities

NOTICE OF INTENTION TO APPEAR

This is Objector John Douglas Morgan's Notice of Intent to Appear at the Fairness Hearing in this action. He will appear through his undersigned counsel.

INTRODUCTION

Class counsel told the Court that the proposed settlement would be worth a "minimum" of $65 million and up to $162 million (Dkt. 135 at 15, 22), but this is a façade. Class members receive nothing from the settlement unless they file a claim, and as of April 23, only about 65,000 claims have been received. Dkt. 152 at 14. While more claims may be received by the August 6 deadline, it is vanishingly unlikely that their value will exceed class counsel's request for $6.24 million in fees and costs.

The settlement resembles a Potemkin village—populated with fanciful structures devised to create the illusion of substance and value. About 95% of claims are for *rebates*, requiring class members to spend hundreds of dollars to get a dime from the settlement. Class counsel and the defendant know that the bulk will never be redeemed. Class counsel touts an Enhanced Rebate of "at least 15.5% of their Washer's estimated purchase price" (Dkt. 152 at 10), but many class members cannot get anything from this provision due to the voluntary recall rebate Samsung already negotiated with regulators. Similarly, class counsel claims full refunds are a settlement benefit for washing machines with top separation, but Samsung was already paying such refunds. The only new benefit is for other expenses, allegedly for up to $400, but while limiting cleanup costs to just $50 per claim.

Rule 23 requires the Court to isolate the reality of relief actually delivered to class members. Actual settlement value will not exceed a couple million dollars. Meanwhile, class counsel has requested $6 million in attorneys' fees and an extravagant lodestar multiplier of 2.33 for a case with little risk. The proposed settlement makes class attorneys the "foremost

beneficiaries" of the settlement, an outcome that should not satisfy Rule 23. *E.g., In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 179 (3d Cir. 2013) ("*Baby Prods.*").

Morgan asks that the Court reject this predominantly coupon settlement. The Class Action Fairness Act ("CAFA"), a federal law that is conspicuously absent from plaintiffs' papers, disfavors coupons settlements like this one and demands heightened scrutiny. Under such scrutiny, it becomes clear that this settlement unfairly benefits the lawyers over the absent class members. If the Court approves the settlement, CAFA requires it to defer attorneys' fees until the redeemed value of the rebates is known. If the Court nevertheless awards fees now, there is no justification for *any* lodestar enhancement, much less the 2.3 multiplier class counsel seeks. *See* Section IV.

ARGUMENT

I. Objector John Douglas Morgan is a member of the Settlement Class.

Objector Morgan is the original purchaser, for household use, of a new Samsung top-loading washing machine, with model number WA50K8600AV/A2 and serial number 0DZ25DDH601812N. Decl. of John Douglas Morgan ("Morgan Decl.") ¶ 3. He is not covered by any exclusions. *Id.* ¶ 4. Morgan therefore is a member of the settlement class with standing to object. Fed. R. Civ. P. 23(e)(5). Morgan's address is 4070 Rasmussen Road, Park City, Utah 84098. His telephone number is (801) 706-3355. Morgan Decl. ¶ 2.

Hamilton Lincoln Law Institute's Center for Class Action Fairness ("CCAF"), through attorney M. Frank Bednarz, represents Morgan *pro bono*. (Morgan's niece is the president of the Hamilton Lincoln Law Institute.) CCAF represents class members *pro bono* where class counsel employs unfair class action procedures to benefit themselves at the expense of the class. Since it was founded in 2009, CCAF has "recouped more than $100 million for class members" by driving the settling parties to reach an improved bargain or by reducing outsized fee awards. Andrea Estes, *Critics hit law firms' bills after class-action lawsuits*, BOSTON GLOBE (Dec. 17, 2017).

To avoid doubts about his motives, Morgan is willing to stipulate to an injunction prohibiting him from accepting compensation in exchange for the settlement of this objection. *See* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623 (2009) (suggesting inalienability of objections). Morgan brings this objection through CCAF in good faith to protect the interests of the class. He adopts any objections regarding the settlement and fee request that are not inconsistent with this one. His objection applies to the entire class. Bednarz gives notice of his intent to appear at the fairness hearing, and requests 15 minutes of speaking time to discuss matters raised in this Objection.

II. A Court owes a fiduciary duty to unnamed class members.

"Class-action settlements are different from other settlements. The parties to an ordinary settlement bargain away only their own rights—which is why ordinary settlements do not require court approval." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013). Unlike ordinary settlements, "class-action settlements affect not only the interests of the parties and counsel who negotiate them, but also the interests of unnamed class members who, by definition, are not present during the negotiations. *Id.* "[T]hus, there is always the danger that the parties and counsel will bargain away the interests of unnamed class members in order to maximize their own." *Id.*

To guard against this danger, a district court must act as a "fiduciary for the class . . . with 'a jealous regard'" for the rights and interests of absent class members. *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010) (cleaned up). It "must remain alert to the possibility that some class counsel may urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013) (cleaned up). "[T]he importance of safeguarding the class' interests cannot be underestimated." *Gottlieb v. Barry*, 43 F.3d 474, 490 (10th Cir. 1994).

There should be no presumption in favor of settlement approval: the proponents of a settlement bear the burden of proving its fairness. *See, e.g.*, *Koby v. ARS Nat'l Servs.*, 846 F.3d

1071, 1079 (9th Cir. 2017); *accord* American Law Institute, *Principles of the Law of Aggregate Litig.* § 3.05(c) (2010). Settlements negotiated prior to formal class certification—such as this one—require that the Court "be particularly vigilant" not only for explicit collusion, but also "for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *Pampers*, 724 F.3d at 718.

III. A settlement that prioritizes the interests of class counsel over absent class members cannot be approved under Rule 23(e).

To determine whether a settlement is "fair" under Rule 23(e), courts should compare the agreed attorneys' fees with the amount the class members will receive to ensure proportionality. *E.g., In re Bluetooth Headset Prods. Liab.,* 654 F.3d 935, 943 (9th Cir. 2011). If class counsel has anointed itself the primary beneficiary, a settlement is unfair under Rule 23(e). *See Allen v. Bedolla*, 787 F.3d 1218, 1224 & n.4 (9th Cir. 2015) (zeroing in on "economic reality" of payment to the class); *Pampers*, 724 F.3d at 718 (rejecting "settlement that gives preferential treatment to class counsel");. For settlement fairness, the "ratio that is relevant . . . is the ratio of (1) the fee to (2) the fee plus what the class members received." *Pearson v. NBTY, Inc.*, 772 F.3d 778, 781 (7th Cir. 2014); *Fager v. CenturyLink Comms.*, 854 F.3d 1167, 1177 (10th Cir. 2016) (endorsing *Pearson*). *But see In re Motor Fuel Temperature Sales Pract. Lit.*, 872 F.3d 1094, 1120-21 (10th Cir. 2017) (rejecting *Pearson* without acknowledging *Fager*).

Here, class counsel stands to gain more than their putative clients. To sidestep this fact, class counsel repeatedly represented to the Court that the "minimum" value of the settlement was "$65 million" (Dkt. 135 at 15, 23, 27). This figure is fictional. Class counsel bases the value of settlement on two false assumptions: that all class members will file valid claims and then redeem the coupons. For most class members, including Morgan, the settlement only provides *any* value if the class member first spends hundreds of dollars on a new Samsung appliance or washing machine. Few very of the 2.8 million class members whose claims are being released will do this. Some will not want to purchase another Samsung appliance given that defendant

allegedly marketed "exploding" washing machines. Most simply will not have an opportunity to gainfully use such a rebate within the year before it expires. The settlement perversely requires most class members to give hundreds of dollars to Samsung in order to obtain one cent of dubious relief. *See In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 803 (3d Cir. 1995). As of April 23, only 65,000 class members have filed claims. Dkt. 154 at 14. "About 95%" of these claims receive ***only rebate relief*** (*id.* at 11), and few rebates will be redeemed for *any* value—a far cry from the $65 million to $125 million claimed value.

The vast majority of class members will receive nothing from the settlement. "Such inequities in treatment make a settlement unfair," for neither class counsel nor the named representatives are entitled to disregard their "fiduciary responsibilities" and enrich themselves while leaving the class behind. *Pampers*, 724 F.3d at 718-21. Revealing the unfairness, the settlement includes all of the "red flags" the Ninth Circuit identified as warning signs of self-dealing by class counsel: **(1)** a disproportionate distribution of fees to counsel; **(2)** a "clear sailing agreement" (the defendant's agreement not to oppose a certain sum in attorneys' fees); and **(3)** a "kicker" (a segregated fee fund that reverts any excess fees to the defendant). *Bluetooth*, 654 F.3d at 947. The presence of these attorney-directed benefits prevents the Court from correcting the imbalance between fees and class recovery. *See id.* at 946-49; *Pearson*, 772 F.3d at 786; *see also Childs v. United Life Ins. Co.*, 2012 U.S. Dist. LEXIS 70113, at *13-14 (N.D. Okla. May 21, 2012) (denying approval of settlement that included these features).

Class counsel negotiated for themselves $6.5 million while imposing a labyrinthian claims process on the class, virtually assuring attorneys will be the primary beneficiaries. Because the combination of clear sailing and kicker prevents the Court from correcting the imbalance by reducing the fee award, the proposed settlement should be rejected in its entirety.

A. The settlement is worth little to class members.

Class members must file a claim to recover anything. Class members who have not suffered specific failures in their washers must also first participate in Samsung's voluntary

recall, by first applying for (and in the case of the Enhanced Rebate, *receiving*) a recall remedy from Samsung before they can proceed to claim *anything* under the settlement. If they jump through these hoops, the vast majority of the class can get no more than a rebate.

For ease of reference, this objection uses "short names" for the relief[1] as follows:

Short Name	Full Name	Description of Relief
Rebate Coupon	Recall Repair Additional Benefit	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. *See* Dkt. 92-1 at 26-27.
Enhanced Rebate	Enhanced Minimum Recall Rebate	Claimants who already received a rebate for buying new washing machine under Samsung's voluntary recall—if the rebate was less than 15.5% the estimated price of the recalled machine—will receive an additional rebate to make a total of 15.5% the price of the recalled washing machine. *Id.* at 24-25.
Top Separation	Top Separation Relief	Claimants who can photographically prove top separation of their washing machine can receive a full refund (to the extent not already provided) and up to $400 in expenses, capped at $50 in cleanup costs. *Id.* at 29-30.
Drain Pump	Drain Pump Failure Relief	Claimants who 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 3 years. *Id.* at 33-34.

The overwhelming majority of claims received so far are for the two forms of rebate relief. And even among the other two types of claim—Top Separation and Drain Pump relief—the settlement provides little value overall.

[1] The settlement purports a fifth form of relief: "Commitment for Recall Repair," but class members cannot claim it through the settlement administrator. Instead, this purported relief requires that, *starting after final approval*, Samsung must efficiently fulfill its voluntary recall and repair washing machines within 14 days of a request. Dkt. 92-1 at 31. If Samsung fails to do so, the class member must submit for verification a detailed claim along with signed letter under penalty of perjury that the class member did not cause the delay, and if Samsung accepts the claim, it will issue "a one-time $50.00 cash-equivalent card." *Id.* at 31-32. Neither the settlement, nor the long-form notice appears to say *where*, exactly, class members are supposed to send this claim. Given the extensive conditions on this alleged relief, and the unlikelihood class members would ever find out about their eligibility for it (if any are ever eligible), the Court can safely assume this provision is worth essentially nothing.

1. Most class members can claim only *de facto* coupons ("rebates").

"[A]bout 95% of claims" fall in the two rebate categories. Dkt. 152 at 11. Both require class members to buy another Samsung appliance or washing machine to receive *any* relief, and both require class members to first sign up for Samsung's voluntary recall.

That recall program is not a settlement benefit. It was established by an agreement Samsung reached with the Consumer Product Safety Commission in 2016, before most of the consolidated suits were even filed. *Compare Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1210 (10th Cir. 2012) (voluntary recall filed with the applicable government agency rendered class action prudentially moot)(Gorsuch, J.). The ongoing voluntary recall allows class members to either: request a free ***repair*** to strengthen the top of the washer, or claim a ***recall rebate*** on the purchase of a new washing machine.[2] The recall rebate requires owners "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." *Id.*

To get a Rebate Coupon, class members must first ask Samsung for a *repair* under its recall program. After requesting the repair, they then must file a claim, attesting under penalty of perjury that "Claimant (i) has affixed to his or her Washer's control panel the control panel guide provided in the Home Label Kit, and (ii) operates his or her Washer in accordance with the additional safety instructions provided in the Home Label Kit." Dkt. 92-1 at 27-28. The claim form employs even more emphatic language: "Do you ***at all times*** operate your Washer in accordance with the additional instructions . . . ?" Dkt. 108-6 (emphasis added). This attestation is significant because the Label Kit gives detailed washing instructions for things like bedding. While the settlement does not formally waive property damage or personal injury claims, if a future injury resulted from overloading a washer, Samsung would surely produce the sworn claim form in defense.

[2] Samsung, *Voluntary Recall of Certain Top-Load Washers*, https://pages.samsung.com/us/tlw/.

Fig. 1. Original settings (left) and Home Label Kit settings (right), requiring consumers to put bedding and denim in lower-speed spin cycles. Source: https://www.consumerreports.org/consumerist/samsung-washing-machine-owners-complain-of-new-problem-after-recall-repair/

Assuming their claim for a Rebate Coupon is accepted, claimants are sent *another* claim form, the "Recall Repair Additional Benefit Rebate Form." *Id.* at 28. Following final approval of the settlement, claimants have just one year to buy a new Samsung appliance and send in proof of payment along with the completed form in order to get their "cash rebate." *Id.* Rebates can only be transferred to a household member, narrowly defined. *Id.* at 5-6. So if the same household has no need to purchase another dishwasher, clothes dryer, range, or refrigerator over the course of a year, the Rebate Coupon is worthless. If the class member *does* buy an appliance, but choses a different brand, the Rebate Coupon is worthless. Only if the claimant buys a *Samsung* microwave they can claim a $25 rebate; $50 for a *Samsung* major appliance; $75 for a *Samsung* major appliance over $900; or $85 for a *Samsung* major appliance over $1500.

In short, these are the ***nine*** steps Morgan would need to go through to receive relief under the settlement (he does not qualify for any other claim): (1) Contact Samsung and arrange for recall repair; (2) Wait for the "average repair time . . . 7 business days," *supra* n.2; (3) Allow Samsung-certified technicians inside home to reinforce washer; (4) Apply "Home Label Kit" to washer (class member may need to request a new kit if they lost or never received the one Samsung sent in 2016); (5) Complete the correct 4-page claim form, including certifying under penalty of perjury that the Home Label Kit has been applied and "at all times"

followed; (6) Wait for final approval of settlement; (7) Receive and retain the "Recall Repair Additional Benefit Rebate Form" sent by settlement administrator; (8) Purchase at full price a Samsung appliance within year after final approval; and (9) Complete the second claim form and submit it along with proof of payment. At the end of this arduous journey, class members like Morgan can receive . . . about 5% off a $1500 Samsung refrigerator.

Thus, 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, and a poor one. The Rebate Coupons are even worse than typical coupons because they do not reduce the price consumers need to pay; claimants still need to pay full retail, and then hope that Samsung agrees the claimant purchased from a duly "licensed retail or internet store." Dkt. 92-1 at 28. Few people will jump through all of these hoops for so dubious a reward, which primarily benefits Samsung. To the extent class counsel pretends otherwise, they should have put their money where their mouth is and made their fees proportional to and conditioned on actual class relief.

The low redemption rate for class action coupons is well-known, and was one of the motivating factors behind the Class Action Fairness Act ("CAFA"). *See* 28 U.S.C. § 1711 note § 2(a)(3)(A). The "claims rate does not equal redemption rate, and there are good reasons to expect that the redemption rate in this case will be significantly lower than the claims rate." *Cannon v. Ashburn Corp.*, 2018 U.S. Dist. LEXIS 64044, at *43 (D.N.J. Apr. 17, 2018). Even if class counsel had accounted for low redemption rates, the face value of redeemed coupons overestimates their value. Coupons are worth less than cash. *Redman v. RadioShack Corp.*, 768 F.3d 622, 631 (7th Cir. 2014). Submitting rebates costs time and money.

The Rebate Coupons are precisely the sort of worthless remedy that CAFA was meant to curtail. It is an "[a]busive class action settlement[] in which plaintiffs receive promotional coupons or other nominal damages while class counsel receive large fees." S. Rep. 109-14, at 32. *See also GMC Pick-Up*, 55 F.3d at 807 (overturning approval of settlement that would have

provide $1000 coupons on the purchase of a new GM truck, which the court found to be "a sophisticated GM marketing program."); *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1069 (C.D. Cal. 2010) (denying approval where most the purported relief from the settlement was the face value of $500-$1000 rebates for new Honda vehicles). At the very least only *redeemed* rebates should be credited as class relief.

The Enhanced Rebate purported benefit is arguably even more narrow, because it requires class members to have "already" participated in the Samsung recall by buying a whole new washing machine and having discarding their recalled machine. Dkt. 92-1 at 24. As part of Samsung's voluntary recall, they offered consumers a rebate for replacing their recalled model new washing machine, but the size of each rebate was "determined by the model and age of your washer." *Supra* n.2. Therefore, consumers with relatively new machines were offered hundreds of dollars for their recall rebate—much more than 15.5%—while owners with older machines were offered less. Class members who received larger rebates can claim absolutely nothing under the settlement, ever.

The settling parties decline to provide the number of class members who accepted a recall rebate worth less than 15.5%, but this number is probably quite low. This is because owners were not likely induced to junk their washing machines for a pittance. The number of class members who recognize they qualify for additional rebate will be even smaller still.

The Enhanced Rebate also requires class members to have "already received" the underlying recall rebate. Dkt. 92-1 at 25. Because it takes "4 to 6 weeks" to receive the original recall rebate from Samsung (*supra* n.2), it is logistically difficult for class members to receive an Enhanced Rebate unless they had already participated. Many class members would have applied for the repair option years ago, so cannot now elect a recall refund even if they're now willing to junk their older machines for 15.5% of its original value. Class members first learning of the settlement must contact Samsung, buy a new machine, submit a rebate form with Samsung (which requires submitting the serial number of the new washer, and the serial

number stickers off the recalled washer), and wait 4 to 6 weeks to get this recall rebate before August 6, only to turn around and submit another claim form with the administrator to get whatever the difference is between Samsung's recall rebate offer and 15.5%. The value of Enhanced Rebate claims is likely quite low, and the Court should "affirmatively seek out" the actual figures before approving the settlement. *Baby Prods.*, 708 F.3d at 174.

Both rebate claims include an unnecessary claims process that only benefits Samsung. There was no need for a claims process at all for the rebate relief. All rebate claimants participated in the voluntary recall, so Samsung has recent addresses for potential claimants and could have simply sent all "repair" class members Recall Coupons. And because Samsung knows what recall rebates it issued, it could simply send any class members who got less than 15.5% an Enhanced Rebates as a check automatically. Instead, class counsel agreed that everyone instead gets sent postcard notice and a complex claims process, which is costlier simply sending checks and Rebate Coupons. The Court need not debate the best claims process, because this will take care of itself when a settlement aligns the interests of class and counsel. If counsel gets paid in proportion to relief *actually* paid to the class, then counsel will craft a claims process to "maximize the settlement benefits actually received by the class." *Fager*, 854 F.3d at 1177 (quoting *Pearson*, 772 F.3d at 781).

This Court should not approve a settlement that, for most claimants, amounts to little more than paying attorneys to create a sales promotion for the benefit of Samsung.

2. The "Top Separation" and "Drain Pump" claims provide little relief and less relief that Samsung was not already providing.

About 5% (so perhaps 3250) claims received by April 23 were for Top Separation or Drain Pump relief, but the value of these is modest compared to class counsel's fee request.

At first glance, the "Top Separation" relief appears to provide claimants the full retail value of their washing machine plus up to $400 for expenses, but the actual relief from *this settlement* is less. The settlement only provides a refund and expenses "to the extent not

previously provided to the Settlement Class Member." Dkt. 92-1 at 29. It appears Samsung's policy was *already* to refund customers who experienced top separation as a matter of course.[3]

The settlement itself therefore only appears to offer up to $400 more than Samsung was already providing to Top Separation claimants. But even this value is unlikely to be achieved because of how the settlement artificially limits the compensable costs that class members are most likely to have—cleanup after an "exploded" washing machine. Cleanup costs have been restricted to just $50 per claim. The settlement helpfully suggests that class members can get reimbursement of "laundromat expenses" (Dkt. 92-1 at 7, 15), but valid claims require "documentation evidencing" the expenses (*id.* at 30, 33), and who keeps documentation of laundromat expenses, which may have been incurred years ago? Coin-operated machines don't even provide receipts. Class members with "exploding" washers who have already been refunded by Samsung but lack expense receipts quite possibly get *nothing*.

Drain Pump claimants who experienced failures prior to the notice date may claim past repair costs capped at $150. Dkt. 92-1 at 33. Otherwise, Samsung will fix new drain pump malfunctions. *Id.* Either way, claimants may submit claims for reimbursement of up to $400 in related expenses, and here again cleanup costs are restricted to $50 per claim. *Id.* The Drain Pump relief amounts to warranty-like coverage for a specific kind of failure—that is, for class members find out and remember they can submit a statement under penalty of perjury to Samsung (Dkt. 92-1 at 34) for an out-of-warranty washer. The value of this relief is so speculative that even class counsel, boasting of a $65 million dollar value for Top Separation, was "not comfortable giving the Court an estimate." Dkt. 135 at 27.

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[3] Numerous accounts of customers receiving full refunds for the machines exist online, including: https://www.saferproducts.gov/ViewIncident/1599290 (full refund promised in 2016 for 5-year old machine); https://www.reddit.com/bgco8d/ (refund of recalled machine which would be at least 3 years old in 2019); https://www.reddit.com/b9mru6/ (replacement of recalled machine at least 3 years old in 2019); https://www.reddit.com/2iid9x/ (refund in 2014 of 14-month-old machine); https://www.consumerreports.org/washing-machines/some-samsung-washers-may-pose-safety-risk/?fb_comment_id=1193582164014201_1477641452274936 (refund in 2018 for "what I paid plus some.").

In the very unlikely event that all Top Separation and Drain Pump claims are deemed valid and paid to their maximum value, these components of the settlement would at most be worth about $1.6 million as of April 23.[4] This figure pales compared to class counsel's assurance that the "floor" value of the settlement was $65 million. Dkt. 135 at 27. In any event, the Court should request the full value of these claims *after* the administrator has validated the claims and tabulated the payments that will *actually* be sent to class members.

B. The actual value of the settlement relief is required to evaluate Rule 23(e) fairness.

A *comparison* of fees to class relief is required by Rule 23(e). *Bluetooth*, 654 F.3d at 943. In *Bluetooth,* the district court awarded fees on a lodestar basis (reducing lodestar by nearly 50% after scrutinizing billing records), but the Ninth Circuit nevertheless reversed approval because the district court made "no comparison between the settlement's attorneys' fees award and the benefit to the class or degree of success in the litigation" and "no comparison between the lodestar amount and a reasonable percentage award." *Id.*

In making this comparison, courts take a realistic approach in evaluating settlement relief. *E.g., Fager*, 854 F.3d at 1177 ("We see merit in an approach that ties attorney recovery to the amount actually paid to the class."); *Pearson*, 772 F.3d 778; *Baby Prods.*, 708 F.3d at 179 n.13 (district court should consider actual redemptions). "Cases are better decided on reality than on fiction." *Pampers*, 724 F.3d at 721 (internal quotation omitted).

Here, class counsel has presented fictitious figures of "$65 million" or "$125 million," but in reality the actual benefits class members receive will be dwarfed by attorneys' fees. The refusal to structure a settlement to maximize class recovery to instead provide for their own personal benefit was a breach of class counsel's fiduciary duty. *E.g. Tech. Training Assocs., Inc. v. Buccaneers Ltd. P'ship*, 874 F.3d 692, 694 (11th Cir. 2017).

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[4] This estimate is based on Class Counsel's representation that about 3% of the claims (so 1950) are for the Drain Pump, Dkt. 146 at 2, and therefore about 2% (so 1300) are for Top Separation: $400 x 1300 + $550 x 1950 = $1,592,500.

"Basing the award of attorneys' fees on this ratio, which shows how the aggregate value of the settlement is being split between class counsel and the class, gives class counsel an incentive to design the claims process in such a way as will maximize the settlement benefits actually received by the class, rather than to connive with the defendant in formulating claims-filing procedures that discourage filing and so reduce the benefit to the class." *Fager*, 854 F.3d at 1176-77 (quoting *Pearson*, 772 F.3d at 781).[5] By contrast, when the settlement pie can be filled with "potential rather than actual" benefits, class counsel retains all its problematic incentives with respect to seeking actual payouts to the class. *See Pearson*, 772 F.3d at 783, 787 (quoting *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014)). There is serious risk of shortchanging the class in a claims-made settlement like this because every claim unfiled or unused represents money that defendant does not have to pay. "This effectively creates a financial *disincentive* on the Defendants' part to seek out Class Members and pay claims." *Childs*, 2012 U.S. Dist. LEXIS 70113, at *14 (N.D. Okla. May 21, 2012).

When class counsel's fee is tied to what the class actually receives, class counsel is motivated to deliver actual relief to the class. For example, in *Baby Products*, the settling parties unsuccessfully attempted to defend a settlement with a claims process that paid less than $3 million of its $35.5 million settlement fund to the class, arguing as here that it was too difficult to get money to class members without fraud. 708 F.3d at 169-70. On remand, the parties identified thousands of class members who could be issued $15 million directly. *McDonough v. Toys "R" Us*, 80 F. Supp. 3d 626 (E.D. Pa. 2015). After the Seventh Circuit reversed settlement approval in *Pearson*, the renegotiated settlement provided millions of dollars more in payments

[5] *In re Motor Fuel Temperature Sales Practices Litig.*, 872 F.3d 1094, 1121 (10th Cir. 2017), without mentioning *Fager*, declined to impose a bright-line *Pearson* cap in that case because the settlement offered benefits to the public at large "even when significant compensation to class members is out of reach." *Id.* Here, there are no "positive societal effects" of providing rebates for Samsung appliances, and the notion that compensation was out of reach is laughable. Samsung has committed millions of dollars to this settlement, and before that to the recall agreement reached with CPSC. Class counsel has simply crafted a settlement prioritizing themselves over the class members.

to class members. *Pearson v. Target Corp.*, No. 1:11-cv-07972, Dkt. 288 (N.D. Ill. Aug. 25, 2016).

Optimistically, the class here stands to recover $2 or $3 million, while class counsel bargained for itself a segregated fee award with clear sailing of over $6 million. Because the attorneys claim perhaps 67-75% of the value, and the settlement contains all the indicia of self-dealing identified in *Bluetooth*, this Court should reject the settlement. *See Fager*, 854 F.3d at 1177 (criticizing a fee that amounted to 68% of the constructive common fund).

C. The segregated fee structure guarantees class counsel stands to recover millions, while most of the class gets coupons of questionable value.

The attorneys did not merely safeguard up to a $6.55 million fee request disproportionate to what the class receives. The negotiated provisions insulate their fee request by (1) reverting any unawarded fees to Samsung and (2) preventing Samsung from opposing those fees. These clauses make it impossible to correct the disproportion and still retain the full class benefit.

1. The clear-sailing and "kicker" provisions, in combination with the excessive fee request, require rejection of the settlement.

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." *Bluetooth*, 654 F.3d at 947. A "kicker arrangement reverting unpaid attorneys' fees to the defendant rather than to the class amplifies the danger" that is "already suggested by a clear sailing provision." *Id.* 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.* These clauses serve only to protect class counsel by deterring court scrutiny of the fee award. *E.g.*, Charles Silver, *Due Process and the Lodestar Method*, 74 TULANE L. REV. 1809, 1839 (2000). "If the defendant is willing to pay a certain sum in attorneys' fees as part of the settlement package . . . there is ***no apparent reason*** the class should not benefit from the excess allotted for fees." *Bluetooth*, 654 F.3d at 949 (emphasis added).

Typically, the solution to disproportionate allocation is "to increase the share of the settlement received by the class, at the expense of class counsel." *Redman*, 768 F.3d at 632. For example, if the class eventually receives $3 million from the claims process, class counsel might appropriately claim 25% of the constructive common fund (the $6.55m fee fund + $3m in claims recovery), which works out nearly $2.4 million. *Gottlieb*, 43 F.3d at 488 (endorsing the Ninth Circuit's 25% benchmark). If class counsel received this amount and the other $3.85 million were disbursed to the claimants *pro rata*, the overall settlement would be fair. The defendant would pay the exact same amount as they agreed and class members would more than double their actual recovery. Instead, the kicker makes it impossible to reallocate the excessive fee request: any decrease in the Rule 23(h) request redounds to defendants, rather than the class. The settlement must be rejected unless the reversionary structure is "delete[d]." *Eubank*, 753 F.3d at 723.

2. Class counsel's negotiated fee award is entitled no deference.

Class counsel argues that their clear sailing fee request "greatly reduc[es] the Court's fiduciary role in overseeing the award." Dkt. 142 at 14-15. This assertion gets both the law and facts backwards. As a matter of law, Rule 23(e) requires courts to consider the terms *and timing* of the proposed fee award, and attorneys' fee agreements with clear sailing and kicker are *suspect* because they rob the court of adversarial presentation—the court must be especially vigilant in evaluating such deals. *See Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 525 (1st Cir. 1991). And as a matter of fact, "separate" attorneys' fees and recovery are a "package deal," so every dollar of clear sailing fees represents a dollar Samsung was willing pay, but the class can never enjoy. *Johnston v. Comerica Mortgage Corp.*, 83 F.3d 241, 246 & n.11 (8th Cir. 1996) ("the potential for abuse is heightened by the defendants' agreement not to contest fees").

The Court must exercise enhanced—not reduced—vigilance when attorneys earmark money for their own benefit. The fact that a fee was "separately negotiated" does not change this: defendants aren't stupid, and "economically rational" defendants anticipate what

plaintiffs will request as their attorneys' part of the settlement when negotiating class relief. *Pearson*, 772 F.3d at 786-87. "[T]he separate negotiation of attorney fees presents the opportunity for the attorneys to trade relief benefitting the class for a higher fee for themselves." *Johnston*, 83 F.3d at 246 n.11; *Weinberger*, 925 F.2d at 525. Class counsel argues that the "attorney fees to be awarded in this case to Class Counsel did not, and will not, diminish the recovery to the Class in any way." Dkt. 142 at 25. Appellate courts reject this economic fiction. "[I]n essence the entire settlement amount comes from the same source. The award to the class and the agreement on attorney fees represent a package deal." *Johnston*, 83 F.3d at 246; *see also Bluetooth*, 654 F.3d at 949; *Eubank*, 753 F.3d at 723; *Redman*, 768 F.3d at 637 (placing fees and class recovery in "separate compartments" is "defect of proposed settlement"); *GMC Pick-Up Truck*, 55 F.3d at 820 (severable fee structure "is, for practical purposes, a constructive common fund"). "If an agreement is reached on the amount of a settlement fund and a separate amount for attorney fees" then "the sum of the two amounts ordinarily should be treated as a settlement fund for the benefit of the class." MANUAL FOR COMPLEX LITIGATION § 21.71 (4th ed. 2008).

We know fees are a "package deal" because *in these very proceedings* Samsung rejected a settlement where the "material term" of attorneys' fees was deemed too high. Samsung argued precisely this point in resisting the Orenstein plaintiffs' argument to enforce its putative settlement against Samsung. *See Orenstein v. Samsung Elecs. Am. Inc.*, No. 15-cv-4054, Dkt. 48 (D.N.J. May 18, 2018) (describing a $200,000 fee increase as a "material change"). Just as in this settlement, plaintiffs to the putative New Jersey settlement represented "the counsel fee issue was negotiated only after the parties agreed upon material terms." *Orenstein*, Dkt. 47-1 at 13 (Orenstein plaintiffs' motion to enforce settlement) (emphasis in original).

Whether attorneys' fees were negotiated on the third or ninth day of mediation, every dollar that Samsung agrees to pay as fees is a dollar it did *not* spend on the class. *See Vought v. Bank of Am., N.A.*, 901 F. Supp. 2d 1071, 1101 (C.D. Ill. 2012) (rejecting settlement where it

"it undoubtedly did not escape either party's attention that every dollar not claimed from the fund was one dollar that [defendant] could use to pay class counsel's fees."). Samsung could have, would have, and *actually did* reject a settlement because the total cost to Samsung was too high. To be lawyer-driven and self-dealing, a settlement need not be actually collusive. Courts "must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests . . . to infect the negotiations." *Bluetooth*, 654 F.3d at 947. There need only be acquiescence for such self-dealing to occur: "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." *GMC Pick-Up*, 55 F.3d at 819-20.

Here, Samsung and class counsel have tacitly agreed to provide over $6 million for attorneys' fees and mostly illusory relief to the class. Samsung's liability has been reduced and the claims against it will be released.[6] Meanwhile class counsel tells the court that this is a "$65 million" settlement justifying an oversized fee request. Such a tilted settlement cannot be fair, reasonable, or adequate and should be rejected.

IV. Class counsel's fee award should be based on the value of that actual class relief.

"That the defendant in form agrees to pay the fees independently of any money award or injunctive relief provided to the class in the agreement does not detract from the need to carefully scrutinize the fee award." *Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003). Having agreed to contribute a fixed sum of money in settlement of the suit, defendants have no interest in the amount of fees awarded to counsel. It is thus "necess[ary] for the judge to

[6] The release provided by settlement is obscure to Objector and possibly overbroad. While plaintiffs were supposed to file a consolidated amended complaint and post the operative complaint on the settlement website (Dkt. 92-1 at 18), neither has occurred. The settlement releases all claims related "in any way" to Top Separation and Drain Pump failure in any underlying suit except for personal injury and property damage claims. *Id.* at 46-47. As of this date, the undersigned was unable to examine the myriad underlying complaints to ascertain whether this release is reasonable.

assume the advocates role left unfulfilled by the defendants' departure" in order to protect the interests of the class. *Gottlieb*, 43 F.3d at 490.

A. CAFA requires fees to be based on the redeemed value of the rebates.

The rebates available to class members under the settlement—constituting 95% of claims to date—are "coupons" for purposes of CAFA. Accordingly, any attorneys' fees attributable to the rebates can be awarded only after the actual value of the redeemed rebates is known and must be based on that redeemed value. 28 U.S.C. § 1712(a) In all cases a fee award needs to be attuned to the result actually achieved for the class. *See, e.g.*, *Bluetooth*, 654 F.3d at 942. Here, that result depends overwhelmingly on the redemption rate of those rebates.

1. Attorneys' fees attributable to the rebates must be based on the value of those rebates actually redeemed.

Section 1712 of CAFA requires that attorneys' fees attributable to the coupons to "be based on the value to class members of the coupons that are redeemed," *i.e.*, the value of coupons *actually used*, rather than the number issued. *HP Inkjet*, 716 F.3d at 1175-76. This law is "intended to put an end to the 'inequities' that arise when class counsel receive attorneys' fees that are grossly disproportionate to the actual value of the coupon relief obtained for the class." *Id.* at 1179. Thus, under § 1712(a), "the portion of any attorney's fee award to class counsel that is attributable to the award of coupons shall be based on the value to class members of the coupons that are redeemed."

When there meaningful non-coupon settlement relief, CAFA allows courts to apply a lodestar-based award for that portion of the recovery. Using the data provided by class counsel, however, the portion of non-coupon relief currently hovers at a mere 5% of claims. Even if the percentage were higher, the rebate redemption rate is still critical to the court's analysis. In any settlement, a "fundamental focus" in awarding fees is the "result *actually* achieved for class members." Notes of Advisory Committee on 2003 Amendments to Rule 23 (emphasis added). "The lodestar amount is particularly inappropriate where, as here, the

benefit achieved for the class is small and the lodestar award is large." *True*, 749 F. Supp. 2d at 1077. "Where the parties have reached a coupon settlement, the actual monetary value of the coupons redeemed by the class is a prime consideration in th[e] assessment [of reasonable fees]: it is an indispensable factor in evaluating the reasonableness of the lodestar figure, and it is determinative when calculating an award as a percentage of the recovery." *Fouks v. Red Wing Hotel Corp.*, 2013 U.S. Dist. LEXIS 165588, at *19 (D. Minn. Nov. 21, 2013). "Because redemption rates have a direct and potentially devastating impact on the actual value received by the class, such lack of evidence prevents any reasoned assessment of the settlement's actual value to the class." *Sobel v. Hertz*, 2011 U.S. Dist. LEXIS 68984, at *36 (D. Nev. June 27, 2011).

The policy reasons for basing attorneys' fees on the redemption rate are clear: § 1712 was enacted to target "abusive 'coupon settlements,' where defendants and class counsel agree to provide coupons of dubious value to the class members but to pay class counsel with cash." *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 705-06 (7th Cir. 2015) (internal citation omitted); *see also* 28 U.S.C. § 1711, note § 2(a)(3) ("Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where—(A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value.").

Thus, regardless of the approach this Court applies, the Court should not award attorneys' fees until after the redemption rate is known. *See HP Inkjet*, 716 F.3d at 1186 n.18.

2. The "Recall Repair Additional Benefit" rebates are "coupons" for purposes of CAFA.

Although the parties never use the term "coupon," they cannot rely on their label of "rebate" to evade the effects of CAFA. Numerous courts have rejected similar semantic efforts to avoid the legal conclusion that relief constitutes a coupon. *E.g.*, *HP Inkjet*, 716 F.3d at 1176 ("e-credits" are a "euphemism" for coupons); *Rougvie v. Ascena Retail Grp.*, 2016 WL 4111320, at *27 (E.D. Pa. July 29, 2016) ("vouchers"); *True*, 749 F. Supp. 2d at 1069 ("rebates"); *Sobel*, 2011 WL 2559565, at *11-*12 ("certificates").

Congress did not define the term "coupon" in CAFA. *See* 28 U.S.C. § 1711. "Where a statute does not define a key term, [courts] look to the word's ordinary meaning." *HP Inkjet*, 716 F.3d at 1173. A coupon is "[a] code or detachable part of a ticket, card, or advertisement that entitles the holder to a certain benefit, such as a cash refund or a gift." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011). *Accord Synfuel v. DHL Express (USA)*, 463 F.3d 646, 654 (7th Cir. 2006) (A "discount on a proposed purchase" is typical coupon relief). The rebates provided by the settlement are coupons. They entitle class members to a "refund": a post-purchase discount on a new Samsung appliance or washer. That they are called "cash rebates" is irrelevant; the legal effect of the relief "is a question of function, not just labeling." *Khatib v. County of Orange*, 639 F.3d 898, 905 (9th Cir. 2011). Coupon settlements are problematic because they: (1) often do not provide meaningful compensation to class members; (2) often fail to disgorge ill-gotten gains from the defendant; and (3) often require class members to do future business with the defendant in order to receive compensation. *See Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1302 (S.D. Fla. 2007). These "cash rebates" exhibit all three problems, and should be considered coupons.

3. New York law does not override § 1712 of CAFA.

Plaintiffs assert that "New York law . . . determines the reasonableness of Class Counsel's fee request." Dkt. 142 at 10. This is incorrect. The governing law for fee awards in a coupon settlement in federal court is § 1712, notwithstanding state law. *See, e.g.*, *Davis v. Cole Haan, Inc.*, 2013 U.S. Dist. LEXIS 151813, 2013 WL 5718452 (N.D. Cal. Oct. 21, 2013); *Dardarian v. OfficeMax N. Am., Inc.*, 2014 U.S. Dist. LEXIS 178463, 2014 WL 7463317 (N.D. Cal. Dec. 30, 2014); *Cohen v. R.I. Tpk. & Bridge Auth.*, 2012 U.S. Dist. LEXIS 26647, 2012 WL 723088 (D. R.I. Mar. 1, 2012). A prime object of CAFA's criticism was the "abuse[]" of upside-down federalism of imposing state law on national class actions. *See* 28 U.S.C. § 1711 note §2(a)(4)(C). Otherwise, in MDL proceedings, class counsel could use the most generous state

laws nationwide to determine fees, despite the vast majority of class members having no connection to that state, thus undermining class-member protections in CAFA and Rule 23.

The authorities cited by plaintiffs do not dictate a different result. *Chieftain Royalty Co. v. Enervest Energy Institution*, 888 F.3d 455, 462 (10th Cir. 2018), did not involve a fee award under CAFA and expressly noted that it "would be a more challenging issue if a federal rule of procedure" stated that fees should be calculated according to a specific methodology—as CAFA does. Further, even in cases where CAFA is not applicable, under *Chieftain Royalty*, the relevant question is whether "state law provides for the recovery of an attorney fee as part of the claim being asserted." *Id.* at 461 (quoting 10 Wright & Miller, et al., FEDERAL PRACTICE AND PROCEDURES § 2669 at 263 (3d ed. 2014)); *see also id.* at 460 (evaluating whether state right to fees is "part and parcel of the cause of action"). Plaintiffs have not cited any New York statute or even a case that provides for the recovery of fees as part of the class's claims. Instead, they admit that New York law "provides that federal fee jurisprudence is an 'appropriate guide'" for awarding fees in class actions. Dkt. 142 at 11. In the cases they cite in support of this point, even, the attorneys' fee awards are based on civil practice rules—not any underlying substantive law governing the claims. *See id.* There is no valid concern that the application of either CAFA or Rule 23 in diversity cases would violate the Rules Enabling Act.

Even outside the coupon context, it is doubtful that the New York Civil Practice Law and Rules would control the award of fees in a nationwide class action settlement in federal court. Beyond CAFA, Federal Rule of Civil Procedure 23(h) is a trans-substantive procedural rule that trumps inconsistent state law when the two conflict. *See Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*., 130 S.Ct. 1431 (2010). To the extent that New York or other state law would permit a lodestar award without consideration of class benefit, such procedure would be unreasonable under 23(h) and thus must yield to federal law. *See Inkjet*, 716 F.3d at 1186 n.18. Alternatively, if fees are considered a matter of substance rather than procedure such that state law applies, it is unconstitutional to apply the substantive law of one state to absent class

members who have no connection to that state. *See Phillips Petro. v. Shutts*, 472 U.S. 797, 818 (1985). The court need not decide this larger issue, however, because in the coupon context, CAFA overrides New York law to the extent it is inconsistent under the Supremacy Clause.

Here, the primary forms of relief—selected by 95% of the 65,000 class members who filed claims as of April 23—is a "rebate" that a class member may claim only upon spending their own money to buy a new Samsung appliance or washing machine and that cannot be transferred to anyone who is not household member. "Where a coupon or rebate is not freely transferable on the open market, as is the case here, it has even less value." *True*, 749 F. Supp. 2d at 1075. At this stage, it is unknown how many class members will redeem these rebates. Even using the unrealistic assumption that *all* of those rebates are for $85, and *all* of those rebates are actually redeemed, the total value is only about $5.2 million. The ultimate value of the class relief is likely to be less than class counsel's $6 million fee request.

B. No fee multiplier is warranted.

Even if the Court rejects the applicability of CAFA and awards lodestar-based attorneys' fees at this stage of the case, no fee multiplier is warranted. In *Perdue v. Kenny A.*, the Supreme Court held that "there is a 'strong presumption' that the lodestar figure is reasonable" without an enhancement multiplier. 559 U.S. 542, 546, 554 (2010). An enhancement is justified only in "rare and exceptional" circumstances where "specific evidence" demonstrates that a lodestar fee alone "would not have been adequate to attract competent counsel." *Id.* at 554.

Kenny A.'s limitation on lodestar enhancements was made with respect to attorneys' fees awarded pursuant to 42 U.S.C. § 1988, which provides that a prevailing party in certain civil rights actions may recover "a reasonable attorney's fee as part of the costs." The limitation on § 1988's "reasonable" fee awards should apply equally to "reasonable" fee awards made under Rule 23(h), as a number of courts have recognized. *See, e.g.*, *Bluetooth*, 654 F.3d at 942 n.7; *In re Sears, Roebuck & Co. Front-Loading Washer Prods. Liability Litig.*, 867 F.3d 791 (7th Cir. 2017); *cf. also Chieftain Royalty*, 888 F.3d at 463-64 (observing that Oklahoma law would apply

Kenny A. in settlement context). Further, the purpose of awarding reasonable fees is "to induce a capable attorney to undertake [a meritorious] representation" by assuring him that he will be paid for that work. *Kenny A.*, 559 U.S. at 552. If anything, the need to encourage attorneys to vindicate the fundamental civil rights of individuals unable to afford counsel is far greater. *Cf. Eddy v. Colonial Life Ins. Co of Am.*, 59 F.3d 201, 204 (D.C. Cir. 1995).

There are no exceptional circumstances that justify class counsel's request for a 2.3 lodestar multiplier. *See Rosenbaum v. MacAllister*, 64 F.3d 1439, 1447 (10th Cir. 1995) (reversing 3.16 multiplier as conscience-shocking). Nor have class counsel provided the specific evidence required for *any* lodestar enhancement. Instead, they rely on some of the very factors the Supreme Court instructs should not be used to justify an enhancement. *E.g.* Dkt. 142 (citing "difficult questions of law that required skillful handling"; the "exceptional"—yet currently unknown—result obtained; the contingent nature of their compensation; and counsel's skill). But the "complexity of a case generally may not be used as a ground for an enhancement because these factors presumably are fully reflected in the number of billable hours recorded by counsel." *Kenny A.*, 559 U.S. at 553 (cleaned up). And "the quality of an attorney's performance" already is "reflected in the reasonable hourly rate" and "should not be used to adjust the lodestar." *Id.* Similarly, "superior results are relevant only to the extent it can be shown that they are the result of superior attorney performance . . . not adequately taken into account in the lodestar calculation." Lastly, contingency is no longer a proper basis for lodestar enhancement. *Bluetooth*, 654 F.3d at 942 n.7.

C. Independently, class counsel's fee request is insufficiently documented.

Even if the Court were inclined to apply a lodestar analysis, class counsel did not provide sufficient information to meet its burden of justifying the requested fees. *Hershey v. ExxonMobil Oil Corp.*, 550 Fed. Appx. 566, 574 (10th Cir. 2013). "[C]ounsel for the party claiming the fees … [must] submit[] meticulous, contemporaneous time records that reveal, for each lawyer for whom fees are sought, all hours for which compensation is requested and

how those hours were allotted to specific tasks." *Case by Case v. Unified Sch. Dist. No. 233*, 157 F.3d 1243, 1250 (10th Cir. 1998).

The lodestar information is limited to high-level general descriptions in a declaration with three pages listing purported hours and rates. *See* Dkt. 142-1. It lacks even minimal information about the number of hours expended on general categories of work, and whether steps were taken to avoid duplication and churn. This is entirely inadequate for any lodestar calculation, let alone a fee award on the basis of lodestar. *See Tommey v. Computer Sciences Corp.*, 2015 WL 1623025, 2015 U.S. Dist. LEXIS 48011, at *8-*9 (D. Kan. Apr. 13, 2015) (without lodestar data "the Court cannot determine if the amount of proposed attorneys' fees is reasonable" even when the request is made for a solely percentage-based award); *Flores v. Mamma Lombardi's of Holbrook, Inc.*, 104 F. Supp. 3d 290, 305 (E.D.N.Y. 2015) (failure to submit timesheets "provides a basis to deny the fee application in its entirety").

Class counsel's failure to submit any breakdown of hours worked prevents class members and the Court from evaluating the reasonableness of those hours, and so should prevent the award of attorneys' fees on the basis of lodestar. *See, e.g., Otey v. Crowdflower, Inc.*, No. 12-cv-05524-JST, 2014 U.S. Dist. LEXIS 52192, at *26 (N.D. Cal. Apr. 15, 2014) ("The Court is . . . unable to determine whether the hours spent are reasonable, because Plaintiffs' counsel have provided no evidence or itemized records to support the hours they worked."). Class counsel has failed to meet the bare minimum of "listing [its] hours and identifying the general subject matter of [its] time expenditures." *Fischer v. SJB-P.D., Inc.*, 214 F.3d 1115, 1121 (9th Cir. 2000).

CONCLUSION

For the foregoing reasons, the Court should not approve the settlement. If the Court were to approve the settlement, it should delay a Rule 23(h) award until the value of the relief is known, and also require class counsel to submit more detailed billing, which the Court wisely required counsel to keep in order to receive attorneys' fees. *See* Dkt. 52 at 3 n.1.

Dated: June 7, 2019

/s/ M. Frank Bednarz
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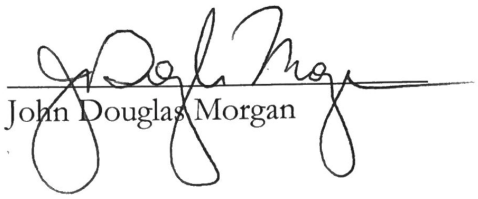
Certificate of Service

I hereby certify that on this 7th day of June, 2019, I filed the foregoing Notice of Intent to Appear and Objection with the Clerk of the Court for the Western District of Oklahoma via the Court's CM/ECF system. Based on the records currently on file in this case, the Clerk of the Court will transmit a Notice of Electronic filing to all parties of record in this matter.

/s/ M. Frank Bednarz
M. Frank Bednarz

I, John Douglas Morgan, am the objector. I sign this written objection drafted by my attorneys as required by the Class Notice on June 7, 2019.

June 7, 2019



John Douglas Morgan