IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE WAWA, INC DATA SECURITY LITIGATION

This document relates to: Consumer Track

Case No. 19-6019-GEKP

Class Action

OBJECTION OF THEODORE H. FRANK

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INTRODUCTION

This Court now confronts a classic question of fiction versus reality. The settling parties would have this Court reflexively adopt the notion that this settlement provides a $12.2 million benefit to class members. Objector Theodore H. Frank instead asks this Court to the take the realistic approach required by Fed. R. Civ. P. 23(e) and Third Circuit case law, and to recognize what the class will ***actually*** receive from this settlement—just over $1 million of Wawa gift cards (that do not qualify as "gift cards" under federal law because they can expire), and a tiny bit of cash. Using a claims-made process, the parties create the illusion of class relief. In reality, the class attorneys are raking in over 50% of the actual settlement benefit, thus making themselves the "foremost beneficiaries" of the settlement. *In re Baby Products Antitrust Litigation.*, 708 F.3d 163, 179 (3d Cir. 2013) ("*Baby Prods.*"). Rule 23(e) forbids this.

It would therefore be error to approve the settlement and the fee award. The settling parties are entitled to reach an arm's-length agreement that Wawa's total settlement liability will only be about $4.2 million. They are not entitled to allocate that recovery so that class counsel collects the majority of those proceeds.

REQUIRED STATEMENT

Frank's objection applies to the entire class. His mailing address is 1629 K Street. NW, Suite 300, Washington, DC 20006. Declaration of Theodore H. Frank ¶2. As documented in his declaration, Frank is a member of the class as defined in the preliminary approval order and amended settlement agreement. *Id.* ¶4 and Exhibit 1.

Frank is the co-founder and Director of Litigation of the Hamilton Lincoln Law Institute ("HLLI"), a public interest law firm that houses the Center for Class Action Fairness ("CCAF"). CCAF, established in 2009, represents class members *pro bono* in class actions where class counsel employs unfair practices to benefit themselves at the expense of the class. *See id.* at ¶¶13-15. CCAF has "develop[ed] the expertise to spot problematic settlement provisions and attorneys'

fees." Elizabeth Chamblee Burch, *Publicly Funded Objectors*, 19 THEORETICAL INQUIRIES IN LAW 47, 57 & n.37 (2018). Over that time CCAF has recouped over $200 million for class members by driving settling parties to reach an improved bargain or by reducing outsized fee awards. *See, e.g.*, *McDonough v. Toys "R" Us*, 80 F. Supp. 3d 626, 661 (E.D. Pa. 2015).

Frank objects to the unduly burdensome requirement of providing objection history. *See* Frank Decl. ¶16 (citing cases). This information is irrelevant to the matter at hand: it is the "merits of an objection" that "are relevant, not amateurism or experience." *Pearson v. Target Corp.*, 968 F.3d 827, 831 n.1 (7th Cir. 2020); *In re Paper Antitrust Litig*., 751 F.2d 562, 587 (3d Cir. 1984). But to the extent the Court believes it relevant, CCAF's success—including a 3-0 record in Third Circuit appeals—should weigh in favor of his objection here, and Frank has provided the information demanded. Frank Decl. ¶17.

HLLI attorney Adam Schulman, will appear on Frank's behalf at the Fairness Hearing, scheduled for January 26, 2022. Frank reserves the right to make use of all documents entered on to the docket. He also reserves the right to cross-examine any witnesses who testify at the hearing. He adopts any objections not inconsistent with this one.

ARGUMENT

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

"Class-action settlements are different from other settlements." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013). In class actions "the district court cannot rely on the adversarial process to protect the interests of the persons most affected by the litigation—namely, the class." *Id.* at 718. "And thus there is always the danger that the parties and counsel will bargain away the interests of unnamed class members in order to maximize their own." *Id.* at 715. "Because class actions are rife with potential conflicts of interest between class counsel and class members, . . . judges presiding over such actions are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole." *In re Baby Prods Antitrust Litig.*, 708 F.3d 163, 175 (3d Cir. 2013) (quotation

omitted); *accord In re GMC Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995) ("*GM Trucks*") (Becker, J.). As such, the Court itself assumes a derivative "fiduciary" role for absent class members. *In re Google Inc. Cookie Placement Consumer Priv. Litig.*, 934 F.3d 316, 326 (3d Cir. 2019).

The Court's oversight role does not end at making sure that the settling parties engaged in "'hard fought' negotiations." *Pampers*, 724 F.3d at 717. Although it is *necessary* that a settlement is at "arm's length" without express collusion between the settling parties, it is not *sufficient. See Redman v. RadioShack Corp.*, 768 F.3d 622, 628 (7th Cir. 2014). Because of the defendant's indifference as to the allocation of the settlement funds, courts must look for "subtle signs that class counsel have allowed pursuit of their own self-interest and that of certain class members to infect the negotiations." *Pampers*, 724 F.3d at 718 (internal quotation omitted). And for signs that "self-interest, even if not purposeful collusion" has "seep[ed] its way into the settlement terms." *Roes v. SFBSC Mgmt. LLC*, 944 F.3d 1035, 1060 (9th Cir. 2019). "In reviewing a proposed settlement, a court should not apply any presumption that the settlement is fair and reasonable." Am. Law Institute, *Principles of the Law of Aggregate Litig.* § 3.05 (c) (2010). "The burden of proving the fairness of the settlement is on the proponents." *Pampers*, 724 F.3d at 718; *accord GM Trucks*, 55 F.3d at 785. In this case, that burden is yet heightened because this settlement has been proposed before class certification. Delaying certification until settlement poses various problems, *see GM Trucks*, 55 F.3d at 786-800, and calls for heightened judicial scrutiny, *id.* at 807.

In investigating the "economic reality" of this settlement, the Court's first step must be "affirmatively seek[ing] out" the necessary claims data to ascertain class benefit. *GM Trucks*, 55 F.3d at 821; *Baby Prods.*, 708 F.3d at 174. This information is critical to the vital second step of the analysis: ensuring that class members and not their counsel are the "foremost beneficiaries" of the settlement. *Baby Prods.*, 708 F.3d at 179. Appeals courts reverse settlements that accord "preferential treatment" to class counsel or to the class representatives at the expense of absent class members. *See, e.g.*, *Pampers*, 724 F.3d at 718; *Pearson*, 772 F.3d at 781-83; *Redman*, 768 F.3d 622. As of the 2018 Amendments, Rule 23(e) now codifies this concern about lawyer-driven

settlements, requiring consideration of "the effectiveness of any proposed method of distributing relief to the class" and assurance the class's recovery is commensurate with "the terms of any proposed award of attorney's fees" Fed. R. Civ. P. 23(e)(2)(c)(ii)-(iii); *see also Briseño v. Henderson,* 998 F.3d 1014, 1023-27 (9th Cir. 2021).

Preferential treatment to class counsel is the gist of Frank's objection here. He does not argue that Wawa must pay the $12.2 million that plaintiffs tout as having been "made available"; but if the parties agree to reversion provisions that lead to Wawa paying just one-third of that, the parties cannot pretend that the settlement was actually worth $12.2 million. The settlement is unfair because class counsel is appropriating an excessive amount of the real settlement value for itself.

II. The proposed settlement is unfair, as the class is not the foremost beneficiary.

This is a "claims-made" settlement—one where class members must submit a claims form to obtain compensation. The abuse of claims-made settlements to inflate attorneys' fees and deflate defendants' obligations to class members has been the subject of substantial criticism. *E.g.*, *Pearson*, 772 F.3d at 787 (reversing approval of an attorney-centric "selfish" claims made settlement); *Briseño*, 998 F.3d 1014 (same); Howard M. Erichson, *Aggregation As Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. 859, 892-83 (2016) (citing, *inter alia*, *Baby Products*). That said, Frank does not object to the claims-made process as *per se* unreasonable in this case, but the parties must not be permitted to create the illusion of class benefit using money that will revert to the defendants.

Rule 23(e) requires evaluation of a "claims-made" settlement by the objective standard of the "effectiveness" of the distribution—what the class *actually* got. Rule 23(e)(2)(C)(ii). Settling parties attempting to maximize attorneys' fees while minimizing a defendant's expense might ask a court to look at a hypothetical world where the settlement fund *might have been* exhausted, however unlikely. Thus, we see plaintiffs depict a $12.2 million fund, of which class counsel seek more than $3 million as their attorney award, amounting to 24.9% of the $12.2 million settlement. Dkt. 258 at 24-32. On this view, it is of no consequence how the funds are ultimately distributed

among the settlement administrator's costs, those class members claiming compensation, and the reversion to the Defendants. This approach exalts fiction over reality, even though cases—especially class action cases that determine the rights of millions of consumers—"are better decided on reality than on fiction." *Pampers*, 724 F.3d at 721 (internal quotation omitted).[1]

The Third Circuit has adopted the realistic view that courts must judge a settlement by what the class *actually* receives:

> [the court's] inquiry needs to be, as much as possible, practical and not abstract. If the parties have not on their own initiative supplied the information needed to make the necessary findings, the court should affirmatively seek out such information. Making these findings may also require a court to withhold final approval of a settlement until the actual distribution of funds can be estimated with reasonable accuracy.

Baby Products, 708 F.3d at 174 (internal quotation omitted). An accurate appraisal is even more essential in cases involving coupon-adjacent settlements like this because "Congress require[s]

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[1] Nor does this view consider how many Wawa "gift cards" class members will redeem. (It is a misleading trade practice to call the Wawa settlement instruments "gift cards" because they can expire after only one year. 12 C.F.R. § 205.20(e).) As the Court has already addressed, there is an issue of whether these instruments constitute "coupons" for purposes of the limitations of the Class Action Fairness Act, 28 U.S.C. § 1712. Dkt. 233 at 13-14, 19-22. HLLI has successfully litigated in support of applying CAFA's "coupon" strictures in numerous cases around the country, including in this Circuit. *See, e.g.*, *In re HP Inkjet Printer Litig.* 716 F.3d 1173 (9th Cir. 2013); *Cannon v. Ashburn Corp.*, 2018 WL 1806046, 2018 U.S. Dist. LEXIS 64044 (D.N.J. Apr. 17, 2018); *Rougvie v. Ascena Retail Grp., Inc.*, 2016 WL 4111320, 2016 U.S. Dist. LEXIS 99235 (E.D. Pa. Jul. 29, 2016). While the expiring Wawa instruments in this settlement are coupons under the plain language of Section 1712, some courts apply an extratextual test that excludes some coupons from CAFA's definition of "coupon." *E.g.*, *McKinney-Drobnis v. Oreshack*, __F.4th__, 2021 WL 4890277 (9th Cir. Oct. 20, 2021); *In re Lumber Liquidators Chinese-Manufactured Flooring Prod. Mktg., Sales Practices & Prods. Liab. Litig.*, 952 F.3d 471 (4th Cir. 2020). The Court need not reach the issue: this settlement flunks Rule 23(e)(2)(C) whether or not the settlement relief constitutes "coupon" relief. *See Roes*, 944 F.3d at 1060 (reserving the question of CAFA's applicability, but reversing, as unfair, a settlement that served the "self-interests" of class counsel at the expense of the class).

courts to base attorneys' fees . . . 'on the value to class members of the coupons that are redeemed' rather than on the face value of the coupons." *Id.* at 179 n.13 (quoting 28 U.S.C § 1712).

The 2018 Amendments ratified the *Baby Products* position by requiring courts to consider the "effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims" and the "the terms of any proposed award of attorney's fees." Rule 23(e)(2)(C)(ii)-(iii). This inquiry entails looking to the amounts actually claimed, not those that could have "potentially" been claimed. *Briseño*, 998 F.3d at 1026; *accord In re Samsung Top-Load Washing Machine Mktg., Sales Practices & Prods. Liab. Litig.,* 997 F.3d 1077, 1094 (10th Cir. 2021) (requiring "findings . . . based on the terms of the settlement and in light of then-prevailing information on the class participation rate.").

As of this filing's date, the parties have not yet submitted the settlement's claims data. To approve a settlement without an accounting of settlement funds is reversible error under Third Circuit law. *Baby Prods.*, 708 F.3d at 174-75; *GM Trucks*, 55 F.3d at 822.

Because of the structures, burdens, and caps of the claims process, Frank would be very surprised if the total class recovery meaningfully exceeds the $1 million floor attendant to Tier 1 claims. The settling parties appear to be priming the Court for the expected outcome that the negotiated fees will outstrip the class's actual recovery. Dkt. 258 at 30. But, as discussed more below, they are wrong to argue that the law indulges such a result.

In analyzing the fairness of a proposed settlement under Rule 23(e) and the reasonableness of fees under Rule 23(h), district courts "need to consider the level of direct benefit provided to the class" to ensure that the class members rather than their counsel are the "foremost beneficiaries" of the settlement. *Baby Prods.*, 708 F.3d at 170, 179. Affording "preferential treatment" to the named plaintiffs or to class counsel is impermissible. *Pampers*, 724 F.3d at 718 (internal quotation omitted); *see also Briseño*, 998 F.3d at 1026. "Such inequities in treatment make a settlement unfair" for neither class counsel nor the named representatives are entitled to disregard their "fiduciary responsibilities" and enrich themselves while leaving the class behind. *Pampers*, 724 F.3d at 718 (internal quotation omitted). The parties ask the Court to invert these

bedrock principles, and approve a settlement that consigns absent class members to an afterthought. District courts must be "vigilant and realistic" in their review, nixing "selfish deal[s]" when they "disserve" the class. *Pearson*, 772 F.3d at 787.

Briseño reiterates three signs that a class action settlement is inequitable between class counsel and the class in violation of Rule 23(e)(2)(C)(iii): (1) a disproportionate distribution of fees to counsel; (2) a clear-sailing agreement; and (3) a reversion of unclaimed funds or unawarded fees to the defendant. 998 F.3d at 1026-27. All three are present here.

A. Class counsel has negotiated a disproportionate share of the settlement for their fee.

Because adversarial negotiation does not ensure that class relief is appropriately "commensurate with [the] fee award," *Pampers*, 724 F.3d at 720, the most common settlement defect is one of allocation. Thus, the first sign of preferential treatment is "when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011); *accord* American Law Institute, *Principles of the Law of Aggregate Litigation* § 3.05, comment b at 208 (2010). "[N]on-cash relief . . . is recognized as a prime indicator of suspect settlements." *GM Trucks*, 55 F.3d at 803.

This settlement provides class counsel with the right to seek an attorney award of up to $3.2 million supported by Wawa; and ultimately, they seek just over $3 million in fees and the rest in service awards and expenses. Amended Settlement (Dkt. 201-1) ¶77; Dkt. 258 at 9. For the Court's analysis, the "ratio that is relevant is the ratio of (1) the fee to (2) the fee plus what the class members received." *Pearson*, 772 F.3d at 781 (quoting *Redman*, 768 F.3d at 630). A proportionate attorney award adheres to the 25% of the fund benchmark established in the Ninth Circuit and followed by courts of this Circuit.[2] Plaintiffs declare that their fee request is only 24.9%

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

of the gross funds "made available," and only 6.4% of the total "value" created by the settlement if you include the cost of the injunctive relief. Dkt. 258 at 31, 33. This is wrong.

As discussed below, plaintiffs' error lies in employing a faulty denominator. Peeling away layers of the onion, the only demonstrable benefit to class members is the just over $1 million in cash and gift cards claimed by class members. And even this slim margin over $1 million supposes that the submitted claims are validly documented and that Wawa does not exercise its right under the settlement to audit and contest them. Amended Settlement ¶¶48-49.[3] Under the settlement, it appears that we will not know the final claims numbers until three to four months after the claims deadline later this month. *Id.* ¶50. But we can assume *arguendo* that the parties somehow cobble together $500,000 worth of Tier 2 and 3 claims, such that the aggregate recovery of the class is $1.5 million, however fanciful that may be. In that event, class counsel is seeking more than 63% of the $4.7 million constructive common fund, unjustifiably appointing themselves the foremost beneficiary of the settlement. This exceeds the 38.9% that the Ninth Circuit calls "clearly excessive." *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012); *see also Roes*, 944 F.3d at 1051 (fee award of 45% of gross cash fund is "disproportionate"); *Pearson*, 772 F.3d at 781 (69% fee is "outlandish"); *Redman*, 768 F.3d at 630-32 (55-67% allocation unfair); *Cunningham v. Suds Pizza, Inc.*, 290 F. Supp. 3d 214, 225 (W.D.N.Y. 2017) (62.5% in fees is an "unreasonable and

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discussion"); *Brown v. Rita's Water Ice Franchise Co. LLC*, 242 F. Supp. 3d 356, 366-67 (E.D. Pa. 2017); *Erie County Retirees Ass'n. v. County of Erie,* 192 F. Supp. 2d 369, 381 (W.D. Pa. 2002); *Lachance v. Harrington*, 965 F. Supp. 630, 648 (E.D. Pa. 1997); *see generally* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 833 (2010) (analyzing 688 class action settlements in 2006 and 2007 and finding a mean of 25% and a median of 25.4% for the award of attorneys' fees "with almost no awards more than 35 percent").

[3] It also generously supposes that CAFA does not apply to the gift cards, for otherwise the legal measure of benefit would be the redemption value of the coupons actually used by class members. 28 U.S.C. § 1712; *Baby Prods*., 708 F.3d at 179 n.13.

improper" "windfall"). It remains more likely, however, that they are seeking roughly 70% of the concrete settlement value.

Plaintiffs argue that $9 million that was "made available" to class members but was never claimed and will instead revert to Defendants should be considered part of the settlement value. Not so. Rule 23(e)(2)(C); *Briseño*, 998 F.3d at 1026; *Samsung*, 997 F.3d at 1094; *Pearson*, 772 F.3d at 781-82; *Fitzgerald v. Gann Law Books*, 2014 WL 8773315, 2014 U.S. Dist. LEXIS 174567, at *41 (D.N.J. Dec. 17, 2014).[4] Plaintiffs' calculation is pure fiction, and violates the aforementioned principle that "[c]ases are better decided on reality than on fiction." *Pampers*, 724 F.3d at 721 (internal quotation omitted); *accord Dennis*, 697 F.3d at 868 (chronicling the problem of "fictitious" fund valuations that "serve[] only the 'self-interests' of the attorneys and the parties, and not the class."). The Court's "inquiry needs to be, as much as possible, practical and not abstract." *Baby Prods*., 163 F.3d at 174

Excluding amounts that revert to Wawa follows from *Baby Products*'s reasoning. Just as the class is "not indifferent" as between money that goes to them and money that goes to third-party *cy pres* beneficiaries, they are likewise not indifferent as between money that goes to them and money that reverts to the defendants. *Baby Prods.*, 708 F.3d at 178; *Lachance*, 965 F. Supp. at 648 (explaining the importance of incentivizing counsel to maximize the class's recovery);

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[4] The cases plaintiffs cite for the contrary proposition (Dkt. 258 at 29-30), addressed this issue only in the context of assessing fee reasonableness, not in assessing the Rule 23(e) fairness of settlements. Moreover, these cases all predate Rule 23(e)(2)(C). Even at the time they were decided, these cases misread *Boeing v. Van Gemert*, because *Boeing* did not apply to a claims-made settlement with "no fund," "no litigated judgment" and "no reasonable expectation . . . that more members of the class would submit claims than did." *Pearson*, 772 F.3d at 782. *Boeing* only applies to a "traditional common fund," not a claims-made settlement where "no fund was established at all." *Strong v. Bellsouth Tel. Inc.*, 137 F.3d 844, 852 (5th Cir. 1998). *Boeing* itself recognizes this distinction. *Boeing*, 444 U.S. 472, 479 n.5 (1980) (reserving decision on whether its common-fund analysis applies to claims-made scenarios). Thus, the *Strong* class counsel's fee award was properly based on actual class-member participation—the real value of the settlement—rather than the "phantom" value assigned by class counsel. 137 F.3d at 852.

Pearson, 772 F.3d at 783 (same). "[C]lass counsel should not be [indifferent] either"; if they are only paid on the amount of the benefit received, they will be encouraged to minimize costs and maximize benefit. *Baby Products*, 708 F.3d at 178. What is more, plaintiffs' proposal would turn Rule 23's new subsection inoperative. Treating reversions as equivalent to claimed amounts would make the question of the "effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims" irrelevant. *Contra* Rule 23(e)(2)(C)(ii).

Next, the plaintiffs already appear to be arguing that the miniscule claims rate is no fault of their own. Nonsense. Class counsel "cannot claim surprise" for the foreseeable result of their negotiated deal. *Rougvie,* 2016 WL 4111320, 2016 U.S. Dist. LEXIS 99235, at *88. First of all, plaintiffs acceded to having a documentation and attestation requirement before class members could submit *any* claim, even a most basic Tier 1 claim for a base $5 gift card. This structure is even more restrictive of claims than that in *Baby Products*, where class members without documentary proof could submit a claim subject to a $5 cap. And even there, the Third Circuit was skeptical, suggesting that "[o]ther means of preventing fraud could have been explored" and explicitly "doubt[ing]" the parties' suggestion that requiring documentation of claims is a "fairly low bar." 708 F.3d at 175. It's not a low bar; it is empirically well established that proof of purchase requirements heavily depress consumer class member claims rates. *See, e.g.*, *McCrary v. Elations Co.,* 2016 WL 777865, 2016 U.S. Dist. LEXIS 24050, at *15 (C.D. Cal. Feb. 25, 2016) (Only 2 of 3,405 claimants submitted proof of purchase); Supplemental Declaration of Jeanne C. Finegan, APR, *Kumar v. Salov N. Am. Corp*., No. 14-cv-02411, Dkt. 164 ¶4 (N.D. Cal. May 26, 2017) (attesting that only 33 of more than 53,000 valid claims were submitted with proof of purchase); *Johnson v. Metro-Goldwyn-Mayer Studios Inc*., No. 17-cv-541, 2018 WL 5013764, at *1 (W.D. Wash. Oct. 16, 2018) (365 of 300,000 class members claimed two free James Bond movies when notice required proof of purchase); *Holt v. Foodstate, Inc*., No. 17-cv-00637, 2020 U.S. Dist. LEXIS 7265 (D.N.H. Jan. 16, 2020) (99.5% of claimants submitted claims without proof of purchase); *Kukorinis v. Walmart*, No. 19-cv-20592, Dkt. 97 at 16 n.9 (S.D. Fla. Sept. 20, 2021) (0.0012% of claims made were made with proof of purchase). Even without proof of purchase

hurdles, claims rates in low value consumer class settlements are "notoriously low." *Briseño*, 998 F.3d at 1020 (claims rate of "barely more than one-half of one percent"); *Pearson*, 772 F.3d at 782 (claims rate of one-quarter of one percent); Second Expert Decl. of Prof. William B. Rubenstein, *In re Facebook Biometric Info. Privacy Litig.*, No. 15-cv-3747, Dkt. 517-2 ¶ 5 (N.D. Cal. Dec. 14, 2020) (average claims rate for classes above 2.7 million class members is less than 1.5%). Class counsel proclaimed that they had "learned from experience in data breach cases the importance of using a simple claim form and claims process to maximize class members' participation in any settlement." Dkt. 78 at 25. They promised that they would "requir[e] minimal effort or documentation to submit a claim." *Id.* This settlement breaches that promise.

And these "notoriously low" rates "shrink[] even further if the settlement, as here, provides for no direct notice to class members." *Briseño*, 998 F.3d at 1026. That lack of notice "underscore[s] that the parties here knew that the [claims rate] would be extremely low and that the agreed-upon attorneys' fees would swamp the actual recovery for class members." *Id.*at 1026 n.3; *see generally In re Carrier iQ, Inc., Consumer Privacy Litig.*, 2016 U.S. Dist. LEXIS 114235, 2016 WL 4474366 at *4 (N.D. Cal. Aug. 25, 2016) (noting median claims rates in publication notice settlements below 1%). It doesn't have to be this way. The employee plaintiffs are correct that Wawa has contact information for employee class members, and yet the settling parties eschewed any direct-notice component for these class members in violation of Rule 23(c)'s requirement of the "best notice that is practicable." Dkt. 187 at 25-26. Moreover, there has been no showing that it would be infeasible for the settlement administrator to obtain patron class members' contact information from Wawa's rewards program database or through reverse lookups of the credit card information that Wawa possesses.

Failure to enhance notice casts doubt on whether the representatives and counsel are adequately representing the class. Both have now signed off on a settlement that objectively confers more than 50% of the demonstrated settlement benefit upon class counsel. An "extremely expedited settlement of questionable value accompanied by an enormous legal fee" casts doubt on the adequacy of counsel's representation. *GM Trucks*, 55 F.3d at 801-803. Counsel's fiduciary

responsibilities include the responsibility to ensure that client class members receive the best notice practicable. *Zimmer Paper Products, Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 91 (3d Cir. 1985). But here, the structure of the settlement raises the specter that class counsel's self-interest is determining the course of the proceeding. Namely, each additional dollar in class notice and administration necessarily decreases the pot of money available for class counsel's attorneys' fees. Amended Settlement ¶¶77, 82. As a result, we are left with a settlement for 22 million class members that proposes to only expend $100,000 on settlement notice and administration, less than half of one cent per class member. Dkt. 259 at 31. That could be acceptable with direct email notice designed to avoid spam filters, but Frank is unaware of a publication-notice settlement with tens of millions of class members with such a low budget. Frank requests that the Court inquire whether the settling parties or the administrator know of any other comparably cheap settlement administration of a consumer claims-made settlement of tens of millions of class members.

Additionally, the "injunctive relief" provided for in the settlement is a red herring that the Court should ignore when assessing both the settlement and counsels' fees. Plaintiffs bear the burden of proving the value of injunctive relief. *Pampers* 724 F.3d at 719; *Briseño*, 998 F.3d at 1028. And "the district court must bring an informed economic judgment to bear in assessing its value." *Merola v. Atlantic Richfield Co*., 515 F.2d 165, 172 (3d Cir. 1975). Here, the plaintiffs briefly gesture at the "$35 million" in enhanced cybersecurity costs in the accounting of class benefits, but can't bring even themselves to make a full-throated argument that the class truly benefits to such a magnitude. Dkt. 258 at 27, 32-33. They are correct to exclude the injunctive relief from the settlement accounting. Dkt. 258 at 10, 12. 32. But they are wrong to assert the supposed value of the injunctive relief here should weigh in favor of their exorbitant fee request. *See, e.g.*, Dkt. 258 at 33. As a general rule, prospective injunctive relief is "easily manipulable by overreaching lawyers" and so may not typically be included as part of the value of the common fund. *Staton v. Boeing Co*., 327 F.3d 938, 974 (9th Cir. 2003). It would be especially improper here for two reasons.

First, "the standard [under Rule 23(e)] is not how much money a company spends on purported benefits, but the value of those benefits to the class." *Bluetooth*, 654 F.3d at 944 (quoting *In re TD Ameritrade Accountholder Litig*., 266 F.R.D. 418, 423 (N.D. Cal. 2009)); *see also Charles v. Goodyear Tire & Rubber Co.,* 976 F. Supp. 321, 325 (D.N.J. 1997) (similar); *O'Keefe v. Mercedes-Benz USA, L.L.C*., 214 F.R.D. 266, 304-05 (E.D. Pa. 2003) (similar). Plaintiffs expressly state that a $35 million valuation of the injunctive relief is "based on costs Wawa paid and will continue to pay to enhance its data security." Dkt. 259 at 17.

Second, the improved data security measures taken by Wawa were a result of the data breach itself and not this litigation. Settlement Paragraph 38 memorializes this fact: "Wawa acknowledges that providing benefits to its valued customers, including those in the Settlement Class, was a factor in Wawa's decision to strengthen its data security systems to minimize the likelihood of future data security incidents which could affect Wawa customers." A court order codifying the existing expenditures adds nothing. Injunctions like the one here are "of no real value" where they "do[] not obligate [the defendant] to do anything it was not already doing." *Koby v. ARS Nat'l Servs., Inc*, 846 F.3d 1071, 1080 (9th Cir. 2017). Wawa's voluntary, pre-settlement changes, later duplicated in the settlement, do not count as a compensable class benefit. *See Subway*, 869 F.3d at 556 (comparing "state of affairs before and after the settlement" to find relief "utterly worthless"); *Pampers*, 724 F.3d at 719.

As another court facing a similar attempt to attribute previously undertaken actions by the defendant as valuable injunctive relief under the settlement stated: "[A] settlement agreement on paper that appears to be a dam holding back a flood is superfluous if there is nothing to hold back." *Grok Lines Inc., v. Paschall Truck Lines, Inc.*, 2015 WL 5544504, at *3 (N.D. Ill. Sept. 18, 2015). As in *Grok Lines*, the changes codified in this settlement are "nothing more than ordinary steps that any business might take on its own." 2015 WL 5544504, at *5. Even if it was the filings of the complaints in this litigation that impelled Wawa's board to act in February 2020, it is "the *incremental* benefits" from the settlement that count, "not the total benefits" from the litigation. *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282 (7th Cir. 2002).

Attempts to fiat the value of injunctive relief are the "classic manifestation" of the attorney/client agency problem in class action litigation. *In re Oracle Sec. Litig.*, 132 F.R.D. 538, 544 (N.D. Cal. 1990) (Walker, J.); *see also Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1311 (3d Cir. 1993). If the plaintiffs alter course and attempt to rely on Wawa's cybersecurity enhancements to justify their fee, the Court should reject it. *In re Anthem Inc. Data Breach Litig.,* 2018 WL 3960068, at *8 (N.D. Cal. Aug. 17, 2018) (rejecting plaintiffs' attempt to include the cost of cybersecurity spending increase in the denominator for purposes of awarding fees). The injunctive relief benefits class members, non-class members, and opt-outs equally. It cannot be consideration for the release of a class's damages claims. *See, e.g.*, *Koby*, 846 F.3d at 1080.

Finally, class counsel's lodestar "can't be given controlling weight in determining what share of the class action settlement pot should go to class counsel." *Redman*, 768 F.3d at 633; *accord Baby Prods.*, 708 F.3d at 180 n.14 (3d Cir. 2013) (0.37 lodestar multiplier was not "outcome determinative"). "Plaintiffs attorneys don't get paid simply for working; they get paid for obtaining results." *HP Inkjet*, 716 F.3d at 1182.

In short, the first symptom of an unfair settlement is present: class counsel is attempting to seize an excessive portion of the settlement proceeds.

B. Class counsel has negotiated the red-carpet treatment of a clear-sailing clause.

In addition to a discrepancy between fees and class benefit, the settlement contains a second telltale indication of an unfair deal: a "clear-sailing" agreement. *See Redman*, 768 F.3d at 637; *Roes*, 944 F.3d at 1050-51. A clear-sailing clause stipulates that attorney awards will not be contested by the defendants. *See* Settlement ¶78 (stipulating that Wawa "shall cooperate with Class Counsel" in connection with preparing the fee petition). "Provisions for clear sailing clauses 'decouple class counsel's financial incentives from those of the class, increasing the risk that the actual distribution will be misallocated between attorney's fees and the plaintiffs' recovery.'" *Vought v. Bank of Am.*, 901 F. Supp. 2d 1071, 1100 (C.D. Ill. 2012) (quoting *Int'l Precious Metals Corp. v. Waters*, 530 U.S. 1223, 1224 (2000) (O'Connor, J., respecting the denial of certiorari)).

"Such a clause by its very nature deprives the court of the advantages of the adversary process." *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 525 (1st Cir. 1991); *see also Samsung*, 997 F.3d at 1090 (clear-sailing provisions "cut against the general adversarial nature of our legal system"). The clause lays the groundwork for lawyers to "urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees" and "suggests, strongly," that its associated fee request should go "under the microscope of judicial scrutiny." *Id.* at 518, 524-25. It indicates that the class attorneys have negotiated "red-carpet treatment" to protect their fee award while urging class settlement "at a low figure or less than optimal basis." *Pampers*, 724 F.3d at 718 (internal quotation omitted). As such, a clear-sailing clause is a "questionable feature" that, "at least in a case . . . involving a non-cash settlement award to the class[,] . . . should be subjected to intense critical scrutiny." *Redman*, 768 F.3d at 637; *accord Guoliang Ma v. Harmless Harvest, Inc*., 2018 WL 1702740, 2018 U.S. Dist. LEXIS 123322, at *12 (E.D.N.Y. Mar. 31, 2018); *see generally* William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 TUL. L. REV. 813, 816 (2003) (courts should "adopt a per se rule that rejects all settlements that include clear-sailing provisions."). While the Third Circuit has eschewed a *per se* rule prohibiting clear-sailing clauses, it has emphasized that such clauses "deserve careful scrutiny in any class action settlement." *In re NFL Players Concussion Injury Litig*., 821 F.3d 410, 447 (3d Cir. 2016) (affirming where fee was only 10%).

Citing *Hensley v. Eckerhart*, Plaintiffs assert that "courts generally prefer litigants agree to a fee award." Dkt. 258 at 5. In the context of a class-action settlement, absolutely not. *See In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortg. Litig*., 418 F.3d 277, 308 (3d Cir. 2005). There is a fundamental difference in procedural posture between *Hensley* and a class-action settlement. *Hensley* was a fully-litigated case, and the parties then sought to resolve the collateral 42 U.S.C. § 1988 litigation on fee-shifting after judgment. 461 U.S. 424, 427-28 (1983). There is no prejudice to the class when that happens, because their relief has already been set in stone by an Article III court. In contrast, when plaintiffs settle a class action, class counsel is not just compromising their fee request, but also compromising the relief available to their

putative clients, and this leads to an inherent conflict of interest that can lead to self-dealing. *Pearson*, 772 F.3d at 786-87; *Pampers*, 724 F.3d at 717-18; *GM Trucks*, 55 F.3d at 819-20. Moreover, *Hensley* involved a bilateral negotiation between one set of class counsel and one set of defendants. In contrast, a class-action settlement fee request is a multilateral issue where absent class members were never at the table and never had the opportunity to consent to the fee. A fee agreement between two of the parties does not end collateral litigation, because absent class members continue to have the right to object under Rules 23(e) and (h). The only effect of a side agreement is to prejudice the class's rights without the benefit of preventing collateral litigation. *See generally Pearson*, 772 F.3d at 787.

Clear-sailing is the second indication that the deal is skewed in favor of class counsel.

C. Class counsel has negotiated a segregated fund that insulates their fee from scrutiny.

Unlike a pure common fund, the class's benefit here is formally segregated from the $3.2 million attorney fee fund. Such a compartmentalized fee structure "is, for practical purposes, a constructive common fund." *GM Trucks*, 55 F.3d at 820. This "constructive common fund" comprises the "sum" of the class's benefit and the "agreed-on fee amount." *In re Home Depot Inc., Customer Data Sec. Breach Litig.*, 931 F.3d 1065, 1080 (11th Cir. 2019) ("*Home Depot*") (Tjoflat, J.) (quoting *Manual for Complex Litigation (Fourth)* § 21.7 (2004)). "[P]rivate agreements to structure artificially separate fee and settlement arrangements cannot transform what is in economic reality a common fund situation into a statutory fee shifting case." *GM Trucks*, 55 F.3d at 821. Because the settlement agreement here contains a $3.2 million cap on fees, the payment to the class and counsel is a "package deal" that effectively reduces "the payment to the class to account for the expected payment to counsel." *Home Depot*, 931 F.3d at 1092.

Plaintiffs fight hard against this economic reality, arguing that the fee payment "will not reduce any settlement benefits made available to the Class" and that the fee fund was only agreed upon after the other material terms of settlement. Dkt. 258 at 9, 13. In fact, they even argue that when the fee award is paid separately "the Court's fiduciary role in overseeing the award is greatly

reduced, because there is no potential conflict of interest between attorneys and class members." Dkt. 258 at 13. Each of these contentions is incorrect. The Third Circuit "has recognized that a defendant is interested only in disposing of the total claim asserted against it; the allocation between the class payment and the attorneys' fees is of little or no interest to the defense." *GM Trucks*, 55 F.3d at 819-20 (cleaned up). "In light of these realities" it is "patently meritless" to believe that the separately-paid fee fund does not impact the class members' interests. *Id.* at 820. Neither can sequentially negotiating class benefit and fees allay the inherent conflict when representatives negotiate their own compensation, at least unless "fee negotiations [are] postponed until the settlement was judicially approved." *In re Cmty. Bank of N. Va.*, 418 F.3d at 308 (quoting *GM Trucks*, 55 F.3d at 804); *see also Pearson*, 772 F.3d at 786-87 (finding it implausible that separate negotiation could benefit the class). In other words, as long as the defendant willingly foots both bills, there is no way to avoid the "truism that there is no such thing as a free lunch." *Staton*, 327 F.3d at 964.

A constructive common fund structure such as this is inferior for one principal reason: the segregation of parts means that the Court cannot remedy any allocation issues by reducing fee awards or named representative payments. *Briseño*, 998 F.3d at 1027; *Pearson*, 772 F.3d at 786. Because "the adversarial process" between the settling parties cannot safeguard "the manner in which that [settlement] amount is allocated between the class representatives, class counsel, and unnamed class members," it is no surprise that the most common settlement defects are ones of allocation. *Pampers*, 724 F.3d at 717 (emphasis in original). There is "no plausible reason why the class should not benefit from the spillover of excessive fees." *Briseño*, 998 F.3d at 1027. But a segregated fund structure prevents the Court from exercising its discretion, in furtherance of its fiduciary duty to cure the most endemic settlement ailment—a malapportioned fund.

The segregated fee constitutes the third red flag of a lawyer-driven settlement and begets a "strong presumption of . . . invalidity." *Pearson*, 772 F.3d at 787; *accord Redman*, 768 F.3d at 637 (segregation is a "defect"); *Bluetooth*, 654 F.3d at 949 (segregation "amplifies the danger" that is "already suggested by a clear-sailing provision"). "The clear sailing provision reveals the

defendant's willingness to pay, but the kicker deprives the class of that full potential benefit if class counsel negotiates too much for its fees." *Bluetooth*, 654 F.3d at 949. With a constructive common fund structure, if this Court reduces the 70% fee request to 25%, it can do nothing to remit additional value to class members. It is "not enough" simply to lower the fee request. *Pearson*, 772 F.3d at 787. The parties have hamstrung the Court, preventing it from returning the constructive common fund to natural equilibrium.

Contrast this settlement with that in *Fitzgerald v. Gann Law Books*, 2014 U.S. Dist. LEXIS 174567 (D.N.J. Dec. 17, 2014). There, the parties negotiated a $1 million attorney fee, excessive in relation to class member recovery of $180,000. Judge McNulty found this untenable, but the settlement was salvageable because of a provision that distributed excess amounts of the cash fund *pro rata* to non-claimant class members. This ensured that "a low response rate does not inure to the benefit of the defendant or class counsel." *Id.* at *48. By decreasing class counsel's proposed fee from $1 million to almost $400,000, Judge McNulty was able to augment the class's residual distribution by a reciprocal $600,000, and bring the settlement back into proportion without sacrificing funds that the defendant was willing to pay. Unfortunately, this settlement lacks a similar provision that would allow the Court to save the agreement. The only solution is denying settlement approval until the parties amend their agreement. *See Rougvie*, 2019 U.S. Dist. LEXIS 28229, at *41-*42 (E.D. Pa. Feb. 21, 2019) (observing that CCAF's client's objections "benefitted the Class" by inducing the settling parties to eliminate the reversion of excess fees).

III. The settlement violates Rule 23(e)(2)(D) if it awards more money for a Tier 1 claim than for a Tier 2 claim.

The settlement's structure poses a different problem under Rule 23(e)(2)(D), which requires that settlements treat "class members equitably relative to each other." If Frank is correct, and the claims rates under each settlement tier are abysmal from the lack of direct notice and the proof-of-purchase requirements, then there are unlikely to be more than 22,000 valid Tier 1 claims (0.1% of the class), and only a fraction of that amount in Tier 2 and 3 claims. If so, each Tier 1

claimant would receive a *pro rata* $45 gift-card share of the $1 million floor. Amended Settlement ¶ 36.a.vi. Meanwhile, Tier 2 claimants are still left with $15 gift cards—the default for their tier—because there is no floor under the settlement for Tier 2 claims.

But Tier 2 claimants possess unequivocally greater injuries than Tier 1 claimants. The settlement recognizes this by requiring much more documentation from Tier 2 than Tier 1 claimants. *Compare* Amended Settlement ¶ 37.b.ii-iii *with* ¶ 36.a.ii. Thus, the settlement inverts the basic principle that the plan of allocation should reflect "the type and extent" of class members' injuries. *McDonough*, 80 F. Supp. 3d at 648.

Though Frank is not a member of the disfavored subclass, as a member of the class he has standing to raise the argument. *Larson v. AT&T Mobility LLC*, 687 F.3d 109, 131 n.34 (3d Cir. 2012). In any event, the district court has an "independent duty" to address the issue and objectors need only the "procedural vehicle" of Rule 23 to place their objection before the district court. *Id.*; *Stetson v. Grissom*, 821 F.3d 1157, 1163 (9th Cir. 2016). Because the current settlement's allocation is irrational and inequitable, it violates Rule 23(e)(2)(D).

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

If the Court nevertheless approves the settlement and reaches the question of a Rule 23(h) fee award, Frank objects to the $3.04 million request. As a fiduciary for the class, the Court maintains a duty of keen oversight of all settlement proceedings, including "a thorough judicial review of fee applications . . . in all class action settlements." *GM Trucks*, 55 F.3d at 819-20. District courts must "conduct an extensive analysis and inquiry before determining the amount of fees." *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 728 (3d Cir. 2001). Judicial involvement is singularly important since it is to be expected that class members with small individual stakes in the outcome will not file objections. *GM Trucks*, 55 F.3d at 812. It requires a "sharp pencil." *United States ex rel. Palmer v. C&D Techs., Inc.*, 2017 WL 1477123, 2017 U.S. Dist. LEXIS

62932, at *10 (E.D. Pa. Apr. 25, 2017) (Pratter, J.), *rev'd in small part on other grounds* 897 F.3d 128 (3d Cir. 2018).

Class counsel requests that this Court award them $3.04 million in fees on a lodestar basis. Dkt. 258. But neither the class nor the Court have been given sufficient billing records to allow a base lodestar award. Moreover, when fee requests are made attendant to common fund or constructive common fund settlements—as opposed to fee shifting after judgment—the lodestar should not be permitted to "trump" or "displace" the primary reliance on the percentage of common fund method." *In re Rite Aid Corp. Secs. Litig*., 396 F.3d 294, 307 (3d Cir. 2005) ("trump"); *In re AT&T Corp. Secs. Litig.,* 455 F.3d 160, 164 (3d Cir. 2006) ("displace"). Cross-checking the bare bones of the lodestar that counsel has submitted, however, does confirm that the fee sought is excessive.

A. The lack of detailed billing records precludes use of the lodestar as the base methodology to award fees.

Fee applicants bear the "ultimate burden" of justifying their fee request. *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 426 F.3d 694, 703 (3d Cir. 2005). They "must submit evidence supporting the hours worked and the rates claimed." *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir.1990) (internal quotation omitted). To meet this burden, they must provide "some fairly definite information as to the hours devoted to various general activities, e.g., pretrial discovery, settlement negotiations, and the hours spent by various classes of attorneys, e.g., senior partners, junior partners, associates." *Id.* at 1191. The "petition must be specific enough to allow the district court determine if the hours claimed are unreasonable for the work performed." *Loughner v. Univ. of Pittsburgh,* 260 F.3d 173, 181 (3d Cir. 2001) (internal quotation omitted).

In the context of a class action attorney fee request, the fee submission also implicates the rights of absent class members under Rule 23(h). The fee submission must furnish absent class members "information of what that work was, how much time it consumed, and how it contributed to the benefit of the class" and thereby enable class members to "provide the court with critiques of specific work done by counsel. *Keil v. Lopez*, 862 F.3d 685, 705 (8th Cir. 2017) (quoting *In re*

Mercury Interactive Corp. Secs. Litig., 618 F.3d 988, 994 (9th Cir. 2010)). Depriving objectors of an opportunity to review "the details of class counsel's hours and expenses" effectively "handicap[s]" them. *Redman*, 768 F.3d at 638. The Third Circuit cites this line of cases approvingly. *NFL Concussion*, 821 F.3d at 446. A leading treatise agrees: "Knowing the level of the fee alone is a weak substitute for reviewing the full fee petition as the latter ought to provide more detail about counsel's time and efforts, precisely the detail that would make the opportunity to object meaningful." William B. Rubenstein, 3 NEWBERG ON CLASS ACTIONS § 8:24 (5th ed. 2014).

On top of all this, "where a settlement agreement contains a 'clear-sailing' agreement, any doubts regarding hourly rates and billed hours shall be resolved against class counsel. In this sense, where class counsel bargains for a defendant's agreement not to challenge a request for fees and costs, class counsel assumes a heightened burden for establishing the propriety of the records supporting its fees and costs award." *Samsung*, 997 F.3d at 1094. A base lodestar award "requires detailed submissions that provide sufficient information from which the Court can determine whether there has been any duplication in attorney effort or whether the amounts expended were reasonable." *In re Johnson & Johnson Derivative Litig*., 900 F. Supp. 2d 467, 499 (D.N.J. 2012).

Class counsel has not even met its basic burden under *Rode* to provide "some fairly definite information" "as to the hours devoted to various general activities," let alone the heightened burden that is necessary in light of the settlement's clear-sailing clause. Rather, their submissions contain only aggregate hours by firm, biller and rate, with no delineation or breakdown whatsoever. Neither the Court nor class members are able to analyze the expenditures for reasonableness given that lack of detail. As such, the base lodestar methodology cannot be used to award a fee to class counsel. *See Keenan v. City of Philadelphia*, 983 F.2d 459, 473 (3d Cir. 1992) ("monthly cumulative totals" of attorney's hours were not sufficiently specific to be compensable) *In re Meade Land & Development Co.*, 527 F.2d 280, 283 (3d Cir. 1975) (disallowing hours described only on an aggregate basis without any detail). "Bills which simply list a certain number of hours

and lack such important specifics as dates and the nature of the work performed . . . should be refused." *Calhoun v. Acme Cleveland Corp.*, 801 F.2d 558, 560 (1st Cir. 1986).[5]

The breach of Rule 23(h) unfairly shrouds class counsel's fee request from scrutiny and prevents the Court from fulfilling its "obligation" "to ensure that the hours claimed are reasonable." *Home Depot*, 931 F.3d at 1089.

B. Percentage-based awards are preferred and should be based upon actual claims made, not upon a fictitious 100% claims rate.

Even aside from the insufficient documentation, "the court should probably use the percentage of recovery rather than the lodestar method as the primary determinant." *GM Trucks*, 55 F.3d at 821. To minimize the likelihood of unreasonable fee awards, this Circuit recognizes that the percentage-of-recovery fee methodology is the generally superior method to use. *In re Cendant Corp. Litig.*, 264 F.3d 201, 256 (3d Cir. 2001); *Cendant PRIDES*, 243 F.3d at 734. This "method is better designed to reward counsel for success and penalize it for failure." *In re Diet Drugs Prods. Liab. Litig.*, 582 F.3d 524, 541 (3d Cir. 2009) (cleaned up). While the lodestar method is generally appropriate in fee-shifting cases involving relief of inestimable value, *GM Trucks*, 55 F.3d at 821, the percentage-of-recovery approach is better suited to common fund cases, as it ensures that the class is not unjustly enriched by not having to compensate counsel for the valuable relief their work bestowed on the class, *id.* Therefore, "a court making or approving a fee award should determine what sort of action the court is adjudicating and then primarily rely on the corresponding method of awarding fees." *Id.*

There is no exception to this principle for data breach cases; the PoR method still "best serve[s]" justice by "incentiviz[ing] counsel to achieve the best possible result." *Anthem,* 2018 WL 3960068, at *5 (N.D. Cal. Aug. 17, 2018). Nor is there an exception for constructive common fund cases. *Contrast* Dkt. 258 at 14, *with GM Trucks*, 55 F.3d at 821; *Cendant PRIDES*, 243 F.3d at

[5] Summary detail is generally sufficient when the lodestar is employed only as a cross-check on a base percentage-of-recovery award. *See Rite Aid*, 396 F.3d at 306; *Report of the Third Circuit Task Force, Selection of Class Counsel*, 208 F.R.D. 340, 423 (2002).

734; *cf. also Brytus v. Spang & Co.*, 203 F.3d 238, 246 (3d Cir. 2000) ("When there has been a settlement, the basis for the statutory fee has been discharged, and it is only the fund that remains.").

When plaintiffs get into the PoR analysis, they err by using a faulty denominator. *See supra* § II.A. This "potential benefits" methodology is outmoded, "premised upon a fictive world" rather than reality. *Pampers*, 724 F.3d at 721; *accord Pearson*, 772 F.3d at 781 ("The $14.2 million 'benefit' to class members was a fiction . . . ."). A fee award needs to be attuned to the result actually achieved for the class, to the money the settlement actually puts in class members' hands. *See, e.g.*, *Baby Prods.*, 708 F.3d at 179. The Advisory Committee Notes agree, counseling that the "fundamental focus is the result actually achieved for class members" and advise "defer[ring] some portion of the fee award until actual payouts to the class are known." Notes of Advisory Committee on 2003 Amendments to Rule 23(h); *accord Baby Prods.*, 708 F.3d at 179.

Class counsel's request fails to "begin by determining with reasonable accuracy the distribution of funds that will result from the claims process." *Baby Prods.*, 708 F.3d at 179.

C. The lodestar cross-check confirms the need to reduce class counsel's award.

While the Third Circuit has been a leader in adopting the PoR approach, it nevertheless has steadfastly encouraged district courts to employ a lodestar cross-check "to ensure that the proposed fee award does not result in class counsel being paid a rate vastly in excess of what any lawyer could reasonably charge per hour, thus avoiding a "windfall" to . . . counsel." *Cendant*, 264 F.3d at 285; *GM Trucks*, 55 F.3d at 821 n.40. Respected commentators have even called the lodestar cross-check "essential" to discourage hasty undervalued settlements with generous attorney payments. Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439, 503 (1996). Here, even at a bird's-eye view without necessary billing records, it is easy to see that the lodestar submission is severely bloated.

First, the blended hourly rates sought by counsel are not reasonable. These rates should "approximate the fee structure of all attorneys who worked on the matter." *Rite Aid.*, 396 F.3d at

306. But the blended rates of lead counsel are astronomical: in the ballpark of $700/hr. for Berger Montague, Fine Kaplan and the Nussbaum firms. Dkt. 259 at 23, 26-27, 27-28. Chimicles Schwartz comes in at a more reasonable, yet still significant, $525/hr. Dkt. 259 at 24-25. All said, the total adjusted lodestar equates to a blended rate of $652.50/hr. Dkt. 259 at 22. That is too high. *In re Domestic Drywall Antitrust Litig.*, 2019 WL 1258832, 2019 U.S. Dist. LEXIS 44492, at *7 (E.D. Pa. Mar. 19, 2019) ($350/hr. is an appropriate blended rate across all timekeepers, rather than the $516/hr. claimed); *Skeen v. BMW of N. Am., LLC*, 2016 WL 4033969, 2016 U.S. Dist. LEXIS 97188 (D.N.J. Jul. 26, 2016) ($664/hr. blended rate too high); Ronald L. Burdge, UNITED STATES CONSUMER LAW ATTORNEY FEE SURVEY, 2017-2018 at 426, *available at* https://burdgelaw.com/wp-content/uploads/2019/10/US-Consumer-Law-Attorney-Fee-Survey-Report-2017-2018.pdf (declaring median rate of $425/hr. for class action practitioners in Philadelphia). The unreasonable blended rate indicates that too much work was performed by partners, and insufficient work was delegated to lower-priced associates and paralegals.

Second, the proclaimed hours are distended with duplication and inefficiency. They have asserted a total of 5942.2 hours from 28 law firms. Dkt. 259 at 22. Yet, almost no actual litigation occurred in these short-lived proceedings. *Compare Brown,* 242 F. Supp. 3d at 366 (1498.5 hours when settlement was reached 6 months after complaint "appears excessive"). Wawa announced the data breach in December 2019, numerous cases were filed and consolidated in January 2020, the Court appointed an unopposed slate of interim counsel in June 2020, they filed a consolidated complaint in July 2020, then the parties attended a mediation and settled in September 2020. As far as Frank can discern, in nine months the only opposed motion was rival plaintiffs' opposition to Chimicles Schwartz and Berger Montague's early motion (Dkt. 3) for appointment as interim lead counsel. And the class may not be billed for such inter-counsel wrangling. *Drazin v. Horizon Blue Cross Blue Shield of N.J., Inc*., 832 F. Supp. 2d 432, 443 (D.N.J. 2011), *aff'd* 528 Fed. Appx. 211 (3d Cir. 2013); *In re Citigroup Inc. Sec. Litig*., 965 F. Supp. 2d 369, 389 (S.D.N.Y. 2013). Where twenty-four firms participate, "duplicative and repetitive legal work is almost inevitable." *Lachance*, 965 F. Supp. at 650; *see also In re Yahoo! Inc. Customer Data Sec. Breach Litig*., 2019

WL 387322, 2019 U.S. Dist. LEXIS 15034 (N.D. Cal. Jan. 28, 2019) (criticizing the submission of bills from 32 law firms when only 5 had been appointed as counsel). "Duplicated work" "will not be entitled to compensation." *In re Cendant Corp. Sec. Litig*., 404 F.3d 173, 197 (3d Cir. 2005).

Plaintiffs tout their request as "modest" relative to the hours spent on the *Home Depot*, *Target*, and *TJX* data breach litigations. Dkt. 258 at 18-19. But those cases involved fully briefed motions to dismiss and other ancillary motion practice. Plaintiffs do provide a better comparator though: this Court's decision in *Fulton-Green v. Accolade, Inc*., 2019 U.S. Dist. LEXIS 164375, 2019 WL 4677954 (E.D. Pa. Sept. 23, 2019). *Fulton-Green* also involved a settlement reached in the early months of data breach litigation. However, class counsel there tendered a lodestar of only 560 hours, less than 10% of the bill here. Class counsel cannot reasonably ask the class to pay ten-fold more, just because of inter-counsel coordination and appointment issues that self-evidently led to duplication of work. Even if triple the hours of *Fulton-Green* are reasonable to account for necessary coordination, the proffered lodestar here is still more than 70% excess. The 25-30% cut that class counsel imposed on themselves is insufficient.

Again, the lack of detailed billing prevents a full investigation of "precise overlap in both time and task" between the firms. *Evans v. Port Auth. of N.Y. & N.J.*, 273 F.3d 346, 362 (3d Cir. 2001). But there was surely excess in the time spent working on all the parallel complaints and the consolidated complaint. (Many non-lead firms submit 10-50 hours for what appears to be work on their independent complaints.) And duplication in attendance at court proceedings. *In re Fine Paper Antitrust Litig*., 98 F.R.D. 48, 75 (E.D. Pa. 1983) ("the attendance [at pre-trial conferences] of the other lawyers who merely sat and watched was superfluous"). And in settlement-related proceedings. *See Anthem*, 2018 WL 3960068, at *25 (N.D. Cal. Aug. 17, 2018) ("Plaintiffs do not put forward any convincing rationale for having five attorneys from Plaintiffs' Co-Lead Counsel and Steering Committee firms attend all three full-day mediation sessions."). And in inter-counsel conferencing. *See Strauch v. Computer Sciences Corp.,* 2020 WL 4289955, 2020 U.S. Dist. LEXIS 133115, at * 32 (D. Conn. Jul. 27, 2020) (excess time spent on communication is "inevitabl[e]" with so many attorneys involved).

CONCLUSION

For these reasons, the settlement is unfair and the fee request is unreasonable; the court should reject settlement approval.

Dated: November 10, 2021

Respectfully submitted,

/s/ Adam E. Schulman

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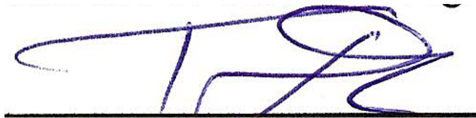
Attorney for Objector Theodore H. Frank

I am the objector and I sign and endorse my attorney's arguments in support of the objection, as required by ¶10 of the class notice.



Theodore H. Frank
Objector

CERTIFICATE OF SERVICE

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

Wawa Settlement Objections
P.O. Box 43502
Providence, RI 02940-3502

DATED: November 10, 2021

/s/ Adam Schulman
Adam Schulman