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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEVE HESSE and ADAM BUXBAUM, on behalf of all others similar situated, Plaintiffs, v. GODIVA CHOCOLATIER, INC., Defendant.	Case No. 1:19-cv-0972-AJN

OBJECTION OF ELI LEHRER
TO PROPOSED CLASS ACTION SETTLEMENT
AND ATTORNEYS' FEE REQUEST

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules and Statutes

Other Authorities

INTRODUCTION

The settlement before the Court is not the sweet deal for class members that plaintiffs would have one believe. Instead, plaintiffs' request for settlement approval and class counsel's attorneys' fee request rely on an illusory valuation of $15 million of class benefit. Based on preliminary claims data plaintiffs provided to the Court, however, the class actually is likely to recover—at most—about $7.1 million, and likely much less given the typical differences between claims data and allowed claims that will be paid. Class counsel, meanwhile, seek $5 million for themselves from a fund that is segregated from the class recovery such that any reduction in their fees will not benefit the class. Instead, any overage in the negotiated fee will remain with Godiva. Nor does the settlement provide for any possibility of a second distribution of claimed funds that are not accepted by class members, instead directing remaining amounts to a third-party *cy pres* recipient engaged in advocacy on contentious policy issues that many class members may not wish to support.

Under Rule 23(e), courts evaluate a settlement's fairness based on the ratio of fees to actual class recovery: the new Rule 23(e)(2)(C)(ii) requires a court to consider the "effectiveness" of distribution—*i.e.*, the *actual* payments to the class. For several reasons, Rule 23(e) is not satisfied by the current proposal. First, plaintiffs' claim of a $15 million benefit is not based in reality. Instead, it is about twice as much as the likely actual recovery by the class. The $5 million that class counsel negotiated for themselves represents 40% of the constructive common fund, if one generously assumes a full $7.1 million payout to the class, along with nearly $0.5 million in notice and administration costs, and a 25% benchmark award. Second, class counsel negotiated for that $5 million to be paid out of a segregated fund, thus denying the class the benefit of any reduction to fees by the Court. Third and similarly, class counsel did not negotiate to have any funds remaining from uncashed checks and PayPal payments that were not accepted by the claiming class members available for a second distribution. That money instead will be paid to a third-party organization who works in support of polarized public policy issues that many members in a large

class of chocolate purchasers don't support. Fourth and finally, the claims process had an early and arbitrary deadline before the objection and opt-out deadlines, further revealing the parties' knowledge and intent that the $15 million "made available" would never be fully paid to the class. *See* Section III.

If the Court approves the settlement despite these serious defects, it should require class counsel to submit finalized and complete claims data and then award a fee of no more than 25% of the actual benefit to the class. Trimming the $5 million fee request to $2.5 million represents a more appropriate 25% of that rough benefit. Though inadequate, the superficial lodestar data supports this result, as the multiplier would then be about 1.7. The better approach, however, if the settlement is approved over objection, would be to delay any fee award until the actual class benefit is presented to the Court and the Court and class members have an opportunity to review a detailed set of billing records. *See* Section IV.

ARGUMENT

I. Objector is a member of the Settlement Class.

Objector Eli Lehrer purchased Godiva Chocolate Products in the United States between January 31, 2015 and October 26, 2021, and is not among those excluded from the class definition. Decl. of Eli Lehrer ("Lehrer Decl.") ¶ 3. Lehrer therefore is a member of the class with standing to object to the settlement. Fed. R. Civ. P. 23(e)(5). Lehrer's business address is 1212 New York Ave. NW, Suite 900, Washington, DC 20005. His telephone number is (202) 525-5719. His email address is elehrer@gmail.com. Lehrer Decl. ¶ 2.

Hamilton Lincoln Law Institute's Center for Class Action Fairness ("CCAF"), through attorney Anna St. John, represents Lehrer *pro bono*. Lehrer gives notice of his intent to appear at the fairness hearing through undersigned counsel, where he wishes to discuss matters raised in this Objection. CCAF represents class members *pro bono* in class actions where class counsel employs unfair class action procedures to benefit themselves at the expense of the class. *See, e.g. Berni v. Barilla S.P.A*, 964 F.3d 141 (2d Cir. 2020) (sustaining CCAF's objection to improper settlement

certification); *Ma v. Harmless Harvest, Inc.*, 2018 WL 1702740, at *4, 2018 U.S. Dist. LEXIS 123222 at *23 (E.D.N.Y. Mar. 31, 2018) (sustaining CCAF objection to unfair settlement). CCAF's track record—and preemptive response to the most common false *ad hominem* attacks made against it by attorneys defending unfair settlements and fee requests—can be found in the Declaration of Theodore H. Frank. To avoid doubts about his motives, Lehrer is willing to stipulate to an injunction prohibiting him from accepting compensation in exchange for the settlement of this objection. Lehrer Decl. ¶ 5. Lehrer brings this objection through CCAF in good faith to protect the interests of the class, and his objection applies to the entire class. *Id.* ¶¶ 5, 9. He adopts any arguments filed or submitted to the Court regarding the settlement and fee request that are not inconsistent with this objection.

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

A "district court ha[s] a fiduciary responsibility to the silent class members," *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987), and must act with "a jealous regard" for the rights and interests of such absent class members, *Goldberger v. Integrated Res.*, 209 F.3d 43, 53 (2d Cir. 2000) (cleaned up). The fiduciary role is necessary because unlike in bilateral settlements, in class action settlements "there is always the danger that the parties and counsel will bargain away the interests of unnamed class members in order to maximize their own." *In re Dry Max Pampers*, 724 F.3d 713, 715 (6th Cir. 2013). The representatives assume a fiduciary obligation to the class, and the Court, through its oversight responsibility, assumes a derivative fiduciary obligation to the class. *Plummer v. Chemical Bank*, 668 F.2d 654, 658 (2d Cir. 1982).

"The concern is not necessarily in isolating instances of major abuse, but rather is for those situations, short of actual abuse, in which the client's interests are somewhat encroached upon by the attorney's interests." *In re "Agent Orange" Prod. Liab. Litig.,* 818 F.2d 216, 224 (2d Cir. 1987) (internal quotation omitted). The Court's oversight role thus does not end at making sure that the parties engaged in arm's length settlement negotiations. At the settlement stage of a class action, "the adversarial process—or … 'hard-fought' negotiations—extends only to the amount the

defendant will pay, not the manner in which that amount is *allocated* between the class representatives, class counsel, and unnamed class members." *Pampers*, 724 F.3d at 717. Due to the defendant's indifference as to the allocation of settlement funds, courts must look for "subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *Id.* at 718 (internal quotation omitted). That a mediator helped to ensure collusion-free arms-length negotiations, Dkt. 81 at 13, thus is insufficient to ensure settlement fairness. *See In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 827 F.3d 223, 235 (2d Cir. 2016); *see also Briseño v. Henderson,* 998 F.3d 1014 (9th Cir. 2021) (after the 2018 amendments, arm's length negotiations are covered by Rule 23(e)(2)(B), and satisfying Rule 23(e)(2)(B) does not mean that Rule 23(e)(2)(C) is satisfied). The proponents bear the burden to demonstrate the settlement is fair, reasonable, and adequate under Rule 23. *Ma*, 2018 WL 1702740, at *4. And because the settlement was reached before certification, a heightened standard of scrutiny applies. *E.g. Payment Card*, 827 F.3d at 235-36.

III. The settlement should be rejected because it disproportionately benefits the attorneys in violation of Rule 23.

Courts have a duty to ensure that overcompensation of attorneys does not result in under-compensation of class members. *See In re World Trade Ctr. Disaster Site Litig.*, 754 F.3d 114, 127 n.9 (2d Cir. 2014). "Claims-made" settlements such as this one—where class members must submit a claims form to obtain compensation—are notorious for such a lop-sided result. Courts and legal scholars alike have criticized the abuse of claims-made settlements to inflate attorneys' fees and deflate defendants' obligations to class members. *E.g.*, *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (reversing approval of an attorney-centric "selfish" claims made settlement); *Briseño v. Henderson,* 998 F.3d 1014 (9th Cir. 2021) (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*, *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013) ("*Baby Prods.*")). Class members are simply not "best served" by low-value claims made settlements, characterized by "mass indifference," that provide defendant a blanket release

of all class members' claims whether or not they submit a claim. *Gallego v. Northland Grp., Inc.*, 814 F.3d 123, 129-30 (2d Cir. 2016).

Where class counsel have agreed to settlement provisions that do not ensure the complete recovery benefits the class, the settlements often direct an excessive share of the settlement funds to the attorneys. A claims-made process is not *per se* unreasonable; however, one with disproportionate results raises a red flag warning that perverse self-dealing incentives have prevailed.

The settlement here doesn't survive scrutiny of both subsections (ii) and (iii) of Rule 23(e)(2)(C) because the class is primed to recover an unfairly small portion of the total settlement payout, while the attorneys will receive an unreasonably large portion. Specifically, class counsel premised their fee application in significant part on illusory settlement "benefits" that are almost costless to the defendant, who never expected to pay the full $15 million "made available." Rule 23(e) requires scrutiny of how effectively the settlement actually distributes benefits to the class members and rejection of settlements, like this one, where class counsel take an unfair portion of the settlement pie.

A. Rule 23(e)(2)(C) confirms that courts should look to the ratio of fees to actual class recovery to determine settlement fairness.

The Rule 23(e) fairness inquiry evaluate what the class *actually* received. Fed. R. Civ. Proc. 23(e)(2)(C)(ii). Codifying the long-running concern with lawyer-driven settlements, the 2018 Amendments to Rule 23(e) specifically require 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*, 998 F.3d at 1023-27.

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. Here we see such a setup: plaintiffs depict a $15 million fund and claim a total settlement value of $20,465,096 consisting of the $15 million fund, $465,096 for

settlement and administration costs, and a $5 million segregated fund for the payment of attorneys' fees and costs. *See* Dkt. 83 at 4. While class counsel's $5 million fee request thus may amount to 25% of the total $20 million that Godiva "made available" for settlement, the largest part of that figure—the $15 million—is largely illusory. Indeed, plaintiffs' representation of a $20.5 million fund would make it inconsequential whether the funds are ultimately distributed among the settlement administrator's costs, those class members claiming compensation, the *cy pres* recipient, 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). This approach neglects actual distribution to the class in favor of the attorneys' self-interest. But class counsel does not earn fees from generating "illusory" benefits or "superficial accomplishments." *Kaplan v. Rand*, 192 F.3d 60, 71-72 (2d Cir. 1999). It cannot stand under Rule 23(e). *See* 2018 Advisory Committee Notes on Rule 23(e).

Class counsel's reliance on *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007), to argue that their $5 million fee request is appropriate based on the "made available" settlement fund is misplaced for three reasons. First, this aspect of the *Masters* decision was an interpretation of Rule 23(h) and has does not control the Rule 23(e) question of whether a settlement is fairly apportioned. *Masters* court did not confront the Rule 23(e) allocation problem present in typical settlements because there class counsel were the appellants, and were challenging only the insufficiency of the fee award. *Pearson* and *Pampers*, in contrast to *Masters* and *Boeing*, were appeals brought by objecting class members under Rule 23(e). Second, to the extent *Masters* can be read to inform Rule 23(e) analysis, it is simply wrong after the 2018 amendments to Rule 23(e). *See Briseño*, 998 F.3d at 1023-24; *In re Samsung Top-Load Washing Machine Mktg., Sales Practices & Prods. Liab. Litig.*, 997 F.3d 1077, 1094 (10th Cir. 2021). Third, *Masters* was clear that courts should consider the amounts claimed when needed to avoid windfall fee awards. "Use of the entire Fund as a basis for computation does not necessarily result in a

'windfall' because the court *may always adjust the percentage awarded* to come up with a fee it deems reasonable in light of the *Goldberger* factors." *Masters*, 473 F.3d at 437 (emphasis added).

Courts since *Masters* have followed this view and the amended Rule 23(e). For instance, in *Hart v. BHH LLC*, Judge Pauley observed that "[a]ny benefit from funds reverted back or never tendered by Defendants are purely hypothetical" and "provide no benefit to the class." 2020 WL 5645984, 2020 U.S. Dist. LEXIS 173634, at *19-*20 (S.D.N.Y. Sept. 22, 2020). Further, "[t]he theoretical benefit [of the settlement fund] dwarfs any real benefit the class receives. Accordingly, unclaimed funds should not be used when assessing the fee percentage." *Id.*; *see also Cunningham v. Suds Pizza, Inc.*, 290 F.Supp.3d 214, 225 (W.D.N.Y. 2017) (holding that fee award that took into account amounts of settlement fund not ultimately distributed to class members and not benefiting class would result in "an improper windfall for counsel"); *Bodon v. Domino's Pizza, LLC*, 2015 U.S. Dist. LEXIS 820 (E.D.N.Y. June 4, 2015) (noting broad language of *Masters* taken out of context in situations where there is not a fixed settlement sum). The weight of the recent case law demonstrates that counsel's interpretation of *Masters* is incorrect. The correct view, and the one in accord with Rule 23, is to examine what the class actually receives. *See, e.g.*, *Briseño*, 998 F.3d at 1026; *Samsung*, 997 F.3d at 1094; *Pearson*, 772 F.3d at 781-82.

B. Class counsel negotiated a disproportionate share of the settlement for themselves.

The most common settlement defect—and one that exists here—is one of allocation. Thus, the main signpost 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 Litig.* § 3.05, cmt. b at 208 (2010).

The Settlement Agreement defines the Settlement Benefit as the "monetary payment . . . available to Settlement Class Members who submit a timely and valid Claim Form." Dkt. 67-1 at 11. Hence, the value actually available to class members is totally dependent on the number of valid claims submitted. Class counsel focus on the allegedly superior individual claimant relief,

emphasizing that the $1.25 recovery per product exceeds the alleged harm suffered by consumers who purchased Godiva products. Dkt. 66 at 20-21. But it is the benefit to the class as a whole that is required to satisfy Rule 23(e)(2). *See Briseño*, 998 F.3d at 1023-27; *see also Gallego*, 814 F.3d at 129 (finding "hardly a selling point" plaintiff's argument that because of "an expected low participation rate of 5%," "those who do file claims will thus recover a more substantial amount").

The benefit to class members is *not* the $15 million Godiva has agreed to set aside to satisfy valid claims—knowing that far short of 100% of the class will make a claim. Rather, the benefit is the total number of valid claims submitted and paid. Before approving the settlement, the court must "affirmatively seek out" the necessary claims data to ascertain the class benefit. *Baby Prods.*, 708 F.3d at 174; *see also In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 8221 (3d Cir. 1995) ("*GM Trucks*"); *Nguyen v. New Link Genetics Corp*., 2021 U.S. Dist. LEXIS 37023, *4, 2021 WL 732254 (S.D.N.Y. Feb. 25, 2021) (ordering claims administrator to provide claims report prior to final approval). This information is critical to ensuring class members, rather than their counsel are the "foremost beneficiaries of the settlement." *Baby Prods.*, 724 F.3d at 179.

Class counsel assert that the Court doesn't need to consider this factor yet "because it does not bear on what the Settlement Class will receive." Dkt. 66 at 16. The assertion appears to be based on the "made available" amount and the segregated $5 million from which fees will be paid, which is separate from the class fund. This approach is wrong, as confirmed by the 2018 Rule 23(e) amendments. *See* Section III.A. The relevant figure is what the class actually received.

According to class counsel, there are approximately 18,000,000 Class Members, and the settlement administrator has email addresses for slightly over half the class. Dkt. 66 at 24. Simple math indicates that the $15 million settlement fund would be exhausted by 600,000 valid claims with proof of purchase, or 1,000,000 valid claims without proof of purchase.

The claims data submitted by plaintiffs shows that the claims here will indeed fall far short of this threshold. With 452,621 claims *potentially* eligible for a maximum payment of $15 and 10,874 claims *potentially* eligible for a maximum payment of $25—calculated with just days left in the claims period—the actual settlement payout to the class is less than $7.1 million.

Even this $7 million figure is almost certainly higher than the ultimate payments to the class. The unvalidated claims data should be viewed with skepticism. A list of typical claims-made cases illustrates that a significant percentage of the submitted claims will ultimately be invalid.

Case	Submitted Claims	Invalid Claims	Invalid Claims %
Apple Device[1]	3,149,072	890,374	28.2%
Lenny & Larry's Inc.[2]	90,677	24,030	26.5%
Jones v. Monsanto[3]	285,399	43,087	15.1%
Salov N. Am. Corp.[4]	65,048	12,018	18.5%
Proctor & Gamble[5]	187,860	50,792	27.0%
United Indus. Corp.[6]	84,572	16,605	19.6%
Manna Pro Prods.[7]	3,891	3,420	87.9%
Rawa v. Monsanto Co.[8]	93,702	16,382	17.4%
Optical Disk Drive[9]	561,254	99,408	17.7%
Carrier IQ[10]	57,266	17,808	31.1%

[1] Joint Status Report ISO Final Settlement Approval, *In re Apple Inc. Device Performance Litig.*, No. 18-MD-2827, Dkt. 592 (N.D. Cal. Dec. 11, 2020). The number of claims validated was prior to deduplication, so the total number of disallowed claims was greater than 890,374. CCAF represented an objector in this case.

[2] Decl. of Cameron R. Azari, *Cowen v. Lenny & Larry's Inc.*, No. 17-CV-1530, Dkt. 110-3 (N.D. Ill. Apr. 2, 2019). CCAF represented an objector in this case.

[3] Decl. of Brandon Schwartz, *Jones v. Monsanto Co.*, No. 19-CV-0102, Dkt. 65-2 (W.D. Mo., Feb. 25, 2021). CCAF represented an objector in this case.

[4] Supp. Decl. of Jeanne C. Finegan, *Kumar v. Salov N. Am. Corp.*, No. 14-CV-2411, Dkt. 164 (N.D. Cal., May 26, 2017). CCAF represented an objector in this case.

[5] Declaration of Jonathon Shaffer, *Pettit v. Proctor & Gamble Co.*, No. 15-CV-2150, Dkt. 139 (N.D. Cal., Jul. 17, 2019).

[6] *Graves v. United Indus. Corp.*, 2020 WL 953210, 2020 U.S. Dist. LEXIS 33781 at *11 (C.D. Cal., Feb. 24, 2020).

[7] *Hale v. Manna Pro Prods., LLC*, 2021 WL 4993036, 2021 U.S. Dist. LEXIS 207828 at *7-8 (E.D. Cal., Oct. 26, 2021). The number of claims submitted was 3,891, but only 471 eventually were validated.

[8] Mem. ISO Pls.' Mot. for Final Approval, *Rawa v. Monsanto Co.*, No. 17-CV-1252, Dkt. 42-1 (E.D. Mo., Mar. 3, 2018).

[9] Status Update Regarding Claims Distribution, *In re Optical Disk Drive Prod., Antitrust Litig.*, No. 10-MD-2143, Dkt. 3072 (N.D. Cal. Oct. 27, 2009).

[10] *In re Carrier IQ, Inc., Consumer Privacy Litig.*, 2016 WL 4474366, 2016 U.S. Dist. LEXIS 114235 at *27-28 (N.D. Cal. Aug., 25, 2016).

Rita's Water Ice[11]	28,523	18,359	64.4%

Empirical data from the Federal Trade Commission also suggests that the number of valid claims will be well below the actual number of claims submitted. The FTC's 2019 report on consumer class action litigation reviewed over 100 class action settlements and found that, as a weighted mean, 15% of claims were denied. *See* Federal Trade Commission, *Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns* 21 (Sept. 2019).[12] Indeed, thorough audits of settlement claims sometimes reveal that the number of valid claims is substantially fewer than the number of submitted claims. *See, e.g.*, Decl. of Brandon Schwartz, *Monsanto Co.*, No. 19-CV-0102, Dkt. 65-2 (W.D. Mo., Feb. 25, 2021) (fraud audit limited to 2,475 claims submitted with proof of purchase revealed that 2,369 of those claims, or 96.7%, were invalid).

Accordingly, it is likely that a significant number of the 463,495 claims submitted will not be valid which further erodes the actual economic value of the settlement for class members. Indeed, an invalid claims rate of 15% translates into approximately a $1,000,000 reduction in the recovery for the class members. In short, the actual claims data, along with empirical data, shows that the $15 million settlement fund is illusory. A true recovery of $6-$7 million, or slightly less, is far more likely.

A $5 million attorney fee award would be disproportionate compared to the realistic benefit to the class members. Even calculating with the $7.1 million that will likely be reduced once claims are validated, a $5 million fee represents an excessive 40% of the settlement benefit ($7.1 million + $465,096 administration costs). Such a result demonstrates the settlement is unfair and cannot be approved. *See, e.g. Dennis v. Kellogg,* 697 F.3d 858, 868 (9th Cir. 2012) (38.9% fee would be "clearly excessive"); *Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1051 (9th Cir. 2019) (fee award of 45% of gross cash fund is "disproportionate"); *Karvaly v. eBay Inc.*, 245 F.R.D. 71, 86

[11] *Brown v. Rita's Water Ice Franchise Co. LLC*, 2017 U.S. Dist. LEXIS 149602 at *8 (E.D. Pa. Sept. 14, 2017).

[12] *Available at* https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf.

n.29 (E.D.N.Y. 2007) (43% of the common fund as a fee "would clearly be excessive"). As a share of recovery, the "norm" in this Circuit is "within a range of 15% to 33%." *Espinal v. Victor's Cafe 52nd St., Inc.*, 2019 WL 5425475, 2019 U.S. Dist. LEXIS 183642, *6 (S.D.N.Y. Oct. 23, 2019).

These results could not have come as a surprise to class counsel. *Ex ante*, practical sense and empirical data from other cases indicate that claims without proof of purchase are far more common, particularly where there's a consumer product like chocolate for which consumers rarely save their receipts for years. *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); Supp. Decl. of Jeanne C. Finegan, APR, *Kumar v. Salov N. Am. Corp.*, No. 14-cv-02411, Dkt. 164 ¶4 (N.D. Cal. May 26, 2017) (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, 2018 U.S. Dist. LEXIS 177824 at *31 (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, Inc.*, 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%).

In short, class counsel understood when they negotiated the settlement that the class would recover nowhere close to the $15 million they tout. Yet they nevertheless base their fee award on that illusory figure while allowing Godiva to retain the shortfall.

C. Class counsel negotiated a segregated fund that insulates their fee from scrutiny and unfairly prevents the class from recovering any reduction.

Class counsel's proposed $5 million attorney fee award is separate and apart from the monetary relief that Godiva has agreed to provide class members. This segregation creates what is known as a "constructive common fund," colloquially known as a "kicker." *See, e.g.*, *Pearson,* 772 F.3d at 786; *GM Trucks*, 55 F.3d at 820-21 (A severable fee structure "is, for practical purposes, a constructive common fund."). A traditional common fund structure—in which attorneys' fees and class benefits come from the same pot—is superior to a segregated fund because it renders transparent the relationship between gains to counsel and loss to the class. *See Pearson*, 772 F.3d at 786; *Bluetooth*, 654 F.3d at 949.

A segregated fund like the one proposed here is a classic red-flag of a settlement driven by attorneys' fees, and thus begets a "strong presumption of...invalidity." *E.g. Pearson*, 772 F.3d at 787. There is "no plausible reason why the class should not benefit from the spillover of excessive fees." *Briseño*, 998 F.3d at 1027. Where a traditional common fund is employed, the court can benefit class members simply by disallowing excessive fee requests. *See, e.g., Pearson,* 772 F.3d at 786 (calling this the "simple and obvious" solution); *In re World Trade Ctr. Disaster Site Litig.,* 2015 U.S. Dist. LEXIS 15942, at *43 (S.D.N.Y. Jan. 16, 2015) (ordering improper portion of attorneys' fees to be distributed amongst plaintiffs); *Cassese v. Wash. Mut., Inc.*, 2014 U.S. Dist. LEXIS 85836, at *6 (E.D.N.Y. June 23, 2014) (describing the reduction of "the fee award sought by Class Counsel in order to provide the Class with the opportunity to claim against a larger share of the Settlement Proceeds."). A segregated fund deters judicial scrutiny precisely because there is no way to benefit the class through such redistribution. In this instance, class members' benefit is capped on the upside, not only in the aggregate ($15 million), but also per claimant—$15 for claims without proof of purchase and $25 for claims with proof of purchase. Yet, on the downside, if claim exceed the $15 million, there is a *pro rata* reduction. The monetary benefit per class member can only decrease and there is no mechanism to increase the benefit to the class.

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. The court 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, the court 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.

Courts must ensure that overcompensation of attorneys does not result in unfair treatment of class members. *See In re World Trade Ctr. Disaster Site Litig.*, 754 F.3d at 127 n.9 ("Where an attorney derives a benefit when his clients agree to settle or dismiss their claims, a conflict of interest may arise. It is a reasonable exercise of a court's power to modify a fee arrangement to prevent a violation of the attorney's ethical responsibilities.").

D. The *cy pres* provision is another indicator of settlement unfairness.

The settlement's unfairness is further evidenced by the *cy pres* provision. The Settlement Agreement provides that any funds sent to class members, whether by check or through PayPal, not accepted within 180 calendars of issuance "shall be distributed by the Settlement Administrator to the *Cy Pres* Recipient." Dkt. 67-1 ¶ 68(d). The *Cy Pres* Recipient is "Public Justice Foundation, or any other non-profit organization that may be mutually-agreed upon by the Parties and approved by the Court." *Id.* ¶ 32. This provision is improper for multiple reasons.

First, the settlement makes no provisions for a second distribution of funds to the class. *See* Fed. R. Civ. Proc. 23(e)(2)(C)(ii) (requiring court to consider "the effectiveness of any proposed method of distributing relief to the class"). While it's possible that it ultimately will not be economically feasible to redistribute remaining funds, the settlement does not even leave open the option to send class funds *to the class* rather than to a third-party hand-picked by the attorneys.

Under Section 3.07(b) of American Law Institute's Principles of the Law of Aggregate Litigation, as credited by the Court in *Masters*, there should be no discretion granted; if secondary class distributions are economically feasible, the law requires them. *See also In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060, 1066 (8th Cir. 2015) (finding "void ab initio" a provision that purported to override *ALI Principles* § 3.07(b)).

Second, this provision runs afoul of the limitations on the use of *cy pres*. "The purpose of Cy Pres distribution is to put the unclaimed fund to its *next best* compensation use, *e.g.*, for the aggregate, indirect, prospective benefit of the class." *Masters*, 473 F.3d at 436 (internal quotation omitted). There is an inappropriately weak connection between Public Justice Foundation and the consumer protection issues at the heart of this case. *See Nachshin v. AOL, LLC*, 663 F.3d 1034, 1040 (9th Cir. 2011) (rejecting *cy pres* distribution with narrow geographic focus and no relation to the objectives of the underlying law); *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060 (8th Cir. 2015) (similar). In recent posts on its website, Public Justice Foundation proudly publicizes its work in support for polarized issues such as "abortion access for all,"[13] fighting against employers' ability to subject employee claims to arbitration,[14] and fighting school dress codes on behalf of non-binary children.[15] While Public Justice states that it will use *cy pres* funds to support its consumer protection work, the reality is that money is fungible, and directing new funds to one area opens up other funding for other areas of work for which it may be more difficult to attract financial support.

In a similar vein, directing class funds to support a third party's agenda and activities

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13 *See* "Public Justice Statement in Support of Abortion Access for All," attached as Ex. 1 to Declaration of Anna St. John ("St. John Decl."), and *available at* https://www.publicjustice.net/womens-health-protection-act-statement/.

14 See Survivors of Sexual Assault and Harassment Deserve the Option of a Day in Court: And So Do All Workers and Small Businesses Harmed by Corporate Misconduct, Jan. 31, 2022, attached as St. John Decl. Ex. 2, and available at https://www.publicjustice.net/ending-forced-arbitration-of-sexual-assault-and-sexual-harassment-act-of-2021-blog/.

15 *See* Public Justice website screenshot, attached as St. John Decl. Ex. 3, and *available at* publicjustice.net.

violates the First Amendment rights of class members. This Court will be ordering that funds belonging to the class members be paid to an organization that works to advance policy positions without the class members' consent or even an option for them to withhold their monetary support. The forced speech comes about through that principle that "settlement-fund proceeds, generated by the value of the class members' claims, belong solely to the class embers." *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011) (citing *ALI Principles* § 3.07 cmt. (b)). In a class of chocolate buyers, there will be widely divergent views on the policy issues that Public Justice works on, and they have a constitutional right not to have their funds, and speech, directed to support those issues.

Finally, if the parties suggest a different *cy pres* recipient as allowed by the settlement, the class is entitled to notice and an opportunity to object to any such alternative recipient and opt out. The identity of a *cy pres* recipient is material to the fairness of a settlement. Notice gives class members an opportunity to evaluate the settlement and make a decision whether to exercise their Rule 23 objection and opt out rights so as to distance themselves from causes or institutions they do not wish to support or to identify potential conflicts between the recipient and the parties or attorneys. *See Mullane v. Central Hanover Bank*, 339 U.S. 306, 314 (1950); *see also In re VeriFone Holdings, Inc. Secs. Litig.*, 2013 U.S. Dist. LEXIS 126988, at *6 (N.D. Cal. Sept. 5, 2013).

E. Lehrer's late-submitted claim form should be accepted because the settlement was subject to an artificial and early claims deadline.

Lehrer further objects to the artificial deadline for submitting claims, arbitrarily set two weeks before the deadline for class members to exclude themselves from the settlement or object. As a result of this early deadline, Lehrer did not file a claim by the February 23 deadline, but he did mail in a claim form on March 7, 2022, and he asks this Court to accept his claim and consider it timely submitted. This abbreviated claims deadline is another means by which the settlement limited the actual recovery provided to class members and another sign of the settlement's unfairness.

The district court "has 'inherent power' to accept a late-submitted claim" if the equities so provide. *Zimmerman v. Portfolio Recovery Assocs., LLC*, 2013 WL 6508813, 2013 U.S. Dist. LEXIS (S.D.N.Y. Dec. 11, 2013). Here, there would be no prejudice to any other class members, as the class recovery does not change depending on the number of claimants, and Lehrer's claim was submitted less than two weeks after the deadline as a result of the parties' decision to set an artificial and early deadline. *See id.*; *see also In re Bear Stearns Cos.*, 297 F.R.D. 90, 96 (S.D.N.Y. 2004) (allowing late-filed claims to participate in settlement does not prejudice those who filed timely because "timely-filed claimants have no justifiable expectation in any particular payout").

* * *

These factors indicate that the settlement affords preferential treatment to class counsel at the expense of class members and should be rejected so that the parties can reach a more appropriate balance between the benefit to class members and the interests of the attorneys who represent them.

IV. Any fee award should be based on true class benefits and crosschecked with class counsel's lodestar.

If the Court nevertheless approves the settlement and reaches the question of a Rule 23(h) fee award, Lehrer objects to the request. Class counsel requests that this Court award them fees on a percentage basis, Dkt. 83 at 4, but neither a percentage analysis nor the lodestar crosscheck support the $5 million request. "For the sake of their own integrity, the integrity of the legal profession, and the integrity of Rule 23, it is important that the courts should avoid awarding 'windfall fees' and that they should likewise avoid every appearance of having done so." *City of Detroit v. Grinnell*, 495 F.2d 448, 469 (2d Cir. 1974). Through fictive calculation, class counsel now attempt to coax this Court into awarding just such a windfall fee.

The correct approach, however, for the Court to award fees based on the final settlement payout to the class, based on validated claims. Lehrer therefore requests that the Court require the Settlement Administrator to provide data regarding "how many claims were filed, how many claims were approved, how many claims were rejected, and the total dollar amount of the approved

claims." *Nguyen v. New Link Genetics Corp.*, 2021 U.S. Dist. LEXIS 37023, at *4 (S.D.N.Y. Feb. 25, 2021); *see also In re Giant Interactive Group*, *Inc. Secs. Litig.*, 279 F.R.D. 151, 165 (S.D.N.Y. 2011) (holding half of the fee award in abeyance pending a report to the Court on the progress of the claims administration process). This approach accords with the maxim that "Plaintiffs attorneys don't get paid simply for working; they get paid for obtaining results." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1182 (9th Cir. 2013).

If the Court is inclined to award an attorneys' fee without such information, a fee of $2.5 million is more appropriate under both a percentage analyses and lodestar crosscheck based on the preliminary but inadequate information presently in the record.

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

Plaintiffs err by using a faulty denominator for their percentage-of-recovery calculation. Their "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).

The appropriate denominator, then, is the actual settlement benefit for the class. Generously adding a $7.1 million recovery and $465,096 for settlement notice and administration costs, and assuming a 25% fee award yields a fee of about $2.5 million in a classic common fund of about $10 million, using the 25% benchmark. Class counsel's $5 million request is thus twice what they would receive in a non-illusory common fund settlement structure based on preliminary but likely high claims data.

B. Even a surface-level lodestar crosscheck confirms the unreasonableness of the $5 million request.

When class counsel request a fee award based on the percentage of recovery, courts use a lodestar crosscheck to test the "reasonableness of the requested percentage." *Goldberger*, 209 F.3d at 52. Respected commentators have even called the lodestar crosscheck "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).

Although a cross-check does not require the bean-counting that the base lodestar method entails, it would "serve[] little purpose as a crosscheck if it is accepted at face value." *In re Citigroup Inc., Secs. Litig.*, 965 F. Supp. 2d 369, 376 (S.D.N.Y. 2013). "[C]ontemporaneous time records are a prerequisite for attorney's fees in this Circuit." *N.Y. State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1147 (2d Cir. 1983); *Scott v. City of New York*, 626 F.3d 130, 133 (2d Cir. 2010) ("[W]e are adamant that, after *Carey*, applications for attorney's fees allowed by federal law 'must' be accompanied by contemporaneous time records.").

Rule 23(h) entitles class members to a full and fair opportunity to object to counsel's fee requests. *See, e.g., In re Mercury Interactive Secs. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010); *Redman v. Radioshack Corp.*, 768 F.3d 622, 637-38 (7th Cir. 2014). *Citigroup Secs.*, 965 F. Supp. 2d at 389. Class members are impaired in realizing that objection right when a fee request contains as little lodestar data as class counsel's does here. Additional detail is necessary because a "summary spreadsheet reciting attorney names, hourly rates, and total hours spent" provides an "inadequate basis for the Court to place great weight on the lodestar as a valid cross-check." *Lacovara v. Hard Rock Cafe Int'l (USA), Inc.*, 2012 WL 603996, at *3 (S.D.N.Y. Feb. 24, 2012). "Class counsel cannot present effectively unreviewable hours in the name of convenience." *Citigroup Secs.*, 965 F. Supp. 2d. at 393.

Crosschecking even the bare bones of the lodestar that counsel has submitted confirms that the requested fee is excessive. When one evaluates the lodestar with a fee properly based on the approximate actual class benefit, the crosscheck is more aligned with the result. Counsel's lodestar

is $1,471,215. Using the $2.5 million—representing a 25% fee award applied to the likely real economic recovery to the class members—then the multiplier is a still generous 1.7.

Class counsel rely heavily on *Goldberger* to support their fee award. Counsel argue that their lodestar cross-check fully supports the requested $5 million fee award and the resulting 3.34 multiplier. The Court in *Goldberger*, however, expressed skepticism regarding risk multipliers. 209 F.3d at 54-57. As a rule, post-*Goldberger*, courts no longer countenance multipliers in the 3-4.5 range. *See Dial Corp. v. News Corp.*, 426 F.R.D. 426, 427 (S.D.N.Y. 2016) (rejecting 2.01 multiplier, applying 1.75); *In re Platinum & Palladium Commodities Litig.*, 2015 WL 4560206 at *4 (S.D.N.Y. July 7, 2015) (rejecting 2.6 multiplier; applying 1.9); *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110 (S.D.N.Y. 2009) (rejecting 2.69 multiplier; applying 1.6).

Goldberger's general presumption against substantial multipliers is buttressed by the Supreme Court's holding that "there is a strong presumption that the lodestar is sufficient" without an enhancement multiplier. *Perdue v. Kenny A*, 559 U.S. 542, 546 (2010). *Kenny A.* allocates "the burden of proving that an enhancement is necessary [to] the fee applicant." *Id.* at 553. A lodestar enhancement is only justified in "rare and exceptional" circumstances where "specific evidence" demonstrates that an unenhanced "lodestar fee would not have been adequate to attract competent counsel." *Id*. at 554. Class counsel has provided no such evidence here. A 1.7 multiplier suggests that the 25% benchmark should be reduced once the full claims data is submitted to the Court.

The crosscheck thus supports a reduced fee award that follows Rule 23(h)'s focus on the result actually achieved.

CONCLUSION

For the foregoing reasons, the Court should reject the proposed settlement and fee award or, at a minimum, award no more than 25% of the actual value of the settlement benefit to the class.

Dated: March 7, 2022

/s/ *Anna St. John*
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Attorney for Objector Eli Lehrer

I, Eli Lehrer, am the objector. I sign this written objection drafted by my attorneys as required by the Class Notice ¶ 19.

Eli Lehrer

Eli Lehrer

Certificate of Service

The undersigned certifies she electronically filed the foregoing Objection and associated declarations and exhibits via the CM/ECF system for the Southern District of New York, thus sending the Objection and declarations and exhibits to the Clerk of the Court and also effecting service on all attorneys registered for electronic filing.

Dated: March 7, 2022

/s/ *Anna St. John*
Anna St. John