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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BAERBEL MCKINNEY-DROBNIS, JOSEPH B. PICCOLA, and CAMILLE BERLESE, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MASSAGE ENVY FRANCHISING, LLC, a Delaware Limited Liability Company,

Defendant.

KURT ORESHACK,

Objector.

Case No. 3:16-cv-6450-MMC

CONTINGENT OBJECTION OF KURT ORESHACK TO AMENDED CLASS ACTION SETTLEMENT

Date: May 20, 2022
Time: 9:00 A.M.
Courtroom: 7, 19th Floor (Zoom hearing)
Judge: Hon. Maxine M. Chesney

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INTRODUCTION

Class member Kurt Oreshack objected to the original settlement on the grounds that (1) it was a coupon settlement subject to the Class Action Fairness Act, and (2) it impermissibly benefited class counsel at the expense of the class by providing for disproportionate attorneys' fees, clear sailing such that Massage Envy would not challenge their fee request, and a segregated fee fund such that any reduction in attorneys' fees reverted to Massage Envy rather than benefit the class. *See* Dkt. 124. At the urging of the settling parties to disregard Oreshack's objections, this Court approved the settlement.

Following Oreshack's successful appeal, the new proposed settlement resolves the first objection by acknowledging that the vouchers the settlement provides are coupons. The proposed settlement potentially resolves Oreshack's second objection by putatively eliminating the clear sailing provision and partially undoing the reversion provision by augmenting the coupon relief. But the sequence of events leading to the last-minute amendment of the settlement—by which class counsel is seeking attorneys' fees based upon an illusory valuation of injunctive relief propounded by an expert hired by Massage Envy, who has yet to file any opposition to the fee request—suggests a danger of the sort of collusive agreement to exaggerate the value of the settlement that the Ninth Circuit found problematic in *Briseño v. Henderson*, 998 F.3d 1041 (9th Cir. 2021). Perhaps the elimination of the clear-sailing clause is legitimate, and Massage Envy will challenge the attorney-fee request. But if the elimination of clear sailing is a sham, and Massage Envy puts forward only a token opposition to the fee request, Oreshack reserves the right to challenge settlement approval and seek discovery. But Oreshack can only make that determination based on Massage Envy's response to class counsel's proposed fee request—which he will be able to evaluate only after the objection deadline.[1]

If the absence of clear sailing is not illusory, Massage Envy would make several objections to Plaintiffs' request for fees. In particular, one would expect Massage Envy to challenge plaintiffs' inflated value of injunctive relief, which consists of actions Massage Envy has already implemented apart from the settlement. If indeed the injunctive relief value constitutes a smaller share of the total settlement value, class counsel's CAFA-based lodestar award would need to shrink proportionally. *Chambers v. Whirlpool Corp.*, 980 F.3d 645,

[1] If the settlement is given final approval Oreshack also reserves his right to move for objector's attorneys' fees in the manner contemplated by Rules 23 and 54, based upon the enhanced benefit conferred upon class members under the amended settlement. *E.g.*, *Rodriguez v. Disner*, 688 F.3d 645, 658 (9th Cir. 2012).

662-65 (9th Cir. 2020). Following *Chambers*, a rational economic actor in Massage Envy's position would also challenge the requested lodestar multiplier. One would also expect Massage Envy to challenge the inclusion in the denominator of the fee award of administrative costs—which are now much greater than in the first settlement solely because the parties convinced this Court to commit legal error and hold that the vouchers are not subject to the Class Action Fairness Act.

If Massage Envy makes these arguments in its response, it will show that the elimination of clear sailing in the amended settlement has substance. If it again sits on the sideline, or fails to provide a zealous adversarial presentation with the strongest arguments, such omissions will show that clear sailing remains a *de facto* part of the settlement, undermining the supposed improvements highlighted by the plaintiffs, and demonstrating exactly the collusion Mr. Rotman's declaration says does not exist.

Similarly, Mr. Rotman's declaration's legal conclusion as to whether plaintiffs' counsel's negotiations were infected by counsel's self-interests is premature, because there is no evidence that Mr. Rotman considered the extent to which the settling parties have colluded, tacitly or otherwise, to exaggerate the value of the injunctive relief; nor could he have in the absence of seeing Massage Envy's yet-to-be-filed response to the fee request and/or objections thereto. And unless Mr. Rotman was privy to every communication between the settling parties, he has no basis to make any judgment. In any event, the legal conclusion is inadmissible as evidence.

I. The amended settlement resolves Oreshack's Rule 23 objection only if the elimination of the clear-sailing provision is not illusory.

Under Rule 23(e)(2), a court may approve a class action settlement only after finding that the settlement is "fair, reasonable, and adequate." The proposed settlement resolves Oreshack's objection that the original settlement did not comply with the Class Action Fairness Act; it also purports to eliminate the clear-sailing provision and effectively undoes the abusive reversion provision by augmenting the coupon relief by ten percent. But Oreshack remains concerned that the elimination of clear sailing is merely a wink and nod between class counsel and the defendant without real effect. This Court is charged with examining the true "economic reality" of the arrangement. *McKinney-Drobnis v. Oreshack*, 16 F.4th 594, 610 (9th Cir. 2021). If Massage Envy's filings demonstrate that the reality of this new settlement is *de facto* clear sailing, which will become apparent only after the objection deadline has passed, then Oreshack reserves the right to object under Rule 23.

The question, then, is what response by Massage Envy would indicate that *de facto* clear sailing remains part of the settlement? There are several possible signs.

Settlement Valuation. In the true absence of clear sailing, one would expect Massage Envy to aggressively challenge the settlement valuation from which the attorneys' fees will be calculated. Ordinarily, in a common-fund settlement, because "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 …." *Staton v. Boeing*, 327 F.3d 938, 964 (9th Cir. 2003) (internal quotations omitted). Here, however, there is no "constructive common fund" if the clear sailing has actually been removed; Massage Envy will be paying the attorneys' fees separately and on top of the settlement amount. *In re Home Depot, Inc. Customer Data Sec. Breach Litig.*, 931 F.3d 1065, 1082 (11th Cir. 2019). It therefore has every financial incentive to challenge that amount—unless the absence of a clear-sailing provision is merely a formality in the written agreement rather than a substantive provision adding a layer of protection to the class.

As Oreshack noted in his objection to the original settlement, the reason that clear-sailing clauses are problematic in class-action settlements is that "by its very nature," the clause "deprives the court of the advantages of the adversary process." *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 525 (1st Cir. 1991). With clear sailing, a court cannot know what class counsel may have bargained away in exchange for a defendant's agreement not to challenge their fee request, thus limiting a court's ability to determine the fairness of an attorneys' fee request. *McKinney Drobnis*, 16 F.4th at 610-11; *In re Bluetooth Headset Products Liability Litig.*, 654 F.3d 935, 948 (9th Cir. 2011). The clause thereby 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 "be placed under the microscope of judicial scrutiny." *Weinberger*, 925 F.2d at 518, 524-25. Allocational issues cannot be waived away simply by structuring the settlement to provide "separate" attorneys' fees, rather than as a traditional common fund. *See In re Dry Max Pampers Litig.*, 724 F.3d 713, 717-18 (6th Cir. 2013); *Bluetooth*, 654 F.3d at 943. 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.

Just as in their original settlement, plaintiffs have put forth an unrealistically high settlement valuation—a purported $11.4 million, comprised of $5.3 million in vouchers and $6.1 million in injunctive

relief. The expert declaration of Christian M. Dippon plaintiffs submit claims that the injunctive relief—which simply requires Massage Envy to give 45 instead of 30 days' notice of price increases and allows subscribers to cancel their subscription with 10 days' notice instead of 30—is worth over $6 million even though Massage Envy has applied these terms since 2019. If the removal of clear sailing is not mere illusion and has any effect whatsoever, then Massage Envy would aggressively challenge the unrealistic valuation and the highly unrealistic expert report that purportedly supports that figure because that valuation directly affects the amount of attorneys' fees that it will have to pay over and above the class relief.

> Under §1712(c)—which governs these so-called "mixed" settlements involving both coupon and non-coupon relief—the percentage-of-redemption-value method still applies to the portion of fees attributable to coupons. 28 U.S.C. § 1712(c)(1) (stating that fees "based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (a)," which sets forth the percentage-of-redemption-value methodology).

Chambers, 980 F.3d at 659.

> But the remaining portion of fees attributable to "non-coupon relief" is calculated under § 1712(b) as a reasonable lodestar amount plus or minus any appropriate multiplier. 28 U.S.C. § 1712(b) (stating that where "a portion of the recovery of the coupons is not used to determine the attorney's fees," it "shall be based upon the amount of time class counsel reasonably expended"). In short, the total fee award for "mixed" settlements under § 1712(c) is the sum of: (i) "a reasonable contingency fee based on the actual redemption value of the coupons" (§ 1712(a)); and (ii) "a reasonable lodestar amount to compensate class counsel for any non-coupon relief obtained" (§ 1712(b)).

Id. Because class counsel here seeks upfront a lodestar award "attributable to the non-coupon portion," Massage Envy, if unburdened by a clear-sailing agreement, would naturally look to minimize the share of the settlement value attributable to the non-coupon relief. *Compare* Dkt. 164 at 38 (plaintiffs claiming that the injunctive relief "makes up approximately 57.24 percent of the benefits provided"). They would do so, because under §1712(b), the Court must limit the lodestar award to that percentage of the time expended that is devoted to obtaining non-coupon value. *Chambers*, 980 F.3d at 662. To do this it "must ascertain the value of the non-coupon portion of the settlement" and weigh that against the "portion of the settlement value [that] stems from coupon relief." *Id.* This means, as the share of the settlement value comprising injunctive relief shrinks, so too must class counsel's lodestar multiplier.

Settlement Valuation: Fictious Injunctive Relief Value. The proponents of a settlement bear "the

burden of demonstrating that class members would benefit from the settlement's injunctive relief." *Koby v. ARS Nat'l Servs.*, 846 F.3d 1071, 1079 (9th Cir. 2017); *accord Pampers*, 724 F.3d at 719 (compiling authorities). Under controlling Ninth Circuit precedent, class counsel cannot rely on hypothetical, highly illusory injunctive relief to justify their fee award. The injunctive relief must have value to the class to justify the class members' release of their claims. *See Koby*, 846 F.3d at 1079 (rejecting settlement where plaintiffs failed to prove that members of the class would benefit from the injunctive relief).

If a defendant agrees to stop doing something it already stopped, or to do something it is already doing, the consideration to class members releasing their claims is essentially zero. *See* Howard Erichson, *Aggregation as Disempowerment*, 92 NOTRE DAME L. REV. 89, 874-76 (2016); *Koby*, 846 F.3d at 1080; *Staton*, 327 F.3d at 961; *Subway Footlong Litig.*, 869 F.3d 551, 557 (7th Cir. 2017). That's what is happening here. Massage Envy adopted the injunctive relief set forth in the proposed settlement (the extended notice and shortened cancelation periods) in June 2019, Dkt. 166-1 ¶ 5; *see also* Dkt. 164 at 15-16, and has agreed to maintain the measures for two years from the settlement. In this circumstance, the defendant already "took that step for its own business reasons (presumably to avoid further litigation risk), not because of any court- or settlement-imposed obligation." *Koby*, 846 F.3d at 1080 (injunction "of no real value" where "it does not obligate [defendant] to do anything it was not already doing").

For settlement valuation, it is only the "*incremental* benefits" that matter, not ones that preceded settlement. *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 286 (7th Cir. 2002); *Hoffmann v. Dutch LLC*, No. 3:14-cv-02418, 2017 WL 840646, at *7 (S.D. Cal. Mar. 2, 2017) (refusing to credit injunctive relief when the defendant had voluntarily revised its labeling before the settlement). Yet plaintiffs value the relief at over $6 million. This valuation is unsupported by either the facts or the law.

The plaintiffs' counsel in *Briseño v. Henderson*, 998 F.3d 1041 (9th Cir. 2021), tried to pull a similar trick. There, plaintiffs alleged that a "100% Natural" label that appeared on Wesson-branded cooking oil was false or misleading. "Under the settlement, ConAgra agreed to refrain from marketing Wesson Oil as '100% Natural.' That sounds great, except that ConAgra already abandoned that strategy" years before the settlement agreement was signed and "[e]ven worse, ConAgra's promise not to use the phrase '100% Natural' on Wesson Oil appears meaningless because ConAgra no longer owns Wesson oil." *Id.* at 1028. The Ninth Circuit fully rejected the injunctive charade—and settlement.

In addition to the problem of duplicating the status quo, Mr. Dippon premises his valuation on the assumption that redemptions of stockpiled massages occur regularly and consistently from the moment that a subscriber is informed about a price increase that will cause them to cancel their membership until the unused massages expire. But there was no reason for the expert to speculate: Massage Envy is in possession of data that either confirms or refutes that hypothesis. Is there a rush to redeem massages when Massage Envy increases prices, and if so, is it by as much as Mr. Dippon assumes? Because Massage Envy did not volunteer this information to Mr. Dippon, we can infer that the facts were less favorable than the model's assumption.

Class counsel should not be given the benefit of the doubt with respect to the value of the injunctive relief because, as this Court already saw with their claim that the vouchers were not coupons, class counsel is willing to twist the law and facts to pursue their self-interest. Indeed, in Oreshack's continued view, the "injunctive relief" if anything constitutes an extension of Massage Envy's release against current subscribers. *See* Dkt. 124 at 25-28. When the Court put no stock in that relief in its final approval order, the settling parties did not pursue the point further on appeal. But now on remand, plaintiffs seek to pull this value back out of the magician's hat.

Because of this history, Oreshack is still concerned that Massage Envy might not do its job to create an adversarial presentation of these issues to the Court, given its willingness to accept class counsel's earlier fictive valuations. The behavior by both parties is emblematic of the perverse class-action incentive problems that courts must guard against. *See, e.g.*, Erichson, 92 Notre Dame L. Rev. at 872-78 (discussing "spurious injunctive relief"). If the elimination of clear sailing is legitimate, Massage Envy will challenge the valuation and aid this Court in undertaking its duty to scrutinize the bogus valuation here.

Lodestar Multiplier. One would also expect Massage Envy to challenge the requested lodestar multiplier of 1.59. *See* Dkt. 164 at 28, 44. "[T]here 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. Although *Kenny A.*'s limitation on enhancements was made in the context of interpreting 42 U.S.C. § 1988's language of "reasonable" fee awards, the Ninth and Sixth Circuits have already applied it in precisely this situation, when

a lodestar-based request is made attendant to a CAFA settlement. *Chambers*, 980 F.3d at 665; *Linneman v. Vita-mix Corp.,* 970 F.3d 621, 631-33 (6th Cir. 2020).

As shown by the multiplier reversals in *Chambers* and *Linneman*, this is an argument that any defendant legitimately challenging fees would make. And if Massage Envy also contests the injunctive relief valuation, the multiplier will be significantly higher than 1.59.

Inclusion of Administrative Costs for Fee Calculation. Another challenge that Massage Envy would be expected to make if the elimination of clear sailing is legitimate is to the inclusion of administrative costs in the denominator of the fee calculation. The inclusion of such costs rewards class counsel for misleading the Court as to the nature of the coupons. Excluding those costs would reduce the fee award and the ultimate amount that Massage Envy must pay as part of the settlement. This issue is addressed further in Section II below.

In sum, Massage Envy has several factual and legal grounds for challenging the fee request. If it instead plays "turnstile defense" with the fee request, we know that the parties have not genuinely dropped the clear-sailing clause.

II. Because class counsel is responsible for the delay in providing relief to the class, the increased administrative fees are not a class benefit for purposes of calculating fees.

Ordinarily, the court has discretion to include administrative costs of a settlement in the denominator of the attorneys' fee calculation. *In re Online-DVD Rental Antitrust Litigation*, 779 F.3d 934, 953 (9th Cir. 2015). Other Circuits have noted the contradictions inherent in including such costs in the denominator because *all* the parties, not just the class, benefit from administrative costs: Without administrative costs, the class would get nothing. "But also without those costs class counsel would get nothing … [a]nd without reliable administration the defendant will not have the benefit of a valid and binding settlement." *Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014). By counting all the administrative costs as a benefit to the class, "the court eliminate[s] the incentive of class counsel to economize on that expense—and indeed may create[] a perverse incentive; for higher administrative expenses make class counsel's proposed fee appear smaller in relation to the total settlement than if those costs were lower." *Id.*

Here, unless *de facto* clear sailing is still part of the settlement, Massage Envy would object that the inclusion of such costs inappropriately inflates the amount of attorneys' fees it must pay class counsel. It is not

entirely clear to what extent the additional notice costs are because of the reapproval process necessitated by an unfair first settlement. (The initial estimate under the first settlement was $450,000, but Massage Envy's counsel represented that those came in "significantly" higher. Dkt. 150 at 58.) But whatever the increase is, it appears to be due entirely to the need for a new settlement to address the deficiencies in the first settlement. The settling parties are responsible for that timeline of events, and cannot bootstrap the settlement valuation by artificially increasing the costs of notice. When plaintiffs sought approval of the original settlement, they were adamant that that "this settlement is not a coupon settlement," Dkt. 122 at 12-16—a position that benefited class counsel by allowing them to seek preferential treatment for themselves over the class members, *see* Dkt. 124 at 1, 8-18. They maintained this position even after Oreshack identified controlling legal authority and the myriad ways in which the vouchers provided by the settlement were coupons. And they maintained this position unsuccessfully all the way to the Ninth Circuit, which ultimately rejected plaintiffs' position under established case law. Numerous courts had long rejected similar semantic efforts, such as the use of the term "vouchers" to avoid the legal conclusion that certain relief constitutes a coupon subject to the Class Action Fairness Act.[2]

If the Court counts the administrative costs in its fee calculation, it will be rewarding class counsel with increased fees for misleading the Court by insisting that the vouchers are not coupons when the law clearly held otherwise.

Once the administrative costs are removed, the plaintiffs' requested 21% of the settlement benefit is $2,391,039.63, rather than the $2,612,500 they request. (This calculation relies on the unrealistic $11,385,902 valuation. If Massage Envy challenges that valuation or the Court otherwise looks through the inflated numbers, the attorneys' fee would be lower. *See* Section I above.)

[2] *E.g.*, *In re HP Inkjet Printer Litig*, 716 F.3d 1173, 1176 (9th Cir. 2013) ("e-credits" are a "euphemism" for coupons); *Easysaver*, 906 F.3d 747 ("credits"); *Seegert v. Lamps Plus, Inc.*, 377 F. Supp. 3d 1127 (S.D. Cal. 2018) ("vouchers"); *Knapp v. Art.com*, 283 F. Supp. 3d 823 (N.D. Cal. 2017) ("vouchers"); *see also In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 952 (9th Cir. 2015) ("*Online DVD*") (courts should "ferret[] out the deceitful coupon settlement that merely co-opts the term 'gift card' [or here, voucher] to avoid CAFA's requirements").

III. Paragraph 12 of the Rotman Declaration must be disregarded as an inadmissible and improper legal conclusion.

Plaintiffs filed the Declaration of David A. Rotman in Support of Their Motion for Final Approval. Dkt. 164-3. In paragraph 12, Mr. Rotman, who oversaw the mediation process between the parties, opines: "There was no collusion between the parties and plaintiffs' counsel's negotiations on behalf of absent class members were not inflected by counsel's self-interests." But whether class counsel prioritized their self-interest above the interests of the class is a legal determination that courts evaluate as part of their fiduciary responsibility under Rule 23 to determine whether a settlement if fair, reasonable, and adequate based, in part, on the terms of a proposed settlement and attorneys' fee request. In fact, class actions have structural conflicts between class counsel and the class members at the settlement stage, as class counsel negotiate over both class members' rights and their own fee, that necessitate this legal determination by a court. "[C]lass-action settlements affect not only the interests of the parties and counsel who negotiate them, but also the interests of unnamed class members who by definition are not present during the negotiations …. [T]hus, there is always the danger that the parties and counsel will bargain away the interests of unnamed class members in order to maximize their own." *Pampers*, 724 F.3d at 715. To guard against this danger, a district court must act as a "fiduciary for the class … with 'a jealous regard'" for the rights and interests of absent class members. *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010) (quoting *In re Washington Pub. Power Supply Sys. Litig.* ("*WPPSS*"), 19 F.3d 1291, 1302 (9th Cir. 1994)).

If the Court accepts Mr. Rotman's determination on this point at face value, it will be ceding its fiduciary responsibility to a third party with no relationship with or duty to the class. As an evidentiary matter, testimony regarding matters of law is inadmissible under either Rule 701 or 702 because "[r]esolving doubtful questions of law is the distinct and exclusive province of the trial judge." *Nationwide Transport Finance v. Cass Info. Sys.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (internal quotation omitted). It is well established that "that expert testimony by lawyers, law professors, and others concerning legal issues is improper." *Pinal Creek Group v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1043 (D. Ariz. 2005). Such legal opinions invade this Court's province as the "sole arbiter of the law." *GPF Waikiki Galleria v. DFS Group*, No. 07-00293 DAE-LEK, 2007 WL 3195089, at *5 (D. Haw. Oct. 30, 2007). "[T]he court is well equipped to instruct itself on the law." *Stobie Creek Invs. v. United States*, 81 Fed. Cl. 358, 361 (Ct. Fed. Cl. 2008), *aff'd* 608 F.3d 1366 (Fed. Cir. 2010).

Furthermore, Mr. Rotman's declaration contradicts the record in this case: the settling parties objectively colluded in the first settlement to (1) attempt to evade the Class Action Fairness Act and (2) use a clear-sailing clause to shield the fee request from scrutiny. The parties may yet demonstrate with Massage Envy's future filing that they are tacitly or explicitly colluding to exaggerate the value of the injunctive relief and have agreed to *de facto* clear sailing.

The Court therefore should strike or, in the alternative, disregard paragraph 12 of Mr. Rotman's declaration because it contains an inadmissible legal conclusion. To the extent the Court wishes to give that conclusion any evidentiary weight, Oreshack requests a continuance of the fairness hearing so that he may depose Mr. Rotman. For example, on remand in *Briseño*, the mediator—a magistrate judge—made the same representations that Mr. Rotman did here. But the district court rejected those assertions because discovery revealed evidence of self-interest of which the mediator was not aware. *Briseño v. Conagra Foods, Inc.*, No. 11-cv-05379-CJC-AGR, slip op. (C.D. Cal. Dec. 21, 2021) (Dkt. 779) (a copy of which is attached as **Exhibit A**).

The better rule is to not allow mediators to opine on these legal conclusions rather than requiring burdensome discovery and collateral litigation over such contentions.

CONCLUSION

The amended settlement may well resolve the primary Rule 23 problems identified by Oreshack in the original settlement; however, one cannot know whether the elimination of the clear-sailing clause is legitimate until we see Massage Envy's response to class counsel's present motion or to the objections thereto. If that response reveals that clear sailing effectively remains part of the settlement, Oreshack objects to the sham on the court and the *de facto Bluetooth* violation shielding disproportionate fees from legitimate scrutiny.

Dated: April 20, 2022

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on this day I electronically filed the foregoing Objection using the CM/ECF filing system thus effectuating service of such filing on all ECF registered attorneys in this case.

DATED this 20th day of April, 2022.

/s/ Theodore H. Frank
Theodore H. Frank