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

IN RE: ALL-CLAD METALCRAFTERS, LLC, COOKWARE MARKETING AND SALES PRACTICES LITIGATION This Document Relates to All Actions	MDL No. 2988 Master Case No. 2:21-mc-491-NR ELECTRONICALLY FILED

OBJECTION OF JOHN MICHAEL ANDREN

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TABLE OF CONTENTS

TABLE OF CONTENTS I

TABLE OF AUTHORITIES II

INTRODUCTION 1

I. Objector John Andren is a class member and intends to appear through counsel at the fairness hearing. 1

II. The Court has a fiduciary duty to the absent members of the class. 2

III. The proposed settlement unreasonably prevents the Court from scrutinizing the effectiveness of the claims process before final approval. 4

IV. The settlement unfairly makes class counsel its foremost beneficiaries. 9

A. Class counsel has negotiated a disproportionate share of the settlement for their fee. 10

B. Class counsel has negotiated the red-carpet treatment of a class-sailing clause. 17

C. Class counsel has negotiated a segregated fund that insulates their fee from scrutiny. 18

V. If the Court does not deny settlement approval, it should defer the fee award pending consideration of the actual payments to class members and the redemption of coupons. 19

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

In re AT&T Corp., 455 F.3d 160 (3d Cir. 2006)....................16-17
In re Baby Prods. Antitrust Litig., 708 F.3d 163 (3d Cir. 2013) ....*passim*
Bell Atlantic Corp. v. Bolger, 2 F.3d 1304 (3d Cir. 1993)....................16
In re Bluetooth Headset Prod. Liab. Litig., 654 F.3d 935 (9th Cir.2011).................... 10, 19
Boeing v. Van Gemert, 444 U.S. 572 (1980)....................14
Briseño v. Henderson, 998 F.3d 1014 (9th Cir. 2021)....................4, 5, 9, 10, 13, 16, 19
Brown v. Rita's Water Ice Franchising Co. LLC, 242 F. Supp. 3d 356 (E.D. Pa. 2017) 10
In re Cendant Corp. PRIDES Litig., 243 F.3d 722 (3d Cir. 2001) 7, 19
Chambers v. Whirlpool Corp., 980 F.3d 645 (9th Cir. 2020) 12
In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortg. Litig., 418 F.3d 277 (3d Cir. 2005) 18
Cottle v. Plaid, 340 F.R.D. 356 (N.D. Cal. 2021)....................12
Cunningham v. Suds Pizza, Inc., 290 F. Supp. 3d 214 (W.D.N.Y. 2017) 13
Dennis v. Kellogg Co., 697 F.3d 858 (9th Cir. 2012) 13
Dewey v. Vokswagen Aktiengesellschaft, 681 F.3d 170 (3d Cir. 2012)....................2
In re Dry Max Pampers Litig., 724 F.3d 713 (6th Cir. 2013)....................2, 3, 4, 6, 9, 10, 15, 17
In re EasySaver Rewards Litig.., 906 F.3d 747 (9th Cir. 2018)....................11
Erie County Retirees Ass'n v. County of Erie, 192 F. Supp. 2d 369 (W.D. Pa. 2002)....................10
Fessler v. Porcelana Corona De Mex., S.A., 23 F.4th 408 (5th Cir. 2022)....................20
Fitzgerald v. Gann Law Books, 2014 WL 8773315, 2014 U.S. Dist. LEXIS 174567 (D.N.J. Dec. 17, 2014) 13
Gelis v. BMW of N. Am., LLC., 49 F.4th 371 (3d Cir. 2022)....................20
In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768 (3d Cir. 1995)...*passim*
In re Google Inc. Cookie Placement Consumer Priv. Litig., 934 F.3d 316 (3d Cir. 2019)....................3
In re HP Inkjet Printer Litig., 716 F.3d 1173 (9th Cir. 2013). 16, 20
In re Home Depot Inc. Customer Data Sec. Breach Litig., 931 F.3d 1065 (11th Cir. 2019) 18
Horton v. Right Turn Supply, LLC, 455 F. Supp. 3d 202 (W.D. Pa. 2020).................... 2-3
In re Cendant Corp. Litig., 404 F.3d 173 (3d Cir. 2005)....................32
Jackson v. Wells Fargo Bank, N.A., 136 F. Supp. 3d 687 (W.D. Pa. 2015)....................13

Koby v. ARS Nat's Services, Inc., 846 F.3d 1071 (9th Cir. 2017) 16

Lachance v. Harrington, 965 F. Supp. 630 (E.D. Pa. 1997) 10, 14

In re LifeTime Fitness, Inc TCPA Litig., 847 F.3d 619 (8th Cir. 2017). 14

McDonough v. Toys 'R' Us., 80 F. Supp. 3d 626 (E.D. Pa. 2015) 2

McKinney-Drobnis v. Oreshack., 16 F.4th 594 (9th Cir. 2021) 15, 17

In re National Football League Players Concussion Injury Litig., 821 F.3d 410 (3d Cir. 2016) 18

O'Brien v. Brain Research Labs, LLC, 2012 WL 3242365, 2012 U.S. Dist. LEXIS 113809 (D.N.J. Aug. 9, 2012) 11

In re Online DVD-Rental Antitrust Litig., 779 F.3d 934 (9th Cir. 2015) 14

In re Oracle Sec. Litig., 132 F.R.D. 538 (N.D. Cal. 1990) 16

In re Paper Antitrust Litig., 751 F.2d 562 (3d Cir. 1984) 2

Pearson v. NBTY, Inc., 772 F.3d 778 (7th Cir. 2014). ....*passim*

Pearson v. Nbty, Inc., 2014 WL 30676, 2014 U.S. Dist. LEXIS 357 (N.D. Ill. Jan. 3, 2014) 11

Pearson v. Target Corp.,968 F.3d 827 (7th Cir. 2020) 2

In re Pet Food Prods. Liab. Litig., 629 F.3d 333 (3d Cir. 2010) 10

Pollard v. Remington Arms Co., 320 F.R.D. 198 (W.D. Mo. 2017) 12

In re Pool Prods. Distrib. Mkt. Antitrust Litig., 2015 WL 4528880, 2015 U.S. Dist. LEXIS 97578 (E.D. La. Jul. 27, 2015) 12

In re Prudential Ins. Co. Am. Sales Practices Litig.,148 F.3d 283 (3d Cir. 1998) 6-7, 8, 20

Redman v. RadioShack Corp., 768 F.3d 622 (7th Cir. 2014) 3, 4, 14, 16, 17, 19, 20

Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277 (7th Cir. 2002) 16

In re Rite Aid Corp. Sec. Litig., 396 F.3d 294 (3d Cir. 2005) 16-17

Roes v. SFBSC Mgmt. LLC., 944 F.3d 1035 (9th Cir. 2019) 3

In re Samsung Top-Load Washing Machine Mktg., Sales Practices & Prods. Liab. Litig., 997 F.3d 1077 (10th Cir. 2021) 8, 9, 13, 17

Staton v. Boeing Co., 327 F.3d 938 (9th Cir. 2003) 18

Strong v. Bellsouth Telecoms. Inc., 137 F.3d 844 (5th Cir. 1998) 14

Sullivan v. DB Invs., Inc.., 667 F.3d 273 (3d Cir. 2011) 11

Vought v. Bank of Am., N.A., 901 F. Supp. 2d 1071 (C.D. Ill. 2012) 17

In re Wawa Inc., Data Sec. Litig., 2022 U.S. Dist. LEXIS 72569, 2022 WL 1548532 (E.D. Pa. Apr. 20, 2022) 13

Weinberger v. Great Northern Nekoosa Corp., 925 F.2d 518 (1st Cir. 1991) 17

In re Wells Fargo Sec. Litig., 157 F.R.D. 467 (N.D. Cal. 1994) 14

Rules and Statutes

28 U.S.C. § 1711 *et seq*. 8

28 U.S.C. § 1712 .... 15, 20

Fed. R. Civ. P. 23 ....*passim*

Fed. R. Civ. P. 23(e) 1, 4

Fed. R. Civ. P. 23(e)(2)(C)(ii) 4, 6, 9, 13

Fed. R. Civ. P. 23(e)(2)(C)(iii) 4, 9, 10, 13

Fed. R. Civ. P. 23(h) 19

Other Authorities

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Am. Law Institute, *Principles of the Law of Aggreggate Litig.* § 3.05(c) (2010) 3

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INTRODUCTION

This Court confronts a classic question of fiction versus reality. The plaintiffs would have this Court reflexively adopt the notion that this settlement provides a $6.3 million benefit to class members. Objector John Andren 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—payments totaling at most a few hundred thousand dollars to a very small fraction of the class. In reality, the class attorneys are raking in over 80% 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 All-Clad's total settlement liability will only be about $2.5 million. They are not entitled to allocate that recovery so that class counsel collects the vast majority of those proceeds.

I. Objector John Andren is a class member and intends to appear through counsel at the fairness hearing.

As documented in his declaration, John Michael Andren is a member of the class as defined in the preliminary approval order and settlement agreement. Declaration of John Andren ¶¶5-9. His declaration lists his mailing address, email address, and telephone number. *Id.* ¶2

Andren is an attorney with 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.* ¶3; Declaration of Adam Schulman at ¶¶5-13. 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).

Andren objects to the unduly burdensome requirement of providing five-years' objection history. *See* Andren Decl. ¶11; Schulman Decl. ¶8. 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[1]—should weigh in favor of his objection here, and Andren has provided the information demanded. Andren Decl. ¶11. He also objects to the unduly burdensome requirement that objectors provide "proof of purchase," if it is interpreted to require more "evidence" than a personal declaration attesting to class membership with photographic exhibit. *See Birchmeier v. Caribbean Cruise Line,* 896 F.3d 792, 798 (7th Cir. 2018).

Andren's HLLI colleague Adam Schulman will likely appear on Andren's behalf at the Fairness Hearing, scheduled for January 26, 2022. Andren reserves the right to substitute other counsel to appear at the hearing. He also reserves the right to make use of all documents entered on to the docket, and the right to cross-examine any witnesses who testify at the hearing. He adopts any objections not inconsistent with this one. Andren's objection applies to the entire class.

II. 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. Because of the lack of oversight from absent class members, class actions "risk[] that the missing class members end up obtaining small benefits from a settlement compared to a large windfall reaped by class counsel." *Horton v. Right Turn Supply, LLC*, 455 F. Supp. 3d 202 (W.D. Pa. 2020)

[1] *In re Google Inc. Cookie Placement Consumer Priv. Litig.*, 934 F.3d 316 (3d Cir. 2019); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013); *Dewey v. Volkswagen AG*, 681 F.3d 170 (3d Cir. 2012).

(Ranjan, J.). And thus, "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." *Baby Prods.*, 708 F.3d at 175 (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. *Google Cookie*, 934 F.3d at 326.

The Court's oversight role extends beyond making sure that the settling parties engaged in "'hard fought' negotiations." *Pampers*, 724 F.3d at 717 (citing *GM Trucks*, *inter alia*). Although it is necessary that a settlement is at "arm's length" without express collusion between the settling parties, it is not sufficient. *See, e.g., 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; *Google Cookie*, 934 F.3d at 322.

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 vacate 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 v. NBTY, Inc.*, 772 F.3d 778, 781-83 (7th Cir. 2014); *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 Andren's objection here. He does not argue that All-Clad must pay the $6 million that plaintiffs tout as having been "made available"; but if the parties agree to reversion provisions that lead to All-Clad paying just a fraction of that, the parties cannot pretend that the settlement was actually worth $6 million. The settlement is unfair because class counsel is appropriating an excessive amount of the demonstrable settlement value for itself.

III. The proposed settlement unreasonably prevents the Court from scrutinizing the effectiveness of the claims process before final approval.

This is a "claims-made" settlement—one in which class members must submit a claims form to obtain compensation. Some class members (those whose cookware has not experienced "sharp edges" and those who discarded their cookware) are eligible to claim only a coupon for 35% off a future purchase on All-Clad's website up to $750. Dkt. 77-1, Settlement § III.10. To make a claim, these class members must submit a timely valid claim form accompanied by documentary proof of purchase. Settlement § III.11. The remaining class members are eligible to claim either (a) $75 and an equivalent replacement item, (b) one of two different multi-piece sets of cookware, or (c) a coupon for 50% off a future purchase on All-Clad's website up to $1200. Settlement § III.9. To make a claim, these class members must also submit a timely valid claim form. Settlement § III.11. Then, they must return their damaged cookware within thirty days of a date arranged by All-Clad. Settlement § IV.15. And finally All-Clad must be satisfied that the cookware is exhibiting the "sharp edges" defect. *Id.* Class members who submit no claim will receive nothing and, by operation of the settlement's release, will be stripped of any claims against All-Clad relating the "sharp edges" issue or "dishwasher safe"

representations, aside from personal injury claims and property damage beyond damage to the cookware. Settlement § VIII.31.A.[2]

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*); Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* 13-14 (2005)[3]. A prominent class action firm even recently produced a music video about it. *See* Jenna Greene, *Why Edelson made a (catchy) music video about class-action claims rates,* REUTERS (Apr. 7, 2022), https://www.reuters.com/legal/litigation/why-edelson-made-catchy-music-video-about-class-action-claims-rates-2022-04-07/.

Rule 23(e) explicitly requires evaluation of a claims-made settlement by the objective standard of the "effectiveness" of the distribution—what the class actually gets. 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 "cash fund of up to $4,000,000" for the class, while class counsel seek $2 million as their attorney award, amounting to 30.5% of a "total" settlement valued at $6.31 million settlement. Dkt. 82, Fee Motion at 14, 20-22. On this view, it is of no consequence how the funds are ultimately distributed among the settlement administrator's costs, class members claiming compensation, and the reversion to All-Clad. This approach exalts fiction over reality, even

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[2] This is also a "constructive common fund" settlement—one in which class counsel has negotiated an unopposed fee fund, separate and segregated from the class's relief. *See, e.g., GM Trucks*, 55 F.3d at 820. As discussed in Section IV.C, *infra*, this structure harms the class because it deprives the court to correct any imbalance in the allocation between counsel's fees and class recovery.

[3] This Federal Judicial Center publication is available online at https://www.uscourts.gov/sites/default/files/classgde.pdf.

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).

Even before the 2018 Amendments added Rule 23(e)(2)(C)(ii), the Third Circuit had repudiated the "made available" fiction in favor of an economically realistic approach, dating at least back to Judge Becker's "masterful opinion" first invoking the constructive-common-fund doctrine in *GM Trucks*. 55 F.3d at 823 (Gibson, J., concurring in the central holding and with the judgment). In *GM Trucks*, the parties proposed to settle a class action by providing the owners of millions of General Motors pickup trucks with $1000 coupons toward the purchase of a new truck, or the option to send $500 coupons to a third-party of their choosing. *Id.* at 780. Class counsel contended that the settlement was worth about $2 billion, based on an expert report that projected 34-38% of the class would redeem the coupons for new trucks and an additional 11% of the class would sell the coupons for $500. *Id.* at 807. This valuation was only a fraction of that "made available" under the settlement. But still, the Third Circuit refused to credit it. Instead, it instructed that when a district court values a constructive common fund, it "needs to make some reasonable assessment of the settlement's value and determine the precise percentage represented by the attorneys' fees." *Id.* at 822. It "need[s] to determine a precise valuation of the settlement on which to base its award." *Id.* at 822. Courts must assess the settlement in "economic reality" and discount value that is "too speculative." *Id.* at 821-22. *GM Trucks* rejects the "made available" fiction.

Just a few years later, the Third Circuit reiterated the principles of *GM Trucks* in *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 334, 338, 342 (3d Cir. 1998). *Prudential* found that "[n]umerous courts have concluded that the amount of the benefit conferred logically is the appropriate benchmark against which a reasonable common fund fee charge should be assessed." *Id.* at 338 (internal quotation omitted). To do this, "the district court [is] required to make a 'reasonable estimate' of the settlement's value." *Id.* at 334 (citing *GM Trucks*, 55 F.3d at 822). But the particular settlement in *Prudential* presented a valuation difficulty, because its "ultimate value [was] dependent on the final number of claims remediated under the settlement." *Id.* The *Prudential* district court overcame

this difficulty by awarding an "immediate fee payment based on a percentage of the guaranteed minimum recovery…, while requiring future payments to be based on actual results." *Id.* And the Third Circuit endorsed that "bifurcated fee structure" as "an appropriate and innovative response." *Id.* Again, the essential takeaway from *Prudential* is that unclaimed amounts may not enter the settlement valuation. "What is important is that the district court evaluate what class counsel actually did and how it benefitted the class." *Prudential*, 148 F.3d at 342.

Again, in *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722 (3d Cir. 2001), an objecting class member appealed the award of attorneys' fees to class counsel in a constructive-common-fund settlement. *Cendant PRIDES* reaffirmed appellate courts' "special responsibility" to protect class members against "the danger inherent in the relationship among the class, class counsel, and defendants." Id. at 728-730. On the merits, *Cendant PRIDES* vacated the fee award for various reasons, but it made (without any apparent prompting from the appellant) one comment that is particularly germane to the valuation issue. Though the district court had described its fee award as 5.7% of a reversionary $341.5 million fund, the Third Circuit demurred. Because "any unclaimed portion of the fund returned to Cendant," "the award actually amounted to more than 5.7% of the total recovery." *Id.* at 741 n.25. Of the $341.5 million available only $263.5 million had been claimed, so class counsel's fee actually "constituted 7.3% of the total fund." *Id.*

Finally, *Baby Products*. *Baby Products* vacated approval of a settlement that proposed to provide roughly $3 million to class members, $14 million to class counsel, and $18 million to third-party charities. 708 F.3d 163, 169-70. The district court had approved the proposal "without knowing" "the amount of compensation that will be distributed directly to the class." *Id. at* 175 Restating foundational principles of class action settlement review, the Third Circuit held that, without an accounting of class member claims, the district court lacked the "factual basis necessary" to determine settlement fairness. Direct benefit to class members matters; "[c]lass members are not indifferent to whether funds are distributed to them [or not], and class counsel should not be either." *Id.* at 178. Courts should ensure that class members, rather than their counsel, are "the foremost beneficiaries of the settlement." *Id.* at

179. To do that, courts must inquire into "the degree of direct benefit provided to the class," an inquiry that "needs to be, as much as possible, practical and not abstract." *Id.* at 174. *Baby Products* places a duty on district courts "to affirmatively seek out" necessary information about claims data and to "withhold final approval of a settlement until the actual distribution of funds can be estimated with reasonable accuracy." *Id.* (internal quotation omitted). *Baby Products* "confirm[s] that courts need to consider the level of direct benefit provided to the class in calculating attorneys' fees." *Id.* at 170 (emphasis added). That means courts "should begin by determining with reasonable accuracy the distribution of funds that will result from the claims process." *Id.* at 179. As in *Prudential*, that may require courts "to delay a final assessment of the fee award to withhold all or a substantial part of the fee until the distribution process is complete." *Id.* (quoting Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION, § 21.71 (4th ed. 2008)). *Baby Products* even notes Congress's legislative rejection of the "made available" fiction in the Class Action Fairness Act, reasoning that even in a non-coupon settlement, "this statutory provision further supports the proposition that the actual benefit provided to the class is an important consideration when determining attorneys' fees." *Id.* at 179 n.13.

This settlement does not allow the Court to fulfill its obligation under *Baby Products* and Rule 23(e)(2)(c)(ii). It sets, indeed requires, an initial claims submission deadline of sixty days **after** the date of the Court's final approval. Settlement § I.1.E, II.3.F. Following that, the process of auditing and reviewing class members' claims, and arranging for the return of damaged cookware will take weeks longer. *Id.* at § IV.15. And finally, there is period of time for class members to return the cookware and for All-Clad to inspect that cookware, and if necessary, enter a dispute resolution phase. *Id.* Each stage of the process will winnow the number of valid claims.

For practical reasons of necessity, Andren does not expect nor request that this Court seek an accounting of damaged cookware returns *before* granting final approval of settlement.[4] But he does

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[4] He does ask that, if the Court approves the settlement, it defer any awarding attorneys' fees until an accounting of the final accounting of valid claims and actual payouts to class members. *See* Section V, *infra*.

object to the schedule mandated by the current settlement that sets the initial claims deadline after final approval is granted. That deprives the Court and class of the ability to "determine whether the class receive[s] sufficient direct benefit to justify the settlement as fair, reasonable, and adequate." *Baby Prods.*, 708 F.3d at 176; *see also GM Trucks*, 55 F.3d at 822 ("At the very least, the district court on remand needs to make some reasonable assessment of the settlement's value and determine the precise percentage represented by the attorneys' fees."). And it short-circuits the Court's obligation to consider "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." Rule 23(e)(2)(C)(ii). 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.").

IV. The settlement unfairly makes class counsel its foremost beneficiaries.

Independently of the improperly delayed claims deadline, the settlement contains a combination of substantive provisions that prioritize the interest of counsel over the absent class members. One major reason that courts "need to consider the level of direct benefit provided to the class" is 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. "[T]he terms of any proposed award of attorney's fees" must be commensurate with "the relief provided for the class." Rule 23(e)(2)(C)(iii). 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). 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." *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, cmt. b at 208 (2010).

This settlement provides class counsel with the right to seek an attorney award of up to $2 million unopposed by All-Clad. Settlement § IX.34. 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 (internal quotation omitted). A proportionate attorney award adheres to the 25% of the fund benchmark established in the Ninth Circuit and followed by courts of this Circuit.[5] Plaintiffs declare that their fee request is only 30.5% of the "combined fund" that totals "$6,310,000.00 Settlement value." Fee Motion at 1, 22, 23.

[5] *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 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").

As discussed above, plaintiffs' legal error lies in employing a faulty denominator based on a stipulated maximum cap under the settlement agreement. Under the settlement, we will not know the final class benefit until well after final approval. *See* Section III, *supra*. But even generous assumptions show that class members will claim nowhere near the $6 million necessary to bring class counsel's negotiated fee into proportion. Plaintiffs have told us that there are "tens of thousands" of class members. Fee Motion at 16, 22; Dkt. 77-2, Joint Declaration ¶31. Let's generously round up to 100,000; and let's say that half of those class members have experienced the sharp edges issue and have still retained their defective cookware. If so, 50,000 class members are eligible to make claims for monetary compensation. And let's also say that *any* election by those class members constitutes a revealed preference value of $75, the cash sum available. *See O'Brien v. Brain Research Labs, LLC.,* 2012 WL 3242365, 2012 U.S. Dist. LEXIS 113809, at *60 n.8 (D.N.J. Aug. 9, 2012) (evaluating a cash/coupon settlement and finding only that a class member who chooses the latter "values it at least as much as the cash option"). To reach $6 million worth of claims, 80,000 pieces of cookware would need to be returned to All-Clad. Even if every claimant submits an average of two pieces of cookware, that would still require 40,000 claimants, or a claims rate of no less than 80% of the eligible class.

That is simply not economically realistic: claim rates in consumer class action settlements "rarely" exceed 7%, "even with the most extensive notice campaigns." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 329 n.60 (3d Cir. 2011) (*en banc*). Most often, claims rates are much lower than that, often settling below 1%. *E.g., Pearson v. NBTY, Inc.*, 2014 WL 30676, 2014 U.S. Dist. LEXIS 357, at *22 (N.D. Ill. Jan. 3, 2014), *rev'd Pearson*, 772 F.3d 778 (0.25% claims rate, including 0.7% for those class members who received direct notice); *In re EasySaver Rewards Litig.*, 906 F.3d 747, 753 (9th Cir. 2018) (0.23% of class members submitted claims for monetary refund).[6] In one case, settlement

[6] *See generally* Federal Trade Commission, *Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns*, 27 (Sept. 2019), *available at* https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report.pdf (finding weighted mean (i.e., cases weighted by the number of notice recipients) of 4% across all consumer cases requiring a claims

administrator Angeion's founder Steven Weisbrot stood ready to testify that a claims rate of 0.3% "is consistent with his experience in other consumer and end-user class settlements." *In re Pool Prods. Distrib. Mkt. Antitrust Litig.*, 2015 WL 4528880, 2015 U.S. Dist. LEXIS 97578, at *21-*22 (E.D. La. Jul. 27, 2015). In another, Mr. Weisbrot estimated a claims rate of 1-4% based on the type and size of case and the manner of notice. *Cottle v. Plaid Inc.*, 340 F.R.D. 356, 374 (N.D. Cal. 2021). Though Mr. Weisbrot's declaration here (Dkt. 77-3) is conspicuously silent on estimated claims rate, it is clear that the rate will not approach the 40%-80% needed to justify class counsel's $2 million fee.

In fact, by erecting barriers to recovery, the proposed settlement would depress claims rates even below the uninspiring average. Here claimants must return cookware to All-Clad within a thirty-day window. All-Clad may then subject those returned items to its own review. When settlements require documentation or return of a physical item itself as a condition of payment, valid claims rates drop. *See, e.g.*, *Chambers v. Whirlpool Corp.*, 980 F.3d 645, 655 (9th Cir. 2020) (In a defective dishwasher settlement, only 0.14% of class filed claims for cash reimbursement that "included potentially adequate documentation); *Pollard v. Remington Arms Co., LLC,* 320 F.R.D. 198, 214, 215 (W.D. Mo. 2017) (only 0.29% claims rate when class members had to return their firearms to defendant to claim settlement recovery). This is not a "fairly low bar." *Baby Prods.*, 708 F.3d at 175.

But let's still generously assume that this settlement would generate the 4% claims rate typical of direct email notice settlements as declared by Weisbrot in *Cottle*. 2000 claimants submitting claims for two pieces of damaged cookware each, amounts to only $300,000 of settlement value. Class

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process, dropping to 3% in cases with (as here) direct notice by email); Jones Day, *An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2010-2018)* (Apr. 2020), https://www.jonesday.com/-/media/files/publications/2020/04/empirical-analysis-consumer-fraud-class-action/files/empirical-analysis-of-federal-consumer-fraud/fileattachment/empirical-analysis-of-federal-consumer-fraud.pdf (surveying forty claims made settlements and finding that the average participation rate was 6.99% and median was 3.4%, with only four cases having a rate higher than 15%); Jones Day, *Update: An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2019–2020)* (Jul. 21), https://www.jonesday.com/en/insights/2021/07/update-an-empirical-analysis-of-federal-consumer-fraud-class-action-settlements-(20192020) (finding average take rate of 4.91%, and median take rate of 3.90%).

counsel's negotiated fee would then constitute 87%[7] of the constructive common fund. That allocation is facially disproportionate, and unjustifiably anoints class counsel the foremost beneficiary of the settlement. *See, e.g., Briseño,* 998 F.3d at 1026 (87% fee is a "gross disparity"); *Pearson*, 772 F.3d at 781 (69% fee is "outlandish"); *Cunningham v. Suds Pizza, Inc.*, 290 F. Supp. 3d 214, 225 (W.D.N.Y. 2017) (62.5% in fees is an "unreasonable and improper" "windfall"). The proposed settlement fails Rule 23(e)(2)(C)(iii).

Plaintiffs argue that $4 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. *See* Section III, *supra*; 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). 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 v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012) (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. For example, in *Jackson v. Wells Fargo Bank N.A.*, 136 F. Supp. 3d 687 (W.D. Pa. 2015), a case relied on by plaintiffs (Fee Motion at 19, 24), the court declined to value the settlement as though each of the 2.3 million class members had submitted claims; rather, it included only the sums that would actually be paid out to the 300,000 claiming class members. *Id.* at 706.

Andren acknowledges that some district courts that have erroneously counted unclaimed amounts as settlement value. *E.g., In re Wawa, Inc., Data Sec. Litig.,* 2022 U.S. Dist. LEXIS 72569, 2022 WL 1548532 (E.D. Pa. Apr. 20, 2022), *appeal pending* No. 22-1950 (3d Cir.). *Wawa* relies on dicta from *Baby Products* that predates the 2018 Amendments adding Rule 23(e)(2)(C)(ii)-(iii), arises in a different

[7] 2,000,000/2,300,000=86.95%.

context (involving *cy pres* rather than a reversion), and simply misapprehended *Boeing v. Van Gemert*, 444 U.S. 472 (1980). *Boeing* has no application 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. If *Boeing* applies to settlements at all, it 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).

Plaintiffs also assert that All-Clad's payment of $310,000 in notice and administration costs constitutes class value. Fee Motion at 14. Again, this view is mistaken. *Redman*, 768 F.3d at 630 ("administrative costs should not have been included in calculating the division of the spoils between class counsel and class members. Those costs are part of the settlement but not part of the value received from the settlement by the members of the class"); *Pearson*, 778 F.3d at 781 (same). Excluding amounts that revert to the defendants and amounts that are paid to the administrator is a natural corollary to *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 or goes to third-party settlement administration companies. *Baby Prods.*, 708 F.3d at 178; *Lachance v. Harrington*, 965 F. Supp. 630, 648 (E.D. Pa. 1997) (explaining the importance of incentivizing counsel to maximize the class's recovery). "[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. "[I]ncentives to minimize expenses and to allocate resources properly go much farther toward cost efficiency than can *post hoc* judicial review" *In re Wells Fargo Sec. Litig*, 157 F.R.D. 467, 471 (N.D. Cal. 1994).[8] Regardless though, even if the Court were to include the notice costs as class benefit

[8] Contrary to *Pearson*, two circuits have explicitly held that notice and administration expenses *may* be included in the settlement valuation. *In re LifeTime Fitness, Inc TCPA Litig.*, 847 F.3d 619, 623 (8th Cir. 2017); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 953 (9th Cir. 2015). Even if the

within the constructive common fund, plaintiffs' negotiated attorney award would still amount to a disproportionate 76.6% of the gross benefit.

Although they err in attempting to count unclaimed sums and administrative costs as class settlement value, plaintiffs do correctly refrain from attempting to include the value of the coupon relief made available to the class. *See* Settlement § III.10. "[N]on-cash relief . . . is recognized as a prime indicator of suspect settlements." *GM Trucks*, 55 F.3d at 803. A provision of the Class Action Fairness Act ("CAFA") governs the approval of class settlements and award of fees when settlements recover coupons. 28 U.S.C. § 1712. That statute requires a district court to apply "heightened judicial scrutiny" and to value the settlement, at least for fee purposes, based "on the value to class members of the coupons that are redeemed," 28 U.S.C. § 1712(a); *Baby Prods*, 708 F.3d at 179 n.13; *McKinney-Drobnis v. Oreshack*, 16 F.4th 594, 602 (9th Cir. 2021). In other words, CAFA disallows valuations of coupon relief even based on the value of those coupons that are claimed (even less those that are "made available"). If class counsel wants to justify their fee allotment based on the coupon portion of the settlement, it must do so based on the coupon value that is "redeemed rather than on the face value of the coupons." *Baby Prods.*, 708 F.3d at 179 n.13 (internal quotation omitted).

Plaintiffs also correctly refrain from attempting to include the settlement's prospective injunctive relief in the constructive common fund valuation. This non-monetary "relief" includes an affirmation that All-Clad has completed packaging changes to remove "dishwasher safe" representations. Settlement § III.12. There are at least two reasons that this provision does not constitute class relief. First, "The fairness of the settlement must be evaluated primarily based on how it compensates class members—not on whether it provides relief to other people, much less on whether it interferes with the defendant's marketing plans." *Pampers,* 724 F.3d at 720 (internal quotation marks omitted; emphasis in original). "Future purchasers are not members of the class,

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Court has discretion over the calculation, the better policy is to exclude costs and expenses from the accounting of class benefit.

defined as it is as consumers who have purchased [the product].” *Pearson*, 772 F.3d at 786. These are proper recognitions of the principle that the class consists of people who interacted with defendant in the past, while the prospective injunctive relief can only benefit those who interact with defendant in the future. Commentators have recognized the problem of such fictive injunctive relief in settlements that remit no benefit to class members. *See, e.g.*, Erin L. Sheley & Theodore H. Frank, *Prospective Injunctive Relief and Class Settlements*, 39 HARV. J. L. & PUB. POL’Y 769, 832 (2016) (“[T]here should be a presumption against approval of such settlements or awarding fees for such relief outside of the actions against public institutions originally contemplated by Rule 23(b)(2).”). Second, codifying and “affirming” practices that All-Clad has already implemented has “no real value.” *Koby v. ARS Nat’l. Services, Inc.*, 846 F.3d 1071, 1080 (9th Cir. 2017). Even if the filing of the instant lawsuits instigated those practice changes, 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 All-Clad advertising changes to justify their fee allotment, the Court should reject it. Benefitting class members, non-class members, and opt-outs equally, the labeling changes cannot be consideration for the release of class damages claims. *See Koby*, 846 F.3d at 1080.

Finally, plaintiffs can’t merely rely on class counsel’s lodestar “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”); *Briseño*, 998 F.3d at 1026 (similar). “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). In this Circuit, 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. Sec. 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").

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 class-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; *McKinney-Drobnis*, 16 F.4th 594, 610-12. A clear-sailing clause stipulates that attorney awards will not be contested by the defendants. See Settlement § IX.34. "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." *Weinberger*, 925 F.2d 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; *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%).

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 $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) (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 $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. "[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. & Guar. Nat'l Bank of Tallahassee Second Mortg. Litig.*, 418 F.3d 277, 308 (3d Cir. 2005) (*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 v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003).

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. 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.

Thus, 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 87% or greater 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.

V. If the Court does not deny settlement approval, it should defer the fee award pending consideration of the actual payments to class members and the redemption of coupons.

If the Court still approves the settlement and reaches the question of a Rule 23(h) attorney award, Andren objects to the $2 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." *Cendant*, 243 F.3d at 728.

Reviewing the actual benefit conferred on the class necessitates deferring any award of attorneys' fees pending an accounting of the final payouts to and coupon redemptions of class members. *See, e.g., Prudential; Baby Prods.,* 708 F.3d at 179; *Inkjet*, 716 F.3d at 1187 n.19; *Fessler v. Porcelana Corona De Mex., S.A.*, 23 F.4th 408, 419 (5th Cir. 2022); 28 U.S.C. § 1712; Advisory Committee Notes on 2003 Amendments to Rule 23 ("[I]t may be appropriate to defer some portion of the fee award until actual payments to class members are known."); Advisory Committee Notes on 2018 Amendments to Rule 23 ("In some cases, it will be important to relate the amount of an award of attorney's fees to the expected benefits to the class. One way to address this issue is to defer some or all of the award of attorney's fees until the court is advised of the actual claims rate and results."). Deferring the fee properly incentivizes class counsel to bestow maximum value on class members, and push back against All-Clad in the auditing process as appropriate.

In any event, the lack of billing detail in class counsel's fee submissions precludes the Court from employing the base lodestar method up front. *Compare* Dkt. 82-1 ¶¶32-38 (providing only summary with gross hours and rates by timekeeper), *with e.g., Gelis v. BMW of N. Am., LLC*, 49 F.4th 371, 379 (3d Cir. 2022) (reversing lodestar award based on summary breakdowns). Under Rule 23(h)(1), fee submissions should 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.

CONCLUSION

For the foregoing reasons, this settlement should be rejected as unfair and unreasonable. At the very least, the fee request should be deferred pending an accounting of the actual value obtained by class members.

Dated: December 8, 2022

Respectfully submitted,

/s/ Adam E. Schulman

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CERTIFICATE OF SERVICE

I certify that I have filed the foregoing document through the Court's ECF system, which has effectuated service of this Objection upon all attorneys in this case who are registered for electronic filing.

In addition, I have caused a copy of this Objection to be served via First Class Mail to the Class Administrator at the following address:

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