UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE BAYER CORP. COMBINATION ASPIRIN PRODUCTS MARKETING AND SALES PRACTICES LITIGATION	No. 09-md-2023 (BMC) (JMA)

OBJECTION OF THEODORE H. FRANK

Adam E. Schulman (*pro hac vice*)
CENTER FOR CLASS ACTION FAIRNESS
1718 M Street NW, No. 236
Washington, DC 20036
Phone: (610) 457-0856
Email: shuyande24@gmail.com

Attorney for Objector Theodore H. Frank

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules and Statutes

Other Authorities

INTRODUCTION

The settlement in this case violates Rule 23 for two independent reasons; the fee request violates it for two more independent reasons.

First, the settlement unfairly prioritizes *cy pres* payments to third parties over relief to class members. This breaches the class representatives' and counsel's fiduciary duty to the class.

Second, one of the proposed *cy pres* recipients has a pre-existing financial and commercial relationship with the defendant. This makes moneys paid to it illusory relief because all that is actually happening is that money that Bayer would have paid to the third party American Heart Association anyway—for public relations purposes and to win the endorsement of its products—is being attributed to this settlement. A simple change in accounting entries is not a class benefit.

Third, the settlement is structured to benefit the attorneys, who are asking for $5.1 million, far more than the class members, who will likely receive less than $1 million, and perhaps even less than a tenth of what the attorneys are seeking. (Fewer than 20,000 claims have been made as of January 18.) This is not a complaint that Bayer should have endowed a larger settlement fund; it is a complaint that the settlement provides the lion's share of the benefits to the attorneys while shortchanging the class, and that any cash settlement structured to pay the attorneys ten times as much as the class is *per se* unfair.

Fourth, the settlement takes the award of attorneys' fees out of the hands of the Court, and places the division amongst the competing attorneys into the hands of lead class counsel. This is a facial violation of Rule 23(h). It is bad enough that the attorneys are not competing against one another to provide the best service to the class at the lowest price to the class. They should not be allowed to bypass the Rule 23(h) requirements that the Court set the award of fees.

I. Objector Theodore H. Frank Is a Member of the Class, and Intends to Appear Through Counsel at the Fairness Hearing.

As documented in the accompanying Declaration of Theodore H. Frank ("Frank Decl."), Theodore H. Frank is a member of the class. In 2008, he purchased a bottle of Bayer Aspirin With Heart Advantage for personal use. Frank Decl. ¶¶ 3-8 & Ex. 1. He thus qualifies as a class member, with standing to object to the settlement and fee request. *See* Order Granting Preliminary Approval of the Settlement, Directing Notice to the Classes, and Scheduling Fairness Hearing ("PAO") (Dkt. No. 181) at 2.

Mr. Frank's attorney, Adam Schulman of the Center for Class Action Fairness, a Public Interest Law Firm, is representing him *pro bono*, has been granted admission *pro hac vice*, and will appear at the fairness hearing. Frank's counsel intends to discuss matters raised in this Objection. Frank does not plan to call any witnesses, but reserves the right to make use of all documents entered on the docket by any settling party or objector and to cross-examine any witnesses who testify in support of the settlement. Frank joins any objections not inconsistent with the objections he makes below.

II. A Court Owes a Fiduciary Duty to Unnamed Class Members.

The *total size* of a settlement can be considered presumptively fair (in terms of class versus defendant) because the class and the class counsel share the same incentive to maximize aggregate recovery. However, there is no reason to provide a presumption of fairness that the *distribution* of the settlement between the class and the class counsel is fair because the class counsel's interest in maximizing their self-interested share of the settlement proceeds is directly contrary to the class. "Because class actions are rife with potential conflicts of interest between class counsel and class members, district 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." *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 785 (7th Cir. 2004); *accord Plummer v. Chemical Bank*, 668 F.2d 654, 658 (2d Cir. 1982). The burden of proving settlement fairness in the face of evidence of self-dealing by class

counsel should thus rest with the moving party. American Law Institute, *Principles of the Law of Aggregate Litig*. §3.05(c) (2010) ("*ALI Principles*"). This burden derives from the district court's "fiduciary responsibility to the silent class members." *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987).

The fiduciary duty ascends a high summit "[i]n setting a fee award, [when] a court is to act as a fiduciary who must serve as a guardian of the rights of absent class members." *Mba v. World Airways*, 369 Fed. Appx. 194, 198 (2d Cir. 2010) (unpublished) (quoting *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care*, 504 F.3d 229, 249 (2d Cir. 2007) ("*Cent. States*") and *Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1099 (2d Cir. 1977) ("*Grinnell II*"). And it reaches its ultimate zenith "[w]hen dealing with an equitable fund action", which begets "an even greater necessity to review the fee agreement" and "protect the interests of the class members from abuse." *In re Agent Orange Prods. Liab. Litig.*, 818 F.2d 226, 240 (2d Cir. 1987).

"The inquiry appropriate under Rule 23(e)… protects unnamed class members from unjust or unfair settlements affecting their rights when the representatives become agreed to by fainthearted before an action is adjudicated or are able to secure satisfaction of their individual claims by a compromise." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 623 (1997) (quotation omitted). Because we deal here with a pre-certification settlement, an even "higher degree of scrutiny is required." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (citing cases). Approval of a pre-certification settlement will occasion appellate review of "the entire settlement, paying special attention to the terms of the agreement containing convincing indications that the incentives favoring pursuit of self-interest rather than the class's interest in fact influenced the outcome of negotiations." *Dennis v. Kellogg Co.*, 697 F.3d 858, 867 (9th Cir. 2012) (internal quotation omitted).

The settling parties belabor the nine *Grinnell*[1] fairness criteria in their final approval papers. Memorandum in Support of Final Approval ("MFA") (Dkt. No. 194-1) at 13-20. While satisfaction of those factors is necessary for approval under Rule 23, it is not sufficient. As other Circuits have explicitly recognized, multi-factor fairness tests like *Grinnell's* are not the exclusive reasons for rejecting a settlement.[2] Indeed, the nine *Grinnell* factors are a nearly exact replica of the *Girsh* factors and the functional equivalent of the *Churchill* and *Reed* factors (of the Third, Ninth and Fifth Circuits respectively). And repeatedly, the Second Circuit too has reviewed and repudiated the approval of class action settlements applying broad notions of fairness without reference to the *Grinnell* factors. *E.g.*, *In re Literary Works in Elec. Databases Copyright Litig*., 654 F.3d 242 (2d Cir. 2011) (reviewing settlement and remanding to cure intra-class conflict); *Cent. States*, 504 F.3d 229 (same); *Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006) (reversing approval due a provision that was unfair to a non-settling defendant).

An arm's length negotiation, likewise, is necessary but not itself sufficient for approval. Even where, as here, "the plaintiff's attorney does not consciously or explicitly bargain for a higher fee at the expense of the beneficiaries, it is very likely that this situation has indirect or subliminal effects on the negotiations." Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 266 (1985). "While the Rule 23(a) adequacy of representation inquiry is designed to foreclose class certification in the face of actual fraud, overreaching, or

---

[1] *Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) (*Grinnell I*).

[2] *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (consideration of *Churchill* factors "alone is not enough to survive appellate review"); *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 195 (5th Cir. 2010) (*Reed* factors are not the sole reasons a settlement should be rejected as unfair, reasonable or inadequate under Rule 23(e)); *In re AT&T Corp Secs. Litig.*, 455 F.3d 160, 165 (3d Cir. 2006) ("The *Girsh* factors do not provide an exhaustive list of factors to be considered when reviewing a proposed settlement….[B]ecause of a 'sea-change in the nature of class actions' since *Girsh* was decided in 1975, district courts should also consider other potentially relevant and appropriate factors…."). *See also ALI Principles* §3.05(b) (suggesting that a "settlement may also be found to be unfair for any other significant reason that may arise from the facts and circumstances of the particular case.").

collusion, the Rule 23(e) reasonableness inquiry is designed precisely to capture instances of unfairness not apparent on the face of the negotiations." *Bluetooth*, 654 F.3d at 948 (internal quotation omitted).

As the Second Circuit has described it, "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 Prods. Liab. Litig.*, 818 F.2d 216, 224 (2d Cir. 1987) (vacating fee). This settlement presents one such instance of encroachment, as too little consideration has been given to getting settlement funds in the hands of absent class members and too much has been given to diverting it to the pockets of class counsel, the named representatives and favored third parties.

III. The *Cy Pres* Component Is Unfair.

Under the settlement, the defendant has agreed to establish an all-inclusive $15 million gross fund. Settlement § III.C. But very little of this money—likely less than $1 million of it—will find its way to the class. This fund will cover the costs of notice and claims administration (unknown, likely <$0.5 million); attorneys' fees ($4.5 million requested); litigation expenses ($0.6 million requested); and service awards ($2,500 to each class representative). The remaining net settlement fund will be allocated 60/40 to the Bayer Women's and Bayer Heart Advantage subclasses respectively. Members of these classes may make claims for $4/unit of Bayer Women's and for $6/unit of Bayer Heart Advantage which does not cover class members' out-of-pocket costs.[3] Those with preferred types of documentary proof of purchase may make claims for as many units as they have purchased. Settlement § III.E.2.a. Meanwhile, those with written attestation of purchase as their only proof are allotted only compensation for a single unit of

[3] The $4 and $6/unit rates were determined not by out-of-pocket purchase costs but by the difference between the purchase price and an average 81 milligram bottle of aspirin. *See* Tr. of Preliminary Approval Hearing (Dkt. No. 200-2) at 8. The notice does not make this formula clear to class members.

Bayer Women's and Bayer Heart Advantage regardless of how many units they have actually purchased. Settlement § III.E.2.b.

Settlement § III.G provides that any excess funds[4] will be distributed *cy pres* to charities agreed to at a later date by the parties and approved by the Court.[5] The mere existence of the doctrine of *cy pres* in the class action context is controversial with good reason. *See Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 480-82 (5th Cir. 2011) (Jones J., concurring); *In re Thornburg Mortg., Inc. Secs. Litig.*, No. 07-cv-0815 JB/WDS, 2012 U.S. Dist. LEXIS 107934 (D.N.M. July 24, 2012). Although *cy pres* has been given a narrow berth in the Second Circuit, for the reasons listed immediately below, this particular application should be rejected for two independent reasons.

A. The Settlement Improperly Prefers Non-Class Third-Party Charities Over Absent Class Members.

Cy pres distributions are unwarranted when class members are less than fully compensated and it is administratively feasible to make further distributions to them. *ALI Principles* § 3.07(a)-(c). In *Masters v. Wilhelmina Model Agency, Inc.*, the Second Circuit endorsed the ALI's suggestions—then in pre-final draft form—as to the appropriate use of *cy pres* in class action settlements. 473 F.3d 423, 436 (2d Cir. 2007) (reversing district court's failure to recognize the scope of its discretion to award treble damages to class members rather than to third-party charities). *Masters* observed the ALI's rule "limiting *cy pres* to circumstances in which individual class members is not economically feasible, or where funds remain after

[4] Given ordinary claim rates in the low single digits and the existence of the artificial single-payment cap, there will surely be multi millions leftover in the net settlement fund. *See* Declaration of Tricia M. Solorzano (Dkt. No. 195) ¶¶10-11 (accounting 17,228 claims submitted as of January 18).

[5] The parties in their final approval memorandum (Dkt. No. 194-1) have now revealed that they wish the recipients to be AARP and the American Heart Association. MFA at 22. The parties have thus remedied one clear objectionable element of the settlement: the lack of notice of and opportunity to object to the identity of the *cy pres* beneficiaries.

class members are given a full opportunity to make a claim" and disparaged the use of *cy pres* when "neither side contends…it would be onerous or impossible to locate class members or…each class member's recovery would be so small as to make an individual distribution economically impracticable." *Id.* (quotation omitted).

The settling parties have transgressed these bounds by attempting to use *cy pres* prior to the full and administratively feasible compensation of one subset of absent class members: those who lack documentary proof of purchase. Yet worse, the use of *cy pres* in *Masters* was benign in comparison to this settlement. There, *cy pres* was implemented only after class members had already been compensated for their actual damages, yet the Second Circuit nonetheless determined that the lower court should have considered allocating up to treble damages. Here, class members do not even receive their out-of-pocket expenditures before money is diverted to cy pres. [6] Furthermore, the arbitrary single-unit damage caps prevent a broad swath of the class from even receiving their measure of differential damages, prior to a *cy pres* distribution.

In the wake of *Masters*, in-circuit district courts have recognized that *cy pres* should remain a recourse of last resort. *See, e.g., SEC v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 417 (S.D.N.Y. 2009) (explaining how the court "exhausted every possible avenue to distribute funds to [class members]" including ordering a targeted outreach and secondary distribution after the first distribution phase left a third of the fund remaining). Also citing *Masters*, another court spotted a "primary defect in the allocation plan" when "a cy pres distribution would [be] substantially greater than the amount distributed to class members in circumstances where the members are relatively identifiable and there is no issue regarding unclaimed funds." *Park v. Thomson Corp.*, No. 05 Civ. 2931 (WHP), 2008 U.S. Dist. LEXIS 84551, at *12 (S.D.N.Y. Oct. 22, 2008). In *Park*, Judge Pauley declared his "misgivings" about an analogously structured

[6] *See supra* note 3.

proposed settlement with a "$40 cap on damages and the creation of a *cy pres* fund." 633 F. Supp. 2d 8, 11 (S.D.N.Y. 2009). At the Judge's invitation, the parties amended the settlement. *Id.*

Rather than permitting class proceeds to be funneled to inferior "next-best" *cy pres* beneficiaries, these courts recognize the precept that class members are entitled to receive their own property, property that has been procured in their name and by their claims. *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011) ("The settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members.") (citing *ALI Principles* § 3.07 cmt. b). This settlement fails in this basic function.

A *cy pres* distribution is proper *only* after further distribution to class members is infeasible. *See McClintic v. Lithia Motors*, No. C11-859RAJ, 2012 U.S. Dist. LEXIS 3846, at *13 (W.D. Wash. Jan. 12, 2012) (citing *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011)). Here however, as in *McClintic*, "the only impediment to full distribution [of the fund] to class members is the artificial payment cap the parties have imposed… The parties do not explain why they wish to cap relief to class members in favor of *cy pres* relief. In a case like this one, *cy pres* payments out to be limited to a distribution of money that the parties cannot distribute to class members with reasonable efforts." *Id.* at *13-*14. (explaining why the *cy pres* component of the settlement at issue was a factor preventing preliminary approval) (citation omitted).

More generally, any *cy pres* distribution in a settlement such as this one is unjustifiable unless and until reasonable measures are taken to ensure that the class members are completely compensated.[7] If class members are legally entitled to compensation on their underlying claims,

[7] "Compensated" here means compensated to full legal measure of available damages, not compensated according to an artificially concocted payment ceiling. *See Klier*, 658 F.3d at 480 ("The fact that the members of Subclass A have received payment authorized by the settlement agreement does not mean that they have been fully compensated."). It is vital not to confuse the quality of the claims with the amount of the claim. Any intimation that a class member's testimony would be insufficient to prove damages is legally erroneous. *See, e.g., Hollywood Fantasy Corp. v. Gabor*, 151 F.3d 203, 215 (5th Cir. 1998) (oral testimony could be competent evidence of damages for breach of contract without documentation); *Elliott v. United States*, 184 Ct. Cl. 298, 304 (1968) (awarding $50 based upon uncorroborated oral testimony).

and that compensation can be feasibly distributed to individual class members without unreasonable administrative burden, class counsel violates its fiduciary duties to put the financial interests of third parties ahead of their clients. And the court's "fiduciary responsibility" must prevent it from ratifying such a provision. *Grant*, 823 F.2d at 23.

Were the question solely how to distribute amongst competing class members a fund that would otherwise be exhausted, it would be justifiable to give preference to the class members with receipts over the class members without receipts. But this is not the situation here; rather, the only question is whether to give money to class members or to give money to AARP or American Heart Association, both of whom are not class members. If the named representatives would favor the non-class members at the expense of class members, then they are not adequate class representatives for the class as a whole. *See Broussard v. Meineke Disc. Muffler Shops,* 155 F.3d 331, 338 (4th Cir. 1998) ("The premise of a class action is that litigation by representative parties adjudicates the rights of all class members, so basic due process requires that named plaintiffs possess undivided loyalties to absent class members.").

The single-unit claims caps may be the result of the parties' concerns about the risk of fraudulent claims. But the parties' solution prevents the hypothetical problem of fraud by creating an actual and demonstrable reduction in compensation to an entire category of claimants. A concern that *some* of the fund would go to non-class members who made fraudulent claims cannot justify allowing *all* of the money to go to third-party non-class members. Rather like the apocryphal American soldier in Vietnam who explained that "we must destroy the village in order to save it," the parties' justification for its plan of allocation gives up a sizable and unambiguous benefit to the class in exchange for an abstract and contingent outside-the-class payment who benefit to the class is uncertain, indirect at best, and as yet unknowable.

This settlement already employs a less damaging means of protecting the settlement from fraud: a jurat under penalty of perjury on the claim form. Another available common method is to

assign audit rights.[8] On the other hand, settlement provisions that unnecessarily "pose significant barriers to" class recovery, even when rationalized as "necessary to prevent fraud" will undermine the legitimacy of a settlement. *In re GMC Pick-Up Truck Fuel Truck Prods. Liab. Litig.*, 55 F.3d 768, 809 (3d Cir. 1995). But instead the parties have ignored the heed of *Masters*, *Klier*, and the *ALI Principles* and are attempting to misuse an option that "arises only if it is not possible to put [the] funds to their very best use: benefitting the class members directly." *Klier*, 658 F.3d at 475.

B. The *Cy Pres* Recipients Are Unfairly Designed to Benefit the Defendant, Not the Class.

At the last minute, the parties disclosed that they intend the *cy pres* recipients will be the AARP Foundation and the American Heart Association. Neither are acceptable. "When selection of *cy pres* beneficiaries is not tethered to the nature of the lawsuit and the interests of the silent class members, the selection process may answer to the whims and self interests of the parties, their counsel, or the court." *Nachshin v. AOL LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011) (argued by Frank).

Bayer is already a large donor to the American Heart Association—and the American Heart Association endorses Bayer's commercial products to the exclusion of similar products with similar efficacy. Frank Decl. ¶¶ 9-11. This is hardly a class benefit when the only consequence is a change in accounting entries: instead of the AHA getting a large sum from

[8] *E.g.*, *In re Diet Drugs Prods. Liab. Litig.*, 582 F.3d 524, 531 (3d Cir. 2009) (recounting settlement's "audit process permitting medical review of up to 15% of all such claims, unless the Court ordered an expanded audit for good cause shown"); *In re Currency Conversion Fee Antitrust Litig.*, 264 F.R.D. 100, 117 (S.D.N.Y. 2010) (noting that "a number of the large claims have been audited by the claims administrator"); *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 410 F. Supp. 706, 713 (D. Minn. 1975) (specifically requiring only a post-claim check for fraud and error and no proof of purchase for claims under $150); *Stewart v. Rubin*, 948 F. Supp. 1077, 1097 (D.D.C. 1996) (one of every ten claims audited, overruling objection that the settlement was "awarding money to virtually any claim."); *In re Domestic Air Transp. Antitrust Litig*, No. 1:90-cv-2485, 1994 U.S. Dist. LEXIS 20451, at *26-*30 (N.D. Ga. Nov. 2, 1994) (describing audit process).

Bayer that Bayer calls a charitable donation, the AHA gets a large sum from Bayer that Bayer attributes to lawsuit-settlement expense. *See Dennis*, 697 F.3d at 868 (expressing concern that "*cy pres* distributions be in addition to that which [the defendant] has already obligated itself to donate"). For this reason, the ALI states that "A cy pres remedy should not be ordered if the court or any party has any significant prior affiliation with the intended recipient that would raise substantial questions about whether the selection of the recipient was made on the merits." *ALI Principles* § 3.07, cmt. b at 219. *See generally* Theodore H. Frank, "Cy Pres Settlements," *Class Action Watch* 1 (March 2008), available at http://www.fed-soc.org/doclib/20080404_FrankCAW7.1.pdf (discussing problem of conflicts of interest in *cy pres* mechanism). In accord with the Second Circuit's adherence to the ALI Principles' guidance on use of *cy pres*, the class settlement should not be used to reward a charity that already has close ties to the defendant.

The AARP Foundation is not an appropriate recipient, either. "[T]he unclaimed funds should be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated." *In re Holocaust Victims Assets Litig.*, 424 F.3d 132, 141 n. 10 (2d Cir. 2005). The AARP Foundation states that its goal is to be a "force for change" for "struggling seniors" over the age of 50. This is not a benefit to the many class members like Frank who are under the age of 50—not to mention the class members who oppose the advocacy that the AARP seeks.[9]

C. The Settlement Must Be Restructured to Put the Class First.

When the parties return to the drawing board after the Court rejects this settlement, there is a quick solution to the chief inequity: excising the single-unit payment caps for those claims made without documentary proof. If there is any concern that those class members with proof of purchase would be disadvantaged under these new terms, Frank has no objection to terms

[9] Frank would similarly oppose any *cy pres* going to the Center for Science in the Public Interest.

ensuring that any pro rata reduction has primacy against claimants with only oral proof of purchase. Any chance of the claims-made fund being exhausted is unrealistically small.

Furthermore, the settlement should be structured so that class counsel is appropriately incentivized to ensure that the money goes to the class. As of January 18th, there have been 17,228 claims submitted. *See* Declaration of Tricia M. Solorzano (Dkt. No. 195) ¶¶10-11. Even under extraordinarily generous assumptions that there will be a total of 35,000 claims (there won't be anywhere near that many) and even under the generous assumption that the average claim will be for $12 (it is likely to be less than half of that, because who keeps a receipt for aspirin for years?), then class members will receive only $420,000—less than a tenth of the $5.1 million class counsel purports to seek for itself.

Removing the single-payment cap is a vital start, but likely not enough by itself to ensure proportionality between class recovery, attorney recovery and *cy pres* remainder.

The parties should consider allowing for pro-rated adjustments upward in case there are too few claimants, in conjunction with the provision already allowing for pro-rated adjustments downward. This is a common and effective method of encouraging claims. *E.g. In re Bank of Am. Credit Protection Mktg. and Sales Practices Litig.*, No. 3:11-md-02269-TEH (N.D. Cal. 2012), *terms of settlement available at* https://www.creditprotectionsettlement.com (last visited Jan. 14, 2013). Less efficiently—but still far preferable to *cy pres*—the initial distribution could be augmented with a secondary distribution to claimants if funds remain and economy permits. *Trombley v. Bank of Am. Corp.*, No. 08-cv-456-JD, 2012 U.S. Dist. LEXIS 63072, at *11 (D.R.I. May 3, 2012); *In re Tyco Int'l Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 262 (D.N.H. 2007) (class members to be compensated until it is "economically unfeasible to continue doing so," with remainder to go to *cy pres*).

Anticipating a prevalent counterargument, one should note neither of these methods would lead to a legal windfall for class members, even assuming a miniscule final claims rate. In the plaintiffs' operative Master Complaint ("Complaint") (Dkt. 29), their theory of damages

included statutory damages, punitive damages, treble damages, and such other relief under the statutes cited in the complaint. *See* Complaint at 41, Prayer for Relief c; *see also* MFA at 20 (showing average of 34.4% actual/potential recovery over 4 different metrics of compensatory recovery, letting alone non-compensatory relief theories of the complaint). Unless the plaintiffs now retract these allegations as frivolously brought, it is impermissible to prioritize third-party distributions over class relief. Yet, the settlement payments to class members do not even contemplate one-to-one restitution for allegedly ill-gotten transactions! This is certainly *not* to say that a settlement need satisfy each demand of the complaint to be adequate; it is to say that a settlement is unfair if it rewards non-party organizations before fully satisfying the class' claims, when such satisfaction is feasible.

Another less efficient—but more egalitarian—preferable alternative to *cy pres* is opening up a supplemental outreach and claims process with the hope of attracting other claimants. *See e.g.*, *See SEC v. Bear, Stearns & Co.*, 626 F. Supp. 2d at 417 (yield increased by approximately 33% with secondary distribution).

The Court should brook no feigned surprise from the parties when it is ultimately revealed that *cy pres* relief outstrips class relief by a factor of ten. The most immediate and telling flaw requiring rejection is not the failure to include any of these secondary mechanisms to maximize class relief, but the affirmative inclusion of the single-payment caps that minimize it. In violation of the *ALI Principles*, this Circuit's decision in *Masters*, and the Southern District's decision in *Park*, these caps amount to a preference for the AARP and American Heart Association over class members and demand denial of the motion for final approval.

IV. The Attorneys' Requested Award is Excessive and a Reasonable Assessment Should be Deferred Pending the Actual Results of the Claims Process.

One problem here is that the attorneys have structured the settlement so that they have no incentive to care whether the class ever collects its money: they are basing their fee request on the "gross settlement fund," rather than on the amount that the class receives—which unfairly

assumes that class members are indifferent as to whether $1 of the fund goes to the class or to a commercial endorser of Bayer's products. This leads to the unfair result that the attorneys are asking for more than ten times as much as their clients will be receiving. Such disproportionality between attorney recovery and actual class recovery should not be countenanced. *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946-49 (9th Cir. 2011).

"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." *Grinnell I*, 495 F.2d at 469. Through fictive calculation, the plaintiffs now attempt to inveigle this Court into awarding just such a "windfall fee." They request fees of $4.5 million and expenses of $0.6 million for a total award of $5.1 million, equal to 34% of the $15 million gross fund. They obtained a "clear sailing" provision that "by its very nature deprives the court of the advantages of the adversary process" and "suggests, strongly," that its associated fee request should go "under the microscope of judicial scrutiny." *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.3d 518, 525 (1st Cir. 1991); *Sobel v. Hertz*, No. 3:06-cv-00545, 2011 U.S. Dist. LEXIS 68984, at *45 (D. Nev. Jun. 27, 2011) (clear sailing undermines any benefit of separate negotiation of fees and terms).

The parties also sought an administrative schedule designed to insulate the fee request from a comparison with the actual amounts claimed by class members. *See* Settlement Exhibit E (proposed preliminary approval order) (requesting a claims deadline of 270 days after preliminary approval without corresponding delay of fairness hearing). Vindicating the Court's "overarching concern for moderation" is made more difficult by the fact that the claims period does not expire month and a half after the fairness hearing. *Goldberger v. Integrated Res.*, 209 F.3d 43, 53 (2d Cir. 2000). This appears to be an attempt to hide the ball so that the Court and the public never learns how poorly the class fares. If, for some reason, the Court does not reject the

settlement out of hand for its *cy pres* violations, Frank formally requests that the Court abstain from ruling on fees until it can make findings on how much the class has actually received.

The crux of the problem is that if as few claims come in as one would reasonably expect,[10] the already saturated attorney request of 34% will expand to a number that is beyond the pale, a number that would reify the lamentable proverb that "[a] lawsuit is a fruit tree planted in a lawyer's garden." *Grinnell I*, 495 F.2d at 469 (quotation omitted). Only 17,228 class members have made claims against the settlement, and the amounts they seek to claim has not been revealed. Solorzano Decl. (Dkt. No. 195) ¶¶10-11. Even with the most generous assumptions, class recovery will likely be less than $500,000, such that if the requested $5.1 million attorney award will outstrip class recovery by a factor of ten.

The plaintiffs may rejoin that *Masters* permits this Court to base any percentage fee award on a percentage of the entire fund available, not just the amounts claimed, and thus the final number of claimants is thus irrelevant to a fee calculation. 473 F.3d at 437. While the first part of this argument is an accurate characterization of *Masters*, the conclusion is emphatically not. *Masters*, to the contrary, urges consideration of the amounts claimed when needed to avoid "windfall" awards. As the panel explained, "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." *Id.*

Post-*Masters* it remains true that "[a]s a matter of public policy, it would be unseemly for the rewards to Class Counsel to exceed those to Class Members, the ones for whom the litigation

---

[10] *See Parker v. Time Warner Entm't Co., L.P.*, 631 F. Supp. 2d 242, 266 (E.D.N.Y. 2009) (when parties only have few addresses for class member notice, "it [i]s clear from the outset that the response rate would only be a small fraction of the … Class Members entitled to a direct benefit."); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 329 n.60 (3d Cir. 2011) (*en banc*) (noting evidence that "consumer claim filing rates rarely exceed seven percent, even with the most extensive notice campaigns.").

is ostensibly contested." *Parker v. Time Warner Entm't Co., L.P.*, 631 F. Supp. 2d 242 (E.D.N.Y. 2009) (Glasser, J.) (reducing attorney award from $5 million requested to $3.3 million so that the award did not exceed the $3.7 million value to class members). Hewing precisely to the method recommended in *Masters*, the court in *Tarlecki v. Bebe Stores, Inc*, lowered the 21.3% fee request to 14.7% based on the poor rate of class participation in the settlement and to prevent the attorney award from constituting 86% of the amounts claimed by class members. No. C 05-1777 MHP, 2009 U.S. Dist. LEXIS 102531 (N.D. Cal. Nov. 3, 2009). In determining whether the attorney award is disproportionate to class recovery, courts routinely consider amounts claimed. *See, e.g., Trombley v. Bank of Am. Corp*., No. 08-cv-456-JD, 2012 U.S. Dist. LEXIS 63072, at *8-9 (D.R.I. May 3, 2012); *Ferrington v. McAfee, Inc*., No. 10-cv-1455-LHK, 2012 U.S. Dist. LEXIS 49160, at *36-37 (N.D. Cal. Apr. 6, 2012).

The plaintiffs' reliance on the fact that the lodestar crosscheck yields a .53 "negative [sic]" multiplier is unavailing. Memorandum in Support of Motion for Attorneys Fees (Dkt. No. 201-1) ("Fee Mem.") at 7. As employed in this Circuit, the lodestar crosscheck is a ceiling on excessive fees, not a floor that would prop them up above what the appropriate PoR calculation would result. *See Goldberger* 209 F.3d at 50, 57 (counseling use of the lodestar crosscheck "consistent with our preference for moderation"). "Courts…utilize the lodestar to confirm that the percentage amount does not award counsel an exorbitant hourly rate." *In re Bristol-Myers Squibb Secs. Litig.*, 361 F. Supp. 2d 229, 233 (S.D.N.Y. 2005) (internal citations omitted).

Class counsel themselves properly recognize the supremacy of the percentage of recovery method. Fee Mem. at 3. The virtue of the percentage method is that judging can avoid the "gimlet-eyed review" necessitated by using lodestar in a manner that augments fees. *See* Fee Mem. at 3 (citing *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 122 (2d Cir. 2005)). Accordingly, allowing lodestar crosscheck to override the appropriately fixed percentage and augment the fee award is unwise. As one court described the unsuitability of lodestar, "Class Counsel has requested for itself an uncontested cash award based on lodestar, rather than the

value of the class recovery, with only a modest discount from the claimed lodestar amount. In other words, the class is being asked to 'settle,' yet Class Counsel has applied for fees as if it had won the case outright." *Sobel v. Hertz*, No. 3:06-CV-00545, 2011 U.S. Dist. LEXIS 68984, at *44 (D. Nev. Jun. 27, 2011).

At this point the Court should defer fixing the appropriate percentage award until actual payouts to class members are known. *See* Notes of Advisory Committee on 2003 Amendments to Rule 23(h) ("[I]t may be appropriate to defer some portion of the fee award until actual payouts to class members are known."); *id.* ("One fundamental focus is the result actually achieved for class members."); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375, 380 (D. Mass. 1997) (staging the fee award based on actual value created for the class); *Bowling v. Pfizer Inc.*, 922 F. Supp. 1261, 1283-84 (S.D. Ohio. 1996) (delaying a fee award in order to account for claims experience), *aff'd* 102 F.3d 777 (6th Cir. 1996).

Most recently, this process was endorsed by *In re Giant Interactive Group, Inc. Secs. Litig.*, 279 F.R.D. 151 (S.D.N.Y. 2011). There, Judge Engelmayer held half of the fee award in abeyance "pending a report to the Court on the progress of the claims administration process." *Id* at 165. The court scheduled the release of fees only "[w]hen and if enough class members come forward with validated claims so that the Court can be assured that the entire settlement…will actually be paid out to the class (as opposed to the charitable beneficiary that would stand to receive the balance if an insufficient number of class members came forward)." *Id.* The condition was imposed "because the touchstone of plaintiffs' counsel's entitlement to fees is the benefit actually conferred on the class" and such "condition will incent plaintiffs' counsel to work vigorously…to make sure that class members…are located and encouraged to submit claims." *Id.*

In an ordinary situation, it may be that a 30% fee is "reasonable and consistent with the norms of class litigation in this circuit." *Massiah v. Metroplus Health Plan, Inc.*, No. 11-cv-

05669 (BMC), 2012 U.S. Dist. LEXIS 166383, at *18 (E.D.N.Y. Nov. 16, 2012), but it is neither reasonable nor consistent to award 30% of the gross fund in this case, where more than 95% of that gross fund will never reach class member pockets. Rather, the Court should hew to *Masters*' suggestion and "adjust the percentage awarded" to avoid a "windfall" or the appearance thereof. *Masters*, 473 F.3d at 437.

One solution that would appropriately incentivize class counsel is to discount the percentage awarded to account for the third-party *cy pres*; a dollar to third-party *cy pres* is not worth the same to the class as a dollar given to the class, and should not be treated the same. *ALI Principles* § 3.13 cmt. a. This is what Judge Rosenthal did in *In re Heartland Payment Sys.*, 851 F. Supp. 2d 1040, 1076-77 (S.D. Tex. 2012). If class counsel were entitled to more money if the class received more and the *cy pres* recipients received less, they would be incentivized to negotiate for a less onerous claims process, and to ensure that more money ended up in the pockets of their putative clients. As it is, they are not just indifferent, but prefer the easier solution of not working to get their clients paid. Thus, the class receives less than 3% of the settlement fund, a plainly unfair share.

V. Rule 23(h) Does Not Permit Lead Class Counsel to Privately Divide a Lump Sum Fee Award.

The Settlement Agreement violates 23(h) in another particular: Section III.F.2.d provides that "[s]uch attorneys' fees and litigation expenses shall be paid to Counsel for allocation and distribution to Class Counsel at Lead Class Counsel's sole discretion and judgment." Rule 23(h) authorizes the Court to award "reasonable" attorneys' fees only when notice of the fee request is "directed to class members in a reasonable manner." Fed. R. Civ. P. 23(h), (h)(1) "Because members of the class have an interest in the arrangements for payment of class counsel whether that payment comes from the class fund or is made directly by another party, notice is required in all instances." Notes of Advisory Committee on 2003 Amendments to Rule 23."[A]ctive judicial involvement in measuring fee awards is singularly important to the proper operation of the class

action process." *Id.* The settlement impermissibly attempts to delegate the Court's role to Lead Class Counsel, without any oversight from absent class members.

It is not sufficient that class members are able to make "generalized arguments about the size of the total fee"; the notice must enable them to determine which attorneys seek what fees for what work. *In re Mercury Interactive Corp. Secs. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010). The fee request in this case lacks basic information; it fails to provide even the bare bones of who seeks what, instead providing for lump sum for Lead Class Counsel to distribute at their "sole discretion." This extra-judicial award undermines Rule 23(h)'s policy of "ensur[ing] that the district court, acting as a fiduciary for the class, is presented with adequate, and adequately-tested, information to evaluate the reasonableness of a proposed fee." *Id.*

As the Fifth Circuit recently noted: "In a class action settlement, the district court has an independent duty under Federal Rule of Civil Procedure 23 to the class and the public to ensure that attorneys' fees are reasonable and divided up fairly among plaintiffs' counsel." *In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220, 227 (5th Cir. 2008). The district court "must not … delegate that duty to the parties." *Id.* at 228 (internal quotation omitted). The appellants in *High Sulfur* complained that the district court had sealed the fee allocation list, such that they could not compare their fee awards to those of other attorneys. The Fifth Circuit agreed: "One cannot compare apples to oranges without knowing what the oranges are." *High Sulfur*, 517 F.3d at 232.

That court also held that it was impermissible for the district court to defer to the allocation proposed by the attorneys themselves.

> "It is likely that lead counsel may be in a better position than the court to evaluate the contributions of all counsel seeking recovery of fees. But our precedents do not permit courts simply to defer to a fee allocation proposed by a select committee of attorneys, in no small part, because 'counsel have inherent conflicts.' As Judge Ambro of the Third Circuit had noted earlier, 'They make recommendations on their own fees and thus have a financial interest in the outcome. How much deference is due the fox who recommends how to divvy up the chickens?'" [*Id.* at 234-35 (quoting *In re*

Diet Drugs Prods. Liab. Litig., 401 F.3d 143, 173 (3d Cir. 2005).]

Furthermore, given the case at hand, the *High Sulfur* fee agreement is comparatively inoffensive: in *High Sulfur*, at least the district court judge had the fee committee's recommendation available. Here, both the Court and class members have only the sole future discretion of Lead Class Counsel to rely on. "[I]n the absence of compelling reasons to the contrary, maintaining a circuit split… is inadvisable." *Janese v. Fay*, 692 F.3d 221, 227 (2d Cir. 2012).

But there is no need to even decide whether to split from the Fifth Circuit because even long before the implementation of 23(h), the Second Circuit has held this unfettered discretion to be improper. In *Agent Orange*, the court "reject[ed] this authority… to the extent it allows counsel to divide the award among themselves in any manner they deem satisfactory under a private fee sharing agreement." 818 F.2d 216, 223 (2d Cir. 1987). "Such a division overlooks the district court's role as protector of class interests under Fed. R. Civ. P. 23(e) and its role of assuring reasonableness in awarding of fees in equitable fund cases." *Id.* The Second Circuit decreed that "in all future class actions counsel must inform the court of the existence of a fee sharing agreement at the time it is formulated." *Id.* at 226.

This Court must inquire whether there is any fee-division agreement between Lead Class Counsel and ancillary class counsel; if so, it must be revealed both to the Court and to the class. Fed. R. Civ. P. 23(h); *see also* Fed. R. Civ. P. 23(e)(3) (requiring the parties seeking approval to file a statement identifying any agreement made in connection with the proposal). A Rule 23(h) deficiency is grounds for rejecting the settlement; approving such notice would constitute reversible error. *Mercury Interactive*, 618 F.3d 988.

VI. The Court Should Not Infer Settlement Approval from a Low Number of Objectors, Especially Because the Parties Have Artificially Reduced the Number of Objections

The settling parties argue in their final approval papers that if only a small fraction of the class objects to the settlement, the silence of the rest of the class as such demonstrates the settlement is fair reasonable and adequate. MFA at 15-16. This is an impoverished argument that has been refuted by authorities time and again.

Any given class action settlement, no matter how much it betrays the interests of the class, will produce only a small percentage of objectors. The predominating response will always be apathy because objectors—unless they can obtain *pro bono* counsel—must expend significant resources on an enterprise that will create little direct benefit for themselves. *See Vought v. Bank of Am.*, No. 10-cv-2052, 2012 U.S. Dist. LEXIS 143595, at *60 (C.D. Ill. Oct. 4, 2012) (citing, *inter alia*, a 1996 Federal Judicial Center survey that found between 42% and 64% of settlements engendered no filings by objectors). Another common response is from non-lawyers will be the affirmative avoidance, whenever possible, of anything involving a courtroom.

Class counsel may argue that this understandable tendency to ignore notices or free-ride on the work of other objectors is best understood as acquiescence in or evidence of support for the settlement. This is wrong. Silence is simply *not* consent. *Grove v. Principal Mut. Life Ins. Co.*, 200 F.R.D. 434, 447 (S.D. Iowa 2001). "Silence may be a function of ignorance about the settlement terms or may reflect an insufficient amount of time to object. But most likely, silence is a rational response to any proposed settlement even if that settlement is inadequate. For individual class members, objecting does not appear to be cost-beneficial. Objecting entails costs, and the stakes for individual class members are often low." Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 Fla. L. Rev. 71, 73 (2007).

Without *pro bono* counsel to look out for the interests of the class, filing an objection is economically irrational for any individual. "[A] combination of observations about the practical realities of class actions has led a number of courts to be considerably more cautious about inferring support from a small number of objectors to a sophisticated settlement." *GMC Pick-Up*, 55 F.3d at 812 (internal citation omitted); *accord Parker*, 631 F. Supp. 2d at 258 ("[T]he Court does not attribute a great deal of significance to the number [of objectors and opt-outs] given the low stakes of a $5 settlement and the burden on each objector to provide their written objections in triplicate."). Moreover, "where notice of the class action is, again as in this case, sent

simultaneously with the notice of the settlement itself, the class members are presented with what looks like a *fait accompli*." *Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.*, 834 F.2d 677, 680-81 (7th Cir. 1987). "Acquiescence to a bad deal is something quite different than affirmative support." *In re GMC Engine Interchange Litig.*, 594 F.2d 1106, 1137 (7th Cir. 1979).

As such, the response from class members cannot be seen as something akin to an election or a public opinion poll. *See GMC Pick-Up*, 55 F.3d at 813; Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 Vand. L. Rev. 1529, 1561 (2004) ("Common sense dictates that apathy, not decision, is the basis for inaction.").

"[T]he absence or silence of class parties does not relieve the judge of his duty and, in fact, adds to his responsibility." *Amalgamated Meat Cutters & Butcher Workmen v. Safeway Stores, Inc.*, 52 F.R.D. 373, 375 (D. Kan. 1971). The Court should draw no inference in favor of the settlement from the number of objections, especially given the vociferousness of the objectors. *GMC Pick-Up*, 55 F.3d at 812-13; *ALI Principles* § 3.05, cmt. a at 206; *Vought*, 2012 U.S. Dist. LEXIS 143595, at *60-*61.

Yet more conducive to apathetic inaction the parties have elected a process of objecting and opting out which is "unnecessarily onerous". *Galloway v. Kan. City Landsmen*, No. 4:11-1020-CV-W-DGK, 2012 U.S. Dist. LEXIS 147148, at *16 (W.D. Mo. Oct. 12, 2012) (denying settlement in part based on parties' failure to allow class members to opt out via email alone). The requirement that objectors print and post multiple copies of their objection/exclusion is both expensive and outdated in 2012. *See Smith v. Levine Leichtman Capital*, No. C 10-00010 JSW, 2012 U.S. Dist. LEXIS 163672, at *8-*9 (N.D. Cal. Nov. 15, 2012) ("[T]he parties have made the procedures for filing objections unduly burdensome. There is no reason to require … the objectors to mail their objections to three different locations."). Other courts permit the relatively efficient (indeed, close to costless) method of transmitting objections by a single electronic submission; *see In re Motor Fuel Temperature Sales Practices Litig.*, No 07-md-01840-KHV-

JPO, Order (Dkt. No. 3019), at 2 (D. Kan. Nov. 10, 2011) ("If Costco plans to proceed with email notification, it must allow class members to opt out of the class and object to the settlement electronically"); Class Notice, *In re Classmates.com Consolidated Litig.*, No. 09-cv-0045-RAJ (W.D. Wash 2011), *available at* http://www.cmemailsettlement.com/docs/notice.pdf (last visited Jan. 15, 2013), *decision reported at* 2012 U.S. Dist. LEXIS 83480 (W.D. Wash. Jun. 15, 2012). Where electronic modes of opting-out and objecting are available, the "vast majority" of participating class members will use those avenues. *Motor Fuel Temperature*, 2012 U.S. Dist. LEXIS 57981, at *76 (D. Kan. Apr. 24, 2012); *id.* at *74 n.13 (nearly three times more people opted-out electronically than by mail).

Preferring a more costly, inefficient alternative over seamless electronic processes can only give rise to the inference that the parties wished to undermine the autonomous decisions of class members. It has been known for at least a half-decade that "the ease and cost-efficiency of such direct internet submissions increases the likelihood of absent class member participation." Robert H. Klonoff, *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. Pitt. L. Rev. 727, 766 n. 251 (2008); Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 Fla. L. Rev. at 128-29. Indeed, class notice was distributed in large part via internet, yet absent class members' responses cannot be made in the same medium. Settlement § IV.B. It is wrong for class counsel to minimize their own costs while disregarding the expenses of their putative clients. Class counsel is not licensed to consign objectors or opt-outs to second class status. *Cf. also* Solorzano Decl. (Dkt. No. 195) ¶¶10-11 (attesting that 15,759 claims were submitted online and only 1,469 were submitted by mail).

"One hallmark of a reasonable settlement agreement is that it makes participation as easy as possible, whether class members wish to make a claim, opt out, or object." *McClintic*, 2012 U.S. Dist. LEXIS 3846, at *17 (critiquing equivalent opt-out and objection process and ultimately rejecting settlement). These hurdles create doubt as to whether the ultimate Settlement Agreement appropriately respects class members' Fed. R. Civ. P. 23 rights to object to the

settlement and opt-out from the class certification. Not only do they constitute a reason to reject the settlement in this case, *see e.g.*, *Galloway*, 2012 U.S. Dist. LEXIS 147148, at *16, they provide an added reason to discredit any argument that the lack of objectors/opt-outs in any way signals the class members' approval of the settlement.

VII. The Objection Is Brought in Good Faith

Theodore Frank is founder of the non-profit Center for Class Action Fairness. The Center's mission is to litigate on behalf of class members against unfair class action procedures and settlements, and it has won millions of dollars for class members. *See, e.g.*, Ashby Jones, *A Litigator Fights Class-Action Suits*, Wall St. J. (Oct. 31, 2011); *In re Classmates.com Consol. Litig.*, No. 09-cv-0045-RAJ, 2012 U.S. Dist. LEXIS 83480, at *29 (W.D. Wash. Jun. 15, 2012) (noting that the Center's client "was relentless in his identification of the numerous ways in which the proposed settlements would have rewarded class counsel (and a *cy pres* charity) at the expense of class members" and "significantly influenced the court's decision to reject the first settlement and to insist on improvements to the second").

Because it has been the Center's experience that class action attorneys often employ *ad hominem* attacks in attempt to discredit objections, it is perhaps relevant to distinguish this objector's intentions from the agenda of those who are often styled "professional objectors." A "professional objector" is a specific legal term referring to for-profit attorneys who attempt or threaten to disrupt a settlement unless plaintiffs' attorneys buy them off with a share of the attorneys' fees. This is not the Center's business model. Paul Karlsgodt & Raj Chohan, *Class Action Settlement Objectors: Minor Nuisance or Serious Threat to Approval*, BNA: Class Action Litig. Report (Aug. 12, 2011) (distinguishing the Center from professional objectors). While Frank has brought several objections to unfair class action settlements on behalf of himself or on behalf of clients, the majority of which have been successful, he refuses to engage in *quid pro*

quo settlements and does not extort attorneys; he has never withdrawn an objection in exchange for payment.

Nonetheless, to preempt any possibility of a false and unjustifiable accusation of objecting in bad faith or seeking to extort class counsel, Frank and his counsel are willing to stipulate to an injunction prohibiting himself and his attorneys from accepting compensation in exchange for the settlement of this objection. *See* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623 (2009) (suggesting inalienability of objections as solution to objector blackmail problem).

CONCLUSION

For the reasons stated above, the *cy pres* provisions make the settlement untenable under Second Circuit law and good public policy, and it must be rejected. Even if the Court were to approve the settlement, it should withhold ruling on the fee request until the parties disclose how little of the settlement fund is actually going to the class, and then scale the Rule 23(h) award to reflect proportionality with the actual class benefit.

Dated: February 5, 2013.

Adam E. Schulman (*pro hac vice*)
DC Bar No. 1001606
1718 M Street NW, No. 236
Washington, DC 20036
Phone: (610) 457-0856
Email: shuyande24@gmail.com

Attorney for Theodore H. Frank

Certificate of Service

The undersigned certifies he electronically filed the foregoing Objection and associated Declaration of Theodore H. Frank via the ECF system for the Eastern District of New York, thus sending the Objection in writing to the Clerk of the Court and also effecting service on all attorneys registered for electronic filing. Additionally he caused to be served via First Class Mail a copy of this Objection and associated Declaration of Theodore H. Frank upon the following attorneys:

Elizabeth A. Fegan Hagens Berman Sobol Shapiro LLP 1144 W. Lake Street, Suite 400 Oak Park, IL 60301	Adam L. Hoeflich Barlit Beck Herman Palenchar & Scott LLP 54 W. Hubbard Street Chicago, IL 60654
Daniel E. Becnel, Jr. Becnel Law Firm, LLC P.O. Drawer H Reserve, LA 70084	

Dated: February 5, 2013.

Adam E. Schulman