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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE: BAYER CORP. COMBINATION ASPIRIN PRODUCTS MARKETING AND SALES PRACTICES LITIGATION THIS PLEADING RELATES TO: ALL CASES	09-md-2023 (BMC)(JMA) **COGAN**, District Judge

PLAINTIFFS' RESPONSE TO OBJECTIONS

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I. INTRODUCTION

After hard-fought litigation, the Parties reached a $15 million dollar settlement, which is equal to nearly 100% of the profits Defendant made on the sale of the Combination Aspirins.[1] This Settlement was not achieved early or with ease, but only after a motion to dismiss, extensive written and oral discovery involving 2.5 million pages of documents and dozens of depositions, a fully briefed motion for class certification, and five motions to strike expert declarations. Moreover, the Settlement was reached after negotiations before two mediators, and only after a failed mediation attempt. Given the nature of the litigation and risks to the Parties, the Settlement will provide Class Members with monetary relief now without the delay and risk of continued litigation. Moreover, the Parties recently amended the Settlement to ensure that both Class Members who make claims and Class Members for which the Claims Administrator has transactional data reflecting their purchases can participate in the Settlement.[2] Because the Settlement is fair, reasonable, and adequate, it should be approved.

Nonetheless, six objections have been lodged, all filed by "professional" or "serial" objectors. None of the objections claim that the Rule 23 requirements have not been met. Moreover, none of the objections claim that the factors enunciated by the Second Circuit in *City of*

[1] Plaintiffs' expert calculated unjust enrichment damages, or profits, on the two Combination Aspirins at $7.634 million for Bayer Heart Advantage during 2007-2010 and $10.328 million for Bayer Women's from 2001-2010. Thus, the Settlement Amount is 83% of the calculated profits.

[2] Hereafter, "Settlement" or "Agreement" will refer to the Settlement Agreement, as amended by the Amendment to the Settlement Agreement dated March 1, 2013 ("Amendment"). With this Response to Objections, Plaintiffs have concurrently filed a Motion to Amend Plan of Distribution along with the Amendment. Generally, under the Amendment, payments via *cy pres* would take place only after direct compensation for purchases self-identified or identified in discovery, *i.e.*, (1) purchases self-identified by Settlement Class Members and reported through the claims submission process ("Claimed Purchases"), and (2) purchases known to have been made by Settlement Class Members with valid addresses as recorded in the retailer purchase data obtained in discovery ("Recorded Purchases").

Detroit v. Grinnel Corp., 495 F.2d 448 (2d Cir. 1974), have not been met. For these reasons alone, this Court should grant final approval.

Instead, the objections fall within a few categories: (1) objections to the notice, (2) objections to the Settlement's *cy pres* provision, (3) an objection to the release, and (4) an objection to the claims process. Each objection fails. First, pursuant to Rule 23, the best practicable notice issued to members of the classes through direct mail efforts and numerous other avenues. Second, *cy pres* is appropriate where, as here, Settlement Class Members with Claimed Purchases or Recorded Purchases are proposed to first receive direct compensation. Moreover, the proposed *cy pres* recipients meet all applicable selection standards. Third, the release at issue is consistent with Second Circuit law and preserves class members' personal injury claims, if any. Plus, all members of the classes had the opportunity to opt-out if they wished to pursue an individual action. Finally, the attacks on the claims process similarly fail where proof of purchase requirements, with caps on awards for those lacking flexible evidence of purchase, are permissible.

Because the objections do not withstand scrutiny, this Court should grant Plaintiffs' motion for final approval and for an award of attorneys' fees and costs.

II. DESPITE NATIONWIDE NOTICE, ONLY FIVE OBJECTIONS WERE TIMELY FILED, SUBMITTED BY MANY OF THE USUAL SUSPECTS

On July 23, 2012, the Court entered its Preliminary Approval Order, granting preliminary approval of the settlement, conditionally certifying the Settlement Class, and directing notice to be disseminated. Preliminary Approval Order, ¶¶ 1-2, 6 (Dkt. # 181). Thereafter, notice issued. *See generally* Declaration of Tricia Solorzano (Dkt. # 195). Even though extensive class notice was issued in this case, which included approximately 700,000 postcards, only five objections were timely submitted by the objection deadline. In addition to the five timely objections, one untimely

objection was served by a *pro se* litigant, Ms. Margaret Strohlein.[3] Because her objection is untimely, she is foreclosed from objecting;[4] nevertheless, without waiving their objection to her timeliness, Plaintiffs respond to the substance of her objections because she objects only to issues also raised by timely objectors.

Notably, all of the objectors have been correctly characterized as professional objectors by the bar and courts across the country because they work to improve their pocketbooks as opposed to class settlements. While objectors may add value to the final approval process, "numerous courts…have recognized that professional objectors undermine the administration of justice by disrupting settlement in the hopes of extorting a greater share of the settlement for themselves and their clients." *In re Initial Pub. Offering Sec. Litig.*, 728 F. Supp. 2d 289, 295 (S.D.N.Y. 2010). "What is less frequently observed is that the [class action settlement] process provokes into action an interesting group of professional objectors, who seem to have a variety of agendas, some not always apparent." *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 218 (D. Me. 2003). "[P]rofessional objectors can levy what is effectively a tax on class action settlements, a tax that has no benefit to anyone other than to the objectors. Literally nothing is gained from the cost: Settlements are not restructured and the class, on whose benefit the appeal is purportedly raised, gains nothing." *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1361 n.30 (S.D. Fla. 2011) (quotations omitted, alteration in original). The objections here fall into the same category and their complaints should be afforded little weight.

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[3] *See* Preliminary Approval Order, ¶ 10.a (requiring objections to be postmarked within 14 days of the filing of Plaintiffs' Motion for Preliminary Approval). While timely comments thus needed to be postmarked by Tuesday, February 5, 2013, Ms. Strohlein's objection was not postmarked until Thursday, February 7, 2013. *See* Kurowski Decl., Ex. 6 (attaching postmarked copy of Strohlein Objection).

[4] *See* Preliminary Approval Order, ¶ 10(d) (stating that any untimely objection shall not be heard at the Fairness Hearing and shall be foreclosed from appeal).

A. Charles Chalmers, Esq. Repeatedly Files Meritless Objections

Charles Chalmers, who represents Objector Timmen Cermak, is a repeat objector to class action settlements, seeking to collect tens of thousands of dollars for bringing his objections. *See In re Elan Sec. Litig.*, 385 F. Supp. 2d 363, 376 (S.D.N.Y. 2005) (noting Chalmers' request for $121,575 in legal fees, a 1.5 multiplier, but permitting only a lodestar award). Objector Cermak and Mr. Chalmers previously teamed up in another case, in which the court rejected Mr. Chalmers' fee request because: "The court does not find that Mr. Chalmers' work led to better results for class members." *In re Classmates.com Consol. Litig.*, C09-45RAJ, 2012 WL 3854501, at *11 (W.D. Wash. June 15, 2012). Moreover, the court found that "Mr. Chalmers' objection did not raise any novel criticism of the first settlement." *Id*. at *3. Chalmers typically follows his objections with unsuccessful appeals too. *See, e.g.*, *Pincay Invs. Co. v. Covad Commc'ns Grp.*, 90 Fed. Appx. 510, 511 (9th Cir. 2004) ("The district court acted within its discretion: it reviewed the balancing of factors and considered Chalmers' objections. Chalmers offers conclusory statements in arguing that the district court abused its discretion. We reject Chalmers' contentions and affirm the district court's approval of the settlement.") (internal citation omitted); *Morris v. Lifescan, Inc*., 54 Fed. Appx. 663, 664 (9th Cir. 2003) ("Catherine Jackson [represented by Chalmers] appeal[s] the district court's attorneys' fee award to class counsel of 33 percent of the $14.8 million cash settlement. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm…The district court noted that class counsel achieved exceptional results in this risky and complicated class action and despite Lifescan's vigorous opposition throughout the litigation."). *See generally In re Wireless Tel. Fed. Cost Recovery Fees Litig*., 343 F. Supp. 2d 838 (W.D. Mo. 2004) (noting Chalmers representation of objector).

B. On Information and Belief, Jeanie Padgett is a Front for Clyde Padgett

While Jeanie Padgett appears *pro se*, Plaintiffs believe that her objection is before the Court at the behest of Clyde Padgett, another serial objector, who has previously filed multiple spurious objections. Ms. Padgett and Clyde Padgett share an address. *Compare* Padgett Obj. *with* Clyde Padgett Objection submitted in *In re Chocolate Confectionary Antitrust Litigation.* Kurowski Decl., Ex. 1. In *Gemelas v. Dannon Co., Inc.*, 1:08 CV 236, 2010 WL 3703811, at *1-2 (N.D. Ohio Aug. 31, 2010), Clyde Padgett objected to a $35 million settlement. That court noted that "[t]he only objections to the settlement were lodged by what now appear to be 'serial objectors'" who "appealed the Court's ruling finding that the parties settlement is fair, reasonable and adequate." *Id.* The Court dealt harshly but appropriately with him and imposed an appeal bond: "The Court finds that Padgett's appeal is meritless…In short, Mr. Padgett appears to be making a business of objecting to, and appealing, class action settlements in order to obtain some financial reward." *Id.* The Third Circuit recently found Clyde Padgett raised a meritless appeal in *In re Chocolate Confectionary Antitrust Litig.*, 470 Fed. Appx. 67, 68, 70 (3d Cir. 2012) ("Clyde F. Padgett appeals an order of the District Court granting final approval to a proposed class-action settlement … Cadbury's final argument is that Padgett's objection is meritless and should be dismissed. On this ground, we are in accord."). Because Clyde Padgett appears to have run out of credibility with the courts, he appears to be using his family member to do his work.

C. Janis Johnson and Gary Sibley, Esq. have Previously Teamed up to File Meritless Objections

Gary Sibley, on behalf of Janis Johnson, has previously submitted apparently frivolous and/or meritless objections and appeals. Objector Johnson and Gary Sibley filed objections in *In re Nutella Mktg. & Sales Practices Litigation*. There, the district court imposed an appeal bond on objectors, noting:

> In the present case, the Objectors argue that (1) their appeal is not frivolous, and (2) the Plaintiffs have not demonstrated that the Objectors will be unable to pay the costs of an appeal. I am not convinced. First, the Objectors have not responded in any meaningful way to the Plaintiffs' contention that the appeal is meritless.

In re Nutella Mktg. & Sales Practices Litig., CIV.A. 11-1086 FLW, 2012 WL 6013276, at *2 (D.N.J. Nov. 20, 2012). Notably, Janis Johnson's objection in this case, appears largely cut and pasted from Mr. Sibley's objection in *Nutella*, further reflecting objections divorced from the facts before the Court here. *See* Kurowski Decl., Ex. 2 (attaching Sibley's *Nutella* objection). Moreover, in *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 317, 184 L. Ed. 2d 239 (2012), "[t]wo groups of objectors to [a] settlement" appealed the district court's certification and approval of that settlement, including Sibley, claiming numerous deficiencies in the proceedings below where "[t]he district court certified a class and approved a class-action settlement." *Id*. at 637. The Fifth Circuit found "appellants' claims lack merit."

D. Thomas L. Cox, Jr., Esq. is "a Frequent and Professional Objector"

Thomas Cox, on behalf of Shelly Stevens, is yet another commonplace class action objector. Another court recounted some of Mr. Cox's extensive objection history, noting:

> Clifton brings this objection by and through her attorney, Thomas L. Cox, Jr. It appears that Mr. Cox is a frequent and professional objector, as he has objected or represented objectors in at least six other class actions since 2010. *See In re Tyson Foods, Inc., Chicken Raised Without Antibiotics Consumer Litig.*, MDL No. 08-1982, 2010 U.S. Dist. LEXIS 48518, 2010 WL 1924012 (D. Md. May 11, 2010); *Dewey v. Volkswagen of Am.*, 728 F. Supp. 2d 546 (D.N.J. 2010); *In re Lawnmower Engine Horsepower Mktg. & Sales Practices Litig.*, 733 F. Supp. 2d 997 (E.D. Wis. 2010); *In re Lifelock, Inc. Mktg. & Sales Practice Litig.*, MDL No. 08-1977, U.S. Dist. LEXIS 130075, 2009 WL 2222711 (D. Ariz. July 24, 2009); *In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, MDL No. 08-1998, 2010 U.S. Dist. LEXIS 131775 (W.D. Ky. Dec. 13, 2010). Mr. Cox's objections were not sustained in any of these cases.

In re Mut. Funds Inv. Litig., MDL 1586, 2011 WL 1102999, at *1 n.1 (D. Md. Mar. 23, 2011). Not surprisingly, the court wrote that the arguments submitted by Mr. Cox "were without merit." *Id.* at *1. *See also Arthur v. Sallie Mae, Inc.*, 10-CV-00198-JLR, 2012 WL 4075238, at *2 (W.D. Wash. Sept. 17, 2012) ("The Court has considered all objections to the Settlement and Amended Settlement, including the Objections of Thomas L. Cox Jr., filed on behalf of Class members Sara Sibley…the Court finds that these objections are meritless and they are hereby overruled."). Objector Stevens too is no stranger to objections and professional objector counsel. *See generally In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935 (N.D. Ill. 2011) (overruling objection Stevens objection and granting final approval).

E. Theodore Frank and the Center for Class Action Fairness Repeatedly Seek Thousands of Dollars (and Multipliers) for Filing Objections

Theodore Frank, and his "Center For Class Action Fairness," is another frequent objector, described by one court as "an entity that has been active in objecting to class action settlements across the nation." *In re Classmates.com Consol. Litig.*, C09-45RAJ, 2012 WL 3854501, at *3. Frank is in the business of monitoring class action settlements solely for the purpose of objecting.[5] While Frank attempts to distance himself from other fee-seeking objectors, claiming he is represented by "*pro bono*" counsel, he too wrests thousands of dollars from class settlements in furtherance of his business of objecting to settlements. *See, e.g.*, *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 842 F. Supp. 2d 346, 351 (D. Me. 2012) (awarding $10,000 fee despite Frank's request for $19,000); *Dewey v. Volkswagen of Am.*, CIV.A. 07-2249, 2012 WL 6586511, at *17 (D.N.J. Dec. 14, 2012) (granting $82,134.10 fee request); *In re Apple Inc. Sec. Litig.*, 5:06-CV-05208-JF HRL, 2011 WL 1877988, at *4-6 (N.D. Cal. May 17, 2011) (noting Frank's request for an award of $297,916 "would result in an excessive hourly rate of more than

[5] *See generally* http://centerforclassactionfairness.blogspot.com/ (last visited Feb. 17, 2013).

$2,800"). Rather than *pro bono* work, this arrangement instead reflects a contingency fee arrangement under which a lawyer receives a fee for services only after a successful effort.[6]

Incredibly, while Frank takes Plaintiffs to task for requesting a fee reflecting a .53 multiplier, Objector Frank requested a lodestar multiplier of 2.2 in his fee petition in *Lonardo v. Travelers Indem. Co.*, which the court denied. 706 F. Supp. 2d 766, 813-14 (N.D. Ohio 2010).

F. Margaret Strohlein is Apparently Represented by Joseph Darrell Palmer, Esq., Whose *Pro Hac Vice* Appearances Have Been Revoked Multiple Times

Lastly, Plaintiffs believe that Untimely Objector Ms. Strohlein is represented by serial objector Joseph Darrell Palmer as her mailing address is listed as Mr. Palmer's business address.[7] Courts have appropriately treated Mr. Palmer harshly. *See, e.g.*, *In re Oil Spill*, MDL 2179, 2013 WL 144042, at *48 n.40 (E.D. La. Jan. 11, 2013) (noting "Mr. Palmer has been deemed a 'serial objector' by several courts" and citing to a transcript in that case involving "Mr. Palmer admitting it was 'regrettable' that he had been found to have engaged in 'bad faith and vexatious conduct'"); *In re Uponor, Inc., F1807 Plumbing Fittings Prods. Liab. Litig.*, 11-MD-2247 ADM/JJK, 2012

[6] Moreover, Frank's objection is problematic for another reason: Frank is a lawyer and is represented here by his own law organization. Under Rule 23(a)(4), employees or lawyers of law firms purporting to act as class counsel are generally prohibited from serving as class representatives. *See, e.g., Housler v. First Nat'l Bank of E. Islip*, 524 F. Supp. 1063, 1066 (E.D.N.Y. 1981) ("The mere possibility of such a conflict of interest is sufficient to disqualify an attorney from participating both as a plaintiff representative and an attorney in the action.") (citations omitted). *See also Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 94-95 (7th Cir. 1977) ("Because the financial recovery for reasonable attorney's fees would dwarf the individual's recovery as a member of the class herein, the financial interests of the named plaintiffs and of the class are not coextensive. If the interests of a class are to be fairly and adequately protected, if the courts and the public are to be free of manufactured litigation, and if proceedings are to be without cloud, the roles of class representative and class attorney cannot be played by the same person. We also find that this possible conflict of interest must be considered in conjunction with public perception that plaintiff shares in attorney's fees won by his law firm."). Just as class representatives seek to represent others, Frank claims to object here in the interest of the class. Because he and his "counsel" would not meet the requirements of Rule 23(a)(4), he should be prohibited from serving as an objector that purports to represent the interests of class members.

[7] *See* Kurowski Decl., Ex. 7 (attaching printout of Mr. Palmer's California attorney registration listing the same address as submitted on Ms. Strohlein's objection).

WL 3984542, at *3 (D. Minn. Sept. 11, 2012) (noting "the Palmer Objectors appear to be represented by an attorney who has not entered an appearance in this case and who is believed to be a serial objector to other class-action settlements…This attorney, Darrell Palmer, paid the appellate filing fee on behalf of the Palmer Objectors, and the documents filed on their behalf bear his California mailing address rather than the Texas addresses of the Palmer Objectors."). Moreover, Ms. Strohlein also objected in *In re AT & T*, 789 F. Supp. 2d at 965, in which Objector Stevens also objected, only to later dismiss her appeal.

Palmer presumably has not filed an appearance here because multiple courts have revoked or denied Palmer's *pro hac vice* petitions. At least two courts denied Mr. Palmer's *pro hac vice* applications. In *Herfert v. Crayola, LLC*, the court denied Mr. Palmer's application, noting:

> Mr. Palmer is denied for failure to appear at a prior hearing and for material nondisclosures in his application. Mr. Palmer falsely declared under penalty of perjury that he had not been disbarred or formally censured by a court of record or by a state bar association. (Dkt. No. 59). In fact, Mr. Palmer was temporarily suspended from the Colorado Bar Association, the State Bar of Arizona, and the State Bar of California as a result of a Colorado felony conviction. Mr. Palmer has submitted a letter to the Court attributing his failure to disclose these suspensions to an oversight on the part of his assistant. Any professional should know better than to blame his assistant for such a serious misstatement in a document containing his own signature. The Court relies on an attorney's signature as his personal attestation that the information submitted is true and complete. It was Mr. Palmer's responsibility, and his alone, to ensure the accuracy of his application.

Order Denying Application of Claimant's Counsel Darrell Palmer to Appear Pro Hac Vice (W.D. Wash. Aug. 17, 2012) (Kurowski Decl., Ex. 3). In *Arthur v. Sallie Mae*, the court revoked Mr. Palmer's *pro hac vice* admission, describing Mr. Palmer's conduct as "unacceptable." Hearing Tr. at 9 (Kurowski Decl., Ex. 4). The court explained:

> Mr. Palmer was alerted to the problem when his pro hac vice application in Judge Coughenour's case was challenged. That was on October 10, 2012 (*sic*). Mr. Palmer did not immediately raise and

> seek to correct the same mistake in this case. In fact, plaintiffs waited ten days before filing their motion to give Mr. Palmer time to raise and correct the issue.
>
> Mr. Palmer did not file an amended pro hac vice application until August 27, 2012, a full 17 days after being notified of the problem. This does not demonstrate candor with the court or that he took seriously the fact that he made a false statement under oath. Additionally, Mr. Palmer has apparently submitted false pro hac vice applications in at least three other cases. As a final note, the false statement in the pro hac vice application is not the only misrepresentation Mr. Palmer has made to this court. It is impossible to reconcile a declaration submitted to this court under penalty of perjury, dated May 17, 2012, with the court record. And Mr. Palmer has now acknowledged that it is incorrect. That serves as the basis for his fee application in this matter. As will be further discussed today, Mr. Palmer made several other misrepresentations in his motions for attorneys' fees. These misrepresentations confirm my conclusion that the court sanction Mr. Palmer by revoking his admission in this case. Therefore, Docket 251 is granted, and Mr. Palmer's pro hac vice is revoked.

Id. Further, in *Ormond v. Anthem, Inc.*, No. 05-cv-1908 (S.D. Ind.), Mr. Palmer filed a *pro hac vice* application to appear on behalf of objectors. *See* Docket in *Ormond v. Anthem, Inc.* at Dkt. # 747(Kurowski Decl., Ex. 5). The docket in that case confirms that after Mr. Palmer filed his *pro hac vice* application, the court scheduled a status conference to "address the motion to appear pro hac vice of attorney Joseph Darrell Palmer." *See id*. at Dkt. # 752. Notably, when class counsel submitted the orders in *Crayola* and *Sallie Mae*, respectively denying and revoking Mr. Palmer's admissions (*id.* at Dkt. # 753), Mr. Palmer withdrew his *pro hac vice* application. *Id.* at Dkt. # 754.

III. ARGUMENT

A. None of the Objectors Challenge Settlement Class Certification Under Rule 23(a) or Rule 23(b)(3)

To start, not one of the Objectors challenges the propriety of settlement class certification under Rule 23(a) and Rule 23(b)(3). Thus, for the reasons provided in their Motion for Final Approval, this Court should grant settlement class certification.

B. The Settlement is Fair, Reasonable, and Adequate

Here, the Settlement before the Court is fair, reasonable, and adequate and nothing in the objections confirms otherwise. No objector challenges any application of the *Grinnell* factors to the facts of this case. Instead, the objections fall within a few categories: (1) objections to the notice, (2) objections to the Settlement's *cy pres* provision, (3) an objection to the release, and (4) an objection to the claims process. Each fails.

1. The class notice complied with Rule 23.

a. The best practicable notice was issued to class members through direct mail efforts and numerous other avenues.

For the first objection to the notice, Objector Johnson asserts that the notice plan failed to meet notice reach standards. Johnson Obj. at 1-2. Objector Johnson ignores the facts.

First, after reviewing the notice plan in this case and speaking to the Claims Administrator at the preliminary approval hearing, the Court ruled that:

> [t]he form and method of notifying the Settlement Classes of the Settlement and its terms and conditions set forth in the Declaration of Daniel Burke submitted with Plaintiffs' Motion For Preliminary Approval meet the requirements of due process and Rule 23 of the Federal Rules of Civil Procedure, constitutes the best notice practicable under the circumstances, and shall constitute due and sufficient notice to all persons and entities entitled thereto.

Preliminary Approval Order, ¶ 6(b) (Dkt. # 181). Second, Objector Johnson cites solely to the estimated direct notice reach (8-10%), ignoring the rest of the notice plan. *Compare* Johnson Obj.

at 3 *with* Preliminary Approval Mem. at 5 (Dkt. # 176) ("Larkspur Design Group composed a notice program designed to reach approximately 8-10% of the class through direct mail and at least 65% percent of the target audience an average of 2.9 times."). However, the settlement notice was expected to reach a minimum of 70% of the target audience:

> Based on the number of addresses available for direct mail along with the number of expected impressions from online efforts, LDG determined that publication in the following magazines and national newspapers would deliver an acceptable *reach* and *frequency* (65% reach at 2.9 frequency), that when supplemented by the other media vehicles, will result in a Notice plan reaching a minimum of 70% of the [Target Audience] which is inclusive of the defined classes.

Declaration of Daniel Burke Regarding Dissemination of Notice to Class Members, ¶ 22 (Dkt. # 176-3). *See also id.* at ¶ 42 ("Many courts have held that notice plans estimated to reach a minimum of 70% of the settlement class, are adequate and sufficient and thus comply with Rule 23. When implemented, the Notice Plan will be well within this standard of reach."). Thus, the notice plan here complied with the law.

Lastly, it is clear that Plaintiffs conducted extensive efforts to identify direct mail addresses for notice (and now propose to use those efforts to provide payments for Recorded Purchases).[8] Plaintiffs issued nearly a dozen subpoenas requesting class member identities and addresses. *See generally* Letter to Court (Dkt. # 182) (describing Plaintiffs' efforts to obtain class member information). And, when non-parties refused to turn over class member contact information, Plaintiffs obtained a court order compelling production. *See* Dkt. # 183-184, 188. Thus, Plaintiffs utilized extensive efforts to obtain class member contact information. And, these successful

[8] In asserting that the notice given was not the best notice practicable, Objector Johnson writes that "[w]hile Rule 23 does not require the parties to exhaust every conceivable method of identifying individual class members, it does require that individual class members are entitled to individual notice where possible…If class members' names and addresses cannot be determined by reasonable efforts, notification by publication is sufficient." Johnson Obj. at 2.

efforts resulted in direct notice being sent to approximately 700,000 class member addresses. *See generally* Solorzano Decl. (Dkt. # 195); Ross Decl. (Dkt. # 196).

b. The notice was adequate and the proposed *cy pres* recipients were identified in publicly-available documents.

Objectors Cermak and Strohlein suggest that class members could not object to the proposed *cy pres* recipients because they were not identified in the notice. Cermak Obj. at 2; Strohlein Untimely Obj. at 2. These objections are factually and legally deficient.

Factually, both the Settlement Agreement and the Long Form Notice apprised class members that any money left over after class members were paid would be distributed to charities agreed to by the parties and approved by the Court. Further, neither objector can dispute that the potential *cy pres* recipients have been disclosed, prior to the deadline for objecting to the Settlement.[9]

Legally, neither objector cites precedent in support of their position. *See id*. Moreover, in *In re Vitamin C Antitrust Litig*., 06-MD-1738 (BMC)(JO), 2012 WL 5289514, at *1 (E.D.N.Y. Oct. 23, 2012), this Court reviewed an identical argument, effectively finding that identification of a *cy pres* recipient subsequent to issuance of class notice did not serve as a bar to final approval. *See id.* at *9 ("An objector to the settlement…challenged the adequacy of the notice on the ground that the notice does not name an organization that will be the cy pres recipient of the $1 million settlement fund. While some courts have faulted settlements that fail to identify the cy pres recipient…here the Court believes that the plan proposed by counsel [which delayed selection of the *cy pres* designees pending on-going case issues] is a reasonable one.") (citing *Dennis v.*

[9] And, Objector Frank further undercuts her argument. *See* Frank Obj. at 6 n.5 ("The parties in their final approval memorandum (Dkt. No. 194-1) have now revealed that they wish the recipients [and] thus remedied one clear objectionable element to the settlement: the lack of notice of and opportunity to object to the identity of the cy pres beneficiaries.").

Kellogg Co., 697 F.3d 858 (9th Cir. 2012)). *See also In re Baby Prods. Antitrust Litig.*, 12-1165, 2013 WL 599662, at *12 (3d Cir. Feb. 19, 2013) ("Young contends that the settlement notice was inadequate because it did not identify the *cy pres* recipients who will receive excess settlement funds…failure to identify the *cy pres* recipients is not a due process violation."). Courts regularly approve *cy pres* recipients after final approval and after all claims have been paid. *See, e.g., In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21 (1st Cir. 2012) (affirming approval of settlement agreement providing for *cy pres* distributions of unclaimed funds, where $11.4 million remained unclaimed); *Stefaniak v. HSBC Bank USA, N.A.*, 05-CV-720S, 2011 WL 7051093, at *1 (W.D.N.Y. Dec. 15, 2011) (approving *cy pres* distributions after payment of claims); *In re Visa Check/MasterMoney Antitrust Litig.*, 96-CV-5238 JG, 2011 WL 5029841, at *1 (E.D.N.Y. Oct. 24, 2011). Accordingly, this argument does not prevent final approval here.

2. The arguments against the *cy pres* provision fail.

a. A potential *cy pres* distribution of excess funds is proper in this nationwide consumer case.

This Court has "broad discretionary powers" regarding "equitable decrees involving the distribution of any unclaimed class action fund." *Van Gemert v. Boeing Co.*, 739 F.2d 730, 737 (2d Cir. 1984). Here, a distribution of remaining funds by *cy pres* after payment of claims to Settlement Class Members for Claimed Purchases and Recorded Purchases is a legitimate exercise of the Court's discretion.

(1) The Settlement class includes unknown individuals and unclaimed funds will likely remain after payment for all Claimed Purchases and Recorded Purchases.

Several Objectors challenge the fact that the Settlement has a *cy pres* provision to distribute remaining funds after class members have been paid.[10] However, these attacks on the Settlement

[10] *See* Frank Obj. at 1; Johnson Obj. at 4; Stevens Obj. at 1.

are long on rhetoric but short on law and have been rejected directly. *See, e.g., In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 352 (E.D.N.Y. 2010) (finding "not persuasive" an objector's argument "that 'the settlement takes $2.5 million owed to the class and gives it instead to a third party as cy pres,' but that '[u]nclaimed funds should be paid to class members, not third parties'").

First, the *cy pres* provision complies with Second Circuit law. Here, "[i]n exercising its discretion, the District Court should bear in mind that the purpose of Cy Pres distribution is to 'put[ ] the unclaimed fund to its next best compensation use, e.g., for the aggregate, indirect, prospective benefit of the class.'" *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) (quoting 2 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 10:17 (4th ed. 2002)) (emphasis in original). The Second Circuit recognizes that "'[c]ourts have utilized Cy Pres distributions'" in situations like that presently before this Court, *i.e.*, "'where class members are difficult to identify, or where they change constantly, or where there are unclaimed funds.'" *Id*. (quoting NEWBERG § 10:16 n.1).[11] Though not referenced in a single of the Objectors' attacks on the Settlement, the situation here has several similarities with that recently reviewed by the Court in *In re Vitamin C*. In granting final approval to a settlement containing a

[11] *See also Dennis v. Kellogg*, 697 F.3d 858, 861 (9th Cir. 2012) (setting aside class settlement because the "*cy pres* portions of the settlement [were] not sufficiently related to the plaintiff class or to the class's underlying false advertising claims," not because the Ninth Circuit did not believe that the *cy pres* was itself unreasonable); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011) (confirming unambiguously, in an appeal involving Objector Frank, that "[t]he *cy pres* doctrine allows a court to distribute unclaimed or non-distributable portions of a class action settlement"); *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 473 (5th Cir. 2011) ("When modern, large-scale class actions are resolved via settlement, money often remains in the settlement fund even after initial distributions to class members have been made because some class members cannot be located or decline to file a claim. Federal district courts often dispose of these unclaimed funds by making what are known as *cy pres* distributions.").

cy pres provision, over objections, the Court explained the difficulties in locating indirect purchasers of products:

> The Indirect Purchaser Damages Settlement Class consists of every person in 21 states that indirectly purchased a vitamin C product for use or consumption at some point over a five year period. It is unclear how these purchasers could be identified in any principled or consistent way since the vast majority of them likely did not retain receipts or other proof of their purchases. Counsel estimates there are millions of such purchasers, and given the nature of the products at issue and their distribution, the Court has no reason to doubt this estimate. In light of these factors, the Court agrees with counsel that a direct cash distribution to class members is not feasible or practical and the Court rejects the objections to the extent they claim that a direct cash distribution to members of the Indirect Purchaser Damages Settlement Class is or may be practical.

In re Vitamin C, 2012 WL 5289514, at *7.[12] A similar situation is present here and arguably magnified. Like with the Indirect Purchaser Damages Settlement Class in *Vitamin C*, the Settlement Class Members purchased the Combination Aspirins from grocery stores or pharmacies throughout the United States over a five- (Bayer Heart Advantage) or twelve- (Bayer Women's) year period. Preliminary Approval Order, ¶ 2(a)-(b). Given these circumstances, confirming the absolute membership of the Classes would be impossible and a direct cash distribution to all members is not feasible.

Furthermore, in declaring that "[*c*]*y pres* distributions are unwarranted when class members are less than fully compensated and it is administratively feasible to make further distributions to them," Frank Obj. at 6, Objector Frank relies on readily distinguishable cases.[13] First, Frank relies on *Masters v. Wilhelmina Model Agency*. Frank Obj. at 6-7. While *Masters* describes the standards governing *cy pres* in the Second Circuit, the case indicates that most of the class was

[12] *See also Dennis*, 697 F.3d at 863 ("Because Kellogg sells its products to wholesalers, not directly to consumers, there was no way to identify each member of the class.").

[13] In any event, Frank's objection is moot given the revised proposed plan of distribution.

reached directly as notice was mailed to potential class members and only a single summary notice of the proposed settlement was published in *USA Today*. *Masters*, 473 F.3d at 429. By contrast, only about 8-10% of class members were reached by mail here, thus requiring extensive efforts to reach class members through non-mail means. *See generally* Burke Decl. (Dkt. # 176-3). The Second Circuit also clarified that "neither side contends that a Cy Pres distribution is appropriate because it would be onerous or impossible to locate class members or because each class member's recovery would be so small as to make an individual distribution economically impracticable." *Masters*, 473 F.3d at 436.[14] And, while Objector Frank asserts that "the use of *cy pres* in *Masters* was benign in comparison to this settlement," where "the Second Circuit nonetheless determined that the lower court should have considered allocating up to treble damages," he neglects to provide the Court with the rest of the story. On remand the district court declined to award treble damages and still awarded money via *cy pres*, which the Second Circuit affirmed. *See Fears v. Wilhelmina Model Agency, Inc.*, 315 Fed. Appx. 333, 335-36 (2d Cir. 2009) (reversing award of attorney's fees and noting "because excess funds may remain after the district court reconsiders the fee award on remand" it advised "that the district court did not err in

[14] Frank's reliance on *Park v. Thompson Corp.* and *McClintic v. Lithia Motors*, is similarly misplaced given that the defendants had direct relations with all class members who were identifiable. *See Park v. The Thompson Corp.*, 05 Civ. 2931, 2008 WL 4684232, at *5 (S.D.N.Y. Oct. 22, 2008) ("Class Counsel's Amended Settlement addressed the primary defect in the allocation plan: that a *cy pres* distribution would have been 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.*") (emphasis added). Likewise, in *McClintic*, involved unauthorized text message marketing, that court declined preliminary approval as "it saw no reason to require class members to submit a claim form, because Lithia's records seemed to already identify the class members who received each of its text messages as well as who had attempted to stop Lithia from sending a second message," where "[a] claim form is superfluous where Lithia already knows who has valid claims." *McClintic v. Lithia Motors, Inc.*, C11-859RAJ, 2012 WL 112211, at *4 (W.D. Wash. Jan. 12, 2012).

awarding the residual funds to charities rather than to the plaintiffs as treble damages or pursuant to the plaintiffs' other alternatives").

This case is also different from *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468 (5th Cir. 2011), which involved funds that were unused by one of three subclasses but "not unclaimed by the class as a whole" where the settlement did not include a *cy pres* provision. *Id*. at 479. There, the Fifth Circuit reversed and ordered *cy pres* distribution where the "decision to distribute the unused funds via *cy pres* finds no support in the text of the settlement documents." *Id.* at 476-77, 480. Thus, the court enforced the bargained-for settlement: "[w]here the terms of a settlement agreement are sufficiently clear, or, more accurately, insufficient to overcome the presumption that the settlement provides for further distribution to class members, there is no occasion for charitable gifts, and *cy pres* must remain offstage." *Id.* at 479. The Fifth Circuit also cautioned against extra-contextual application of the case: "[t]his is not a case where the settlement agreement itself provides that residual funds shall be distributed via *cy pres*." *Id.* at 476.[15]

Finally, Plaintiffs note that the Objectors' arguments against the Settlement's *cy pres* provision, if approved by the Court, would result in the elevation of the rights of class members submitting claims (particularly class members without any proof of purchase) over the rights of class members who do not submit claims.[16] However, courts look to the *class as a whole*, not just

[15] Another court found that *Klier* poses no bar to *cy pres* distributions where the objectors' positions if accepted would result in ignoring the bargained-for settlement agreement. *See In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330 (S.D. Fla. 2011). As that court explained: "[T]he Settlement Agreement explicitly and appropriately provides for cy pres distributions in light of the infeasibility of determining recipients. Objectors ask this Court to do precisely what the Fifth Circuit found to be error in *Klier* – ignore the Settlement Agreement and re-allocate the cy pres funds. This the Court will not do." *Id.* at 1357.

[16] Frank offers suggestions to increase the amount of money paid to individual class members. Frank Obj. at 11-13. However, the fact that Frank wants a different settlement is of no consequence: his suggestions simply reflect dissatisfaction with the amount of money an individual will recover under the settlement and is not sufficient to overcome a finding of fairness

those class members making claims in making the determination of whether a *cy pres* distribution is appropriate, a point confirmed by cases cited by the Objectors. *See, e.g.*, *Masters*, 473 F.3d at 436 (noting that *cy pres* puts "unclaimed fund to its next best compensation use, *e.g.*, for the *aggregate*, indirect, prospective benefit of the class") (second emphasis added, internal quotation omitted); *Dennis*, 697 F.3d at 865 ("Used in lieu of direct distribution of damages to *silent class members*, this alternative allows for 'aggregate calculation of damages, the use of summary claim procedures, and distribution of unclaimed funds to *indirectly benefit the entire class*.'") (emphasis added); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990) ("Most class actions result in some unclaimed funds. Having properly found that certification of the class action was appropriate, the district court was required to formulate a procedure for distributing unclaimed funds. The court's alternatives included: 1) cy pres or fluid distribution, 2) escheat to the government, and 3) reversion to defendants…The district court's choice among distribution options should be guided by the objectives of the underlying statute and *the interests of the silent class members*.") (emphasis added); *Powell v. Georgia Pac. Corp.*, 119 F.3d 703, 706 (8th Cir. 1997) (affirming district court's decision to distribute unclaimed funds via *cy pres*, noting that "neither party has a legal right to the unclaimed funds"). Even the Fifth Circuit's decision in *Klier*, relied upon by Frank, counsels against distributing unclaimed funds to only class members submitting claims as it rejected a *pro rata* re-distribution of the unclaimed funds to the 12,657 members of one subclass with undistributed money allocated to it as "not economically viable." *Klier*, 658 F.3d at 476. Because the *cy pres* provision here is an appropriate method to distribute

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by the Court. *See, e.g.*, *Velez v. Novartis Pharms. Corp.*, 04 Civ. 09194(CM), 2010 WL 4877852, at *14 (S.D.N.Y. Nov. 30, 2010) (noting courts in the Second Circuit "often approve class settlements even where the benefits represent only a fraction of the potential recovery" and collecting Second Circuit district and appellate court decisions approving settlements ranging from 1.6% to 12% of claimed damages). Further, his suggestions do not eliminate a need to distribute unclaimed money.

unclaimed funds after payments for all Claimed and Recorded Purchases, the objections to the use of *cy pres* to distribute money, "because some class members either cannot be located or decline to file a claim," or failed to cash a settlement check, should be overruled. *Id.* at 473.

(2) The proposed *cy pres* recipients satisfy the legal standards.

Next, a number of the Objectors argue against the specific *cy pres* designees proposed to the Court, the AARP Foundation and the American Heart Association ("AHA"). Frank Obj. at 11; Cermak Obj. at 1-2; Padgett Obj. at 3; Johnson Obj. at 5; Strohlein Obj. at 1-3.[17] The crux of these objections is that these organizations do not meet the standards for selecting a *cy pres* recipient, particularly as set forth by the Ninth Circuit in *Dennis v. Kellogg*. *See generally id.*[18] These arguments are mere disagreement and, given the serial nature of the Objectors here, it is highly likely that the Objectors would drum up an objection as to *any* recipient identified.

In any event, the *cy pres* recipients selected, the AARP Foundation and the AHA, fit within the parameters of the Second Circuit's direction for selecting such recipients. As explained in Plaintiffs' opening motion for final approval, each organization's work corresponds with the case's prevailing themes and underlying objectives. Plaintiffs have maintained that Bayer overcharged consumers, because these products were not FDA-approved, could not provide all advertised health benefits, and were inappropriate for long-term use. Each organization's work corresponds with these prevailing themes.

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[17] Certain Objectors assert or imply that any *cy pres* award to the AHA is illusory relief. Frank Obj. at 1, 10-11; Cermak Suppl. to Obj. (Dkt. # 203). Bayer is directly providing this Court with the facts regarding its prior donations to the AHA in declarations being filed contemporaneously with this Response. *See* Declaration of Lauren Trocano; Declaration of Sarah Toulouse; and Declaration of Reese Fitzpatrick.

[18] Objector Cermak, suggests that "[t]he settlement agreement…gives the defendant a veto choice of a proposed recipient," believing that "[t]his allows the defendant to prevent the cy pres distribution from going to a recipient that most satisfies the legal standard for such distributions." Cermak Obj. at 1. As the *cy pres* recipients satisfy the legal standard, this argument is irrelevant.

As Plaintiffs noted, the AARP Foundation would utilize any *cy pres* award to fund education about how to prevent and manage osteoporosis, high cholesterol, and/or heart disease. While some Objectors do not see the connection between the case and this potential designee, Plaintiffs maintain that class members purchased Bayer Women's for its advertised ability to fight osteoporosis and Bayer Heart Advantage for its advertised ability to lower cholesterol. Funding educational efforts by the AARP Foundation on issues such as how to fight osteoporosis and how to lower cholesterol is undoubtedly a next best compensation use for the benefit of all class members. *Masters*, 473 F.3d at 436.

Further, the AHA is also an appropriate selection for the benefit of all class members. That at least some class members took the products at issue in order to further their cardiovascular health cannot be disputed. Given the allegations in the complaint about the safe use of aspirin and alleged confusion, a donation to one of the world's leading charities promoting cardiovascular health cannot be chided as unfair. *See* Master Compl., ¶ 4. *In re Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Practices Litig.*, 701 F. Supp. 2d 356, 362, 365 (E.D.N.Y. 2010) ("Plaintiffs assert that Bayer's labeling was confusing because it commingled statements about the virtues of low-dose aspirin with those about the health benefits of calcium and phytosterols…. Each of the five named plaintiffs bought either Bayer Calcium or Heart Advantage after becoming concerned about their own health and seeing the combination product's promises – decreased risk of osteoporosis or lowered cholesterol."). Indeed, even with respect to aspirin, the AHA's website reveals numerous educational efforts regarding the safe use of an aspirin regimen[19] and a search for "aspirin" reflects 12,800 hits.

[19] *See*, *e.g.*, Aspirin and Heart Disease, *available at* http://www.heart.org/HEARTORG/Conditions/HeartAttack/PreventionTreatmentofHeartAttack/Aspirin-and-Heart-Disease_UCM_321714_Article.jsp (last visited February 14, 2013).

While the Objectors rely heavily on the Ninth Circuit's decision in *Dennis v. Kellogg*, 697 F.3d 858 (9th Cir. 2012), Lexis and Westlaw searches confirm that neither the Second Circuit nor courts within the Second Circuit have adopted *Dennis* as the law in this Circuit.[20] This is not a situation where *cy pres* is straying "far from the 'next best use' for the undistributed funds and turn[s this Court] into a grant giving institution doling out funds to hospitals, legal services organizations, law schools and other charities," unconnected to the issues of the lawsuit. *SEC v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 414 (S.D.N.Y. 2009) (collecting cases such as an antitrust settlement giving money to Hurricane Katrina relief, price-fixing settlement regarding stock car merchandise to various unrelated organizations, antitrust settlement giving money to law schools, and more). The Objectors' attack on the proposed *cy pres* recipients should be denied.

(3) The common settlement provision requiring that the *cy pres* recipient be a 501(c)(3) organization does not prevent final approval of the Settlement.

Citing no case law, Objector Cermak proclaims that the Settlement is objectionable in its requirement "that a proposed recipient be a 'charitable' non-profit qualified under Section 501(c)(3) of the Internal Revenue Code." Cermak Obj. at 1. The case law is replete with examples that such a requirement serves as no bar to final approval of the settlement. *See, e.g.*, *Bennett v. Roark Capital Grp., Inc.*, 2:09-CV-00421-GZS, 2011 WL 1627939, at *2 (D. Me. Apr. 27, 2011) (granting final approval to settlement and naming "qualified 501(c)(3) non-profit charitable organization appropriate to serve as the cy pres beneficiary of any undistributed funds");

[20] In any event, the proposed *cy pres* recipients would satisfy the *Dennis* requirements as well. This case involves the marketing and sale of products that were represented to have certain benefits, but which allegedly were unable to provide those benefits. The "nexus" is present here as the proposed *cy pres* recipients address the objectives of this case as described above. Moreover, given the nationwide sales of the products through major retailers, the proposed recipients are national in scope, thus benefitting class members throughout the country as opposed to benefitting only those living in certain parts of the country.

Gates v. Rohm & Haas Co., CIV.A. 06-1743, 2011 WL 1103683, at *2 (E.D. Pa. Mar. 24, 2011) (granting final approval to settlement where "possible recipients for any remaining funds must be local Section 501(c)(3) charitable organizations" in accordance with the settlement's provisions"); *Velez*, 2010 WL 4877852, at *5 (granting final approval to settlement agreement which included term distributing *cy pres* award to seven 501(c)(3) organizations). Moreover, it was a negotiated term because the purpose is to benefit a charitable association, rather than a corporate interest that would profit from the Settlement.

(4) The purpose of the *cy pres* provision is to ensure no reversion to Defendant after payment to Settlement Class Members for Claimed and Recorded Purchases.

Objector Padgett's argument that "the *cy pres* fund is to assure a settlement fund large enough to guarantee substantial attorney's fees," Padgett Obj. at 3, is mere conspiracy theory. The Settlement includes the *cy pres* provision to ensure that no reversion to Defendant takes place once payments to Settlement Class Members have been made. 2 MCLAUGHLIN ON CLASS ACTIONS § 8:15 (9th ed. 2012) ("When unclaimed funds remain after individual distributions to identifiable class members, courts choose from among four second best[ ] methods of distributing the remainder: (a) pro rata distribution to the class; (b) reversion to the defendant; (c) escheat to the government; or (d) cy pres distribution. Cy pres distribution ordinarily emerges as the preferred method, as courts disfavor the defendant or the government receiving a windfall, an earmarked distribution to the government is cumbersome because it entails government involvement, and pro rata distribution, while often provided for in the stipulation of settlement, usually is impractical for the same reasons that made the initial distribution an incomplete success."). *See Masters*, 473 F.3d at 436 (noting that courts "have utilized Cy Pres distributions where class members are difficult to identify, or where they change constantly, or where there are unclaimed funds" and quoting the Draft of the Principles of the Law of Aggregate Litigation by the American Law Institute, which

proposes to limit "Cy Pres 'to circumstances in which direct distribution to individual class members is not economically feasible, or where funds remain after class members are given a full opportunity to make a claim."). Thus, this argument fails.

(5) Subjective approval of *cy pres* recipients is irrelevant.

Next, Objector Stevens argues that "[t]he Class has no imput [sic] into the selection of the 'non-profits' that will receive the funds and organizations that I find objectionable may receive funds." Stevens Obj. at 1. Objector Frank goes further and objects to the AARP Foundation on personal grounds asserting it "takes many political stands that I disagree with." Decl. of Theodore H. Frank Supp. Obj., ¶ 12 (Dkt. # 206-1).

However, the subjective views of individual class members are irrelevant to the Court's determination of whether the settlement is fair, reasonable, and adequate. Rather, the inquiry at final approval is whether a settlement is procedurally and substantively fair, not whether specific terms are subjectively approvable by one or more of the millions of individuals affected by a large class action. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) ("The District Court determines a settlement's fairness by examining the negotiating process leading up to the settlement as well as the settlement's substantive terms.").

Thus, subjective disapprovals such as those offered by Objectors Stevens and Frank are akin to the objection considered meritless by the court in *Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231 (E.D.N.Y. 2010). There, the court considered an objection to a settlement provision that provided extended Costco memberships as relief in an action which alleged illegality with Costco's membership renewal process. Specifically, the objector subjectively opposed the settlement "on the ground that she lives too far away from the nearest Costco to take advantage of the additional membership terms, and would therefore prefer a cash award." *Id.* at 247 n.14. The court overruled the objection, explaining that "[w]hile additional Costco

membership may be inconvenient for this one class member," "a settlement agreement 'does not have to be perfect, just reasonable, adequate and fair.'" *Id*. (quoting *Joel A. v. Giuliani*, 218 F.3d 132, 144 (2d Cir. 2000)). *Cf. Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) (recognizing the appropriate question at final approval is not whether the settlement "could be prettier, smarter or snazzier," but rather "whether it is fair, adequate, and free from collusion"). Moreover, Plaintiffs note neither objector cites any case law in support of their subjective disapprovals. This objection should be overruled.

3. The release is appropriate.

Objector Padgett claims, without more, that "the release being demanded as a condition of the settlement is extremely overbroad and encompasses claims that were neither pursued in the class complaint nor subject to true adversarial litigation prior to settlement." Padgett Obj. at 4. Padgett does not identify the claims about which she is concerned, nor cites the particular language in the Settlement Agreement causing concern. To the extent that she believes that personal injury claims are being released by the Settlement, she is wrong. Settlement Agreement, § VI.A ("Released Claims shall not include claims for personal injury.").

In any event, the release here is consistent with that permitted in the Second Circuit. The Settlement, if finally approved, releases "any and all claims that were or could have been asserted by the Class Releasors arising from or related to Bayer Heart Advantage and Bayer Women's," the only products at issue in this lawsuit, whether known or unknown. *Id*., § VI.A. These provisions are similar to that approved by the court in *Blessing v. Sirius XM Radio Inc.*, 09 CV 10035 HB, 2011 WL 3739024, at *3 n.5 (S.D.N.Y. Aug. 24, 2011), *aff'd*, 2012 WL 6684572 (2d Cir. Dec. 20, 2012) (affirming final approval of a settlement agreement which "release[d] Defendant from all claims by class members 'arising out of, based on or relating to the merger that formed Sirius XM'" and "include[d] claims that class members did not or could not know were available at the

time of the Settlement Agreement – the type of claim that some state laws preserve unless expressly waived (i.e. it cannot be released through a "general" release).").[21] Like in *Blessing*, the release here complies with Second Circuit law, as it is limited to those claims arising from or related to two specific products challenged in this lawsuit and class members retain all rights to assert personal injury claims under it.

Moreover, all Class members had the opportunity to opt out of the Settlement. Preliminary Approval Order, ¶ 8. Accordingly, any Class member, including Padgett, who believed that they had another claim related to these products, had the opportunity to opt-out of the Settlement Class and preserve any claims that they believed that they had. Thus, this objection should be overruled.

4. The low number of opt-outs and few objections (submitted by serial objectors) weigh in favor of final approval.

In their memorandum in support of final approval, Plaintiffs point to the second of nine *Grinnell* factors, "the reaction of the class to the settlement." *See* Final Approval Mem. at 15 (Dkt. # 194-1). There, Plaintiffs noted that "[f]ollowing a nation-wide notice campaign, which included the direct mailing of nearly 700,000 postcards to Class Members, only 32 Class Members have timely opted out of the Settlement and no objections have been lodged as of this filing." *Id.* While six objections have been lodged, Objector Frank alone argues that the Court should avoid inferring settlement approval from the low number of objections. Frank Obj. at 20, 20-24. Frank is trying to change the law without warrant.

Frank's statement contradicts that the Second Circuit and courts throughout this district weigh the number of objections in considering approval of a settlement. Here, only six objections

[21] "Broad class action settlements are common, since defendants and their cohorts would otherwise face nearly limitless liability from related lawsuits in jurisdictions throughout the country." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 106 (2d Cir. 2005). This statement rings true in this MDL action, which consolidated cases filed across the country.

have been received where approximately 700,000 notices were sent directly to class members' addresses. Courts routinely find that this *Grinnell* factor is satisfied in situations involving millions of class members, extensive notice campaigns, and a handful of opt-outs and/or objections. *See D'Amato*, 236 F.3d at 86-87 (finding 18 objections out of 27,883 notices weighed in favor of the settlement). This Court, in *In re Vitamin C*, explained that it "received three objections out of millions of potential class members," recognizing consistent with the law that "[t]his suggests that the reaction from the classes is positive on the whole." 2012 WL 5289514, at *5. Another court in the district collected cases with similar facts as here:

> Of the 11,800,514 class members, only 127 opted out and 24 objected. Such a small number of class members seeking exclusion or objecting indicates an overwhelmingly positive reaction of the class. *See, e.g., Wal-Mart Stores*, 396 F.3d at 118 (finding that the fact that only 18 out of 5 million class members objected was evidence that the class was "overwhelmingly in favor" of the settlement); *In re Telik, Inc., Sec. Litig.*, 576 F. Supp. 2d 570, 593 (S.D.N.Y. 2008) (finding "overwhelmingly positive reaction of the Class" where, out of 54,000 class members, three opted out of the settlement and one objected to it); *see also In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 511 (E.D.N.Y. 2003) ("[A] certain number of objections are to be expected in a class action with an extensive notice campaign and a potentially large number of class members. If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement." (citation omitted)). Given the relatively small number of class members who opted out or objected to the Settlement, the Court finds that the reaction of the class has been overwhelmingly positive, which strongly weighs in favor of Settlement approval. *See, e.g., Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002) ("It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." (citation omitted)).

Dupler, 705 F. Supp. 2d at 239-40. Thus, Frank is unsupported by the law of this Circuit and this district. Further, where he cites law, Frank relies on readily distinguishable cases:

- *Galloway v. Kansas City Landsmen, LLC*, 4:11-1020, 2012 WL 4862833, at *5-6 (W.D. Mo. Oct. 12, 2012), involved a required opt-out form "to both Plaintiffs'

counsel and Defense counsel, and the form must be both emailed *and* either mailed first-class or hand-delivered," where "[t]he settlement does not contain any provision that allows Defendants to withdraw from the settlement if a certain number of class members decide to opt out." Without citation to case law, the court noted this provision "seems unnecessarily onerous." *Id.* at *6. By contrast, the opt-out procedure here involved mailing to a single post-office box and the Settlement here *does* contain a provision allowing Bayer to withdraw from the settlement if "the number of Class Member opt outs undermines the purpose of the settlement to Bayer," though it was not triggered here. Settlement Agreement, § IX.A.

- *Smith v. Levine Leichtman Capital Partners, Inc.*, C 10-00010, 2012 U.S. Dist. LEXIS 163672, at *8-9 (N.D. Cal. Nov. 15, 2012), declined to grant final approval given numerous defects not present here. The *Smith* court wrote, also without citation to case law, that "[t]here is no reason to require the submission of a telephone number, to require proof of class membership in light of Defendants' records of class membership, or to require the objectors to mail their objections to three different locations" in a case where "Defendants have accurate mailing addresses for 75 to 80 percent of the proposed class members." *Id.* at *8-9. But, Bayer maintained no records of class membership, an important distinguishing characteristic.

- *In re Motor Fuel Temperature Sales Practices Litig.*, 07-md-1840 (Order Dkt. No. 3019) (D. Kan. Nov. 10, 2011), notes that "[i]f Costco plans to proceed with e-mail notification, it must allow class members to opt out of the class and object to the settlement electronically." Here, this case did not involve electronic notification of the settlement by e-mail.

- *McClintic v. Lithia Motors, Inc.*, 2012 WL 112211, at *6, distinguished on other grounds above is problematic as the court, without citation to law, noted "[i]t would be simple, for example, to add the option to opt out to the same postage-prepaid card." However, other courts have held that "due process [does] not require the court to include an opt out postcard or tear-off form in the notice to the Class" and "[i]n fact, some courts have held that including an opt-out postcard along with class notice would only cause confusion." *Patrowicz v. Transamerica HomeFirst, Inc.*, 359 F. Supp. 2d 140, 152 (D. Conn. 2005) (collecting authority).

None of these cases reflect the situation before this Court.[22]

[22] Moreover, in *Cobell v. Salazar*, Frank appealed the district court's approval of a class action settlement agreement involving over three billion dollars. 679 F.3d 909 (D.C. Cir.), *cert. denied*, 133 S. Ct. 543, 184 L. Ed. 2d 370 (2012). That court considered the district court's approval where the court pointed "to the small number of objectors" as "one of many observations" in approving the settlement. *Id.* at 923. The panel found that this was "not a dispositive finding in its fairness analysis amounting to legal error" since "[n]othing in the district court's observation was inconsistent with the caution that should be exercised in inferring support from a small number of

Finally, the fact that no objections were submitted by ordinary class members further indicates a favorable reaction. For the few objections lodged, the objections were submitted only by serial objectors. *In re UnitedHealth Grp., Inc. PSLRA Litig.*, 643 F. Supp. 2d 1107, 1108-09 (D. Minn. 2009) (responding to and rejecting objectors' requests for fees, noting "[t]he remoras are loose again"). Accordingly, this argument does not counsel against final approval.

5. Proof of purchase requirements, with caps on awards for those lacking flexible evidence of purchase, are permissible.

A couple of the Objectors disagree with the Settlement's provision that individuals without any receipts, but who file an attestation that they purchased the products, will receive up to $10 each ($4.00 for Bayer Women's and/or $6.00 for Bayer Heart Advantage). Objector Padgett believes that the Settlement is not fair, reasonable, or adequate because "[u]nder the claims process, each claimant is required to submit a detailed claim, under the penalties of perjury." Padgett Obj. at 1-2.[23]/[24] Padgett adds: "If a claimant does not have a receipt, the amount he or she receives is subject to a ceiling…It should be noted that no one keeps receipts, nor should they be expected to keep receipts for inexpensive over the counter medications." *Id.* at 2. Objector Frank also appears to take issue with the cap on claims, but because it means that more money will go unclaimed and therefore be distributed to *cy pres*. *See* Frank Obj. at 9.

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objectors to a sophisticated settlement." *Id.* at 923. As a result, the D.C. Circuit rejected this "challenge." *Id.*

[23] The "detail" referenced by Objector Padgett reflects additional bluster. The claim form requires basic information about the purchase and purchaser, *e.g.*, what product was purchased (in order to determine which class the claimant falls into as well as the amount of the award), the date of the purchase (to help identify whether claimant falls within the settlement period), as well as personal contact information (so that the award can be made and so that the claims administrator can follow up with the class member as needed).

[24] In any event, the revised proposed plan of distribution further demonstrates the error in this argument because individuals who might not otherwise have kept receipts will receive settlement compensation as a result of records fought for by Plaintiffs in obtaining retailer purchase data.

However, the Settlement itself provides flexibility for what constitutes proof of purchase, and is not limited to receipts as Padgett contends. Rather, "[v]alid proof of purchase may include, but is not limited to product bottles, product packaging, records from a retailer that identify the claimant and the purchases, or other records that show the Authorized Claimant purchased the Class Product(s)." Settlement Agreement, § III.E.2.c. Furthermore, in cases like this case, where the Defendant does not maintain class member purchase records, it is wholly appropriate to have "some mechanism for class members to demonstrate on an individual basis that they satisfy the criteria for participating in the class settlement benefits." 3 NEWBERG ON CLASS ACTIONS § 9:72 (4th ed. 2002). Default awards are permissible and are no basis for overturning a settlement as unfair or unreasonable. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.66 (2004) ("A default award may be appropriate for those who can establish membership in the class but cannot, or prefer not to, submit detailed claims. Typically, such an award would be at the low end of the range of expected claims."); *Wilson v. Airborne, Inc.*, EDCV 07-770 VAP(OPX), 2008 WL 3854963, at *9 (C.D. Cal. Aug. 13, 2008) ("The Court also overrules the objections filed by Objector Walsh, who argues that the settlement is inadequate in limiting recovery for class members without proofs of purchase to the price of six boxes of Airborne. This is essentially a dispute with the form of compromise Plaintiff and his counsel chose to accept by settling, and not a basis for deeming the settlement agreement's terms unfair or inadequate.") (internal citation omitted). The objections related to the Court approved claim form, and the amount of default awards, are insufficient grounds to overturn the Settlement.

B. Plaintiffs' Motion for Attorneys' Fees and Expenses Should be Granted

1. Plaintiffs submitted a reasonable request for attorneys' fees.

The Court retains the discretion to utilize either the percentage-of-the-fund approach or the lodestar approach, governed by the *Goldberger* factors. *Masters*, 473 F.3d at 436. In their Motion

for Attorneys' Fees and Expenses, and Service Awards, Plaintiffs requested that the Court enter an order compensating attorneys' fees in the amount of $4,500,000, which represents 30% of the Settlement Amount and just 53% of Plaintiffs' Counsels' actual lodestar.[25] Dkt. # 201 at 2. With varying degrees of lucidity, some of the Objectors take issue with Plaintiffs' requested award.[26] However, the requested attorney fee is reasonable and the Court does not need to wait until the claims period has ended[27] to award the reasonable fee to reimburse Plaintiffs' counsel for the more than 20,000 hours they have devoted to the case, particularly where payments for Claimed Purchases and Recorded Purchases will result in the near depletion of the Settlement Fund under the revised proposed plan of distribution.

Since the late 1800s, the Supreme Court "has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund *as a whole*." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (emphasis added, citations omitted). Consistently, in *Masters*, the Second Circuit found the district court erred in awarding fees based on the claims filed to the date of the district court's opinion "rather than on the entire Fund created by the efforts of counsel." *Masters*, 473 F.3d at 426, 431. The Second Circuit reasoned as follows:

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[25] Plaintiffs also requested reimbursement of litigation expenses of $600,000, and $2,500.00 service awards to each Named Plaintiff. Dkt. # 201 at 2. None of the Objectors challenge either request. *See In re Vitamin C*, 2012 WL 5289514, at *11 (recognizing "[c]ourts in the Second Circuit normally grant expense requests in common fund cases as a matter of course" and "[c]ourts often grant incentive awards to representative plaintiffs.") (quotation omitted).

[26] *See, e.g.*, Johnson Obj. at 6-7; Frank Obj. at 13-14; Padgett Obj. at 3; Stevens Obj. at 1-2.

[27] Objector Frank objects to any "administrative schedule" where the number of claims is finalized after the fee request is made, requesting "that the Court abstain from ruling on fees until it can make findings on how much the class has actually received" in ignorance of Bayer's $15,000,000 total liability. Frank Obj. at 15. However, no delay is needed where any number of the serial objectors here will appeal, further delaying class payment and attorney payment. Moreover, the revised proposed plan of distribution ensures that the class will receive direct distributions from the Net Settlement Fund.

> In computing the fees on the basis of claims made against the Fund rather than on the basis of the entire Fund, the District Court recognized a split of authority on the subject. In siding with courts that compute fees as a percentage of claims made, the District Court saw the alternative procedure as creating a "windfall" for the attorneys. We disagree. The entire Fund, and not some portion thereof, is created through the efforts of counsel at the instigation of the entire class. An allocation of fees by percentage should therefore be awarded on the basis of the total funds made available, whether claimed or not. We side with the circuits that take this approach.
>
> Our own cases refer to "percentage *of the fund*," and "percentage *of the recovery*." We take these references to be to the whole of the Fund.

Masters, 473 F.3d. at 437 (emphases in original, internal citations omitted).

Faced with the clear direction from the Second Circuit, Objector Frank concedes that "*Masters* permits this Court to base any percentage fee award on the entire fund available, not just the amounts claimed." Frank Obj. at 15 (citing *Masters*, 473 F.3d at 437). Yet, his concession does not stop him from urging "consideration of the amounts claimed when needed to avoid 'windfall' awards" where "the court *may always adjust the percentage awarded* to come up with a fee it deems reasonable in light of the *Goldberger* factors." *Id.* (emphasis in original).

Importantly, no windfall award will take place here as Frank concedes that "'[c]ourts…utilize the lodestar to confirm that the percentage amount does not award counsel an *exorbitant* hourly rate.'" Frank Obj. at 16 (quoting *In re Bristol-Myers Squibb Secs. Litig.*, 361 F. Supp. 2d 229, 233 (S.D.N.Y. 2005)) (emphasis added). The requested fee ($4,500,000) divided by the total number of hours invested as of the date of the Fee Petition (20,734) reflects an average billing rate of $217 per hour, well below even the lower range of rates paid for associates in complex cases in this district. *See, e.g., Ebbert v. Nassau Cnty.*, CV 05-5445 (AKT), 2011 WL 6826121, at *16 (E.D.N.Y. Dec. 22, 2011) (noting rates of $270 to $500 per hour for associates). Moreover, it decreases with every minute of work Class Counsel willingly performs in

administering the settlement on behalf of the classes. Under Frank's preferred approach, the amount claimed (he assumes $420,000) divided by the total number of hours invested (20,734) would reflect an unheard of billing rate of $20.25 per hour. Even Mr. Frank does not bill at that low a fee. *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d at 815 ("Mr. Frank's billing rate is $600 per hour.").

Compounding the problems with the Objectors' opposition, they make no attempt to apply the facts of this case to the *Goldberger* factors.[28] This is a telling omission given that these factors are satisfied here. *See* Mem. Supp. Mot. Attorneys' Fees at 7-13 (Dkt. # 201-1) (detailing how the facts of the case satisfy the *Goldberger* factors). The closest any objector gets to pointing to any *Goldberger* factor is reflected in Objector Frank's citation to *Parker v. Time Warner Entm't Co. L.P.*, 631 F. Supp. 2d 242 (E.D.N.Y. 2009). He quotes *Parker* in arguing "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 is ostensibly contested.'" Frank Obj. at 16 (quoting *Parker v. Time Warner Entm't Co. L.P.*, 631 F. Supp. 2d 242 (E.D.N.Y. 2009)).

But unlike this case, where Bayer's liability is known and set at $15,000,000, *Parker* involved a situation where the "defendant's liability [was] wholly dependent upon the number of claims, the cost of administering the settlement and such fees and expenses as are assessed by the Court." *Id.* at 266.[29] In adjusting the fees ultimately awarded, the reductions applied by that court

[28] Without authority, Objector Padgett even suggests that the Court should consider a multi-factor test in determining a reasonable fee. Padgett Obj. at 3. Padgett's test appears to be that used in determining the value of counsel's services in quantum meruit, not class actions involving a common fund. *See General Star Indem. Co. v. Custom Editions Upholstery Corp.*, 940 F. Supp. 645, 652 (S.D.N.Y. 1996). Of course, this Court must apply a multi-factor reasonableness test embodied in *Goldberger*. Padgett does not apply his test, which would confirm the reasonableness of the fee in any event given its elemental overlap with *Goldberger*.

[29] In a case involving a reversionary interest, another court in the district rejected the argument that the court should base its decision off of the claims made. *In re Nigeria Charter Flights Litig.*,

for its 'public policy' concerns still reflected an award of 62% of the reported lodestar,[30] whereas Plaintiffs' fee request here is lower at 53% of actual lodestar.[31] Frank further omits that because the court considered the extent of the defendant's liability in calculating the value of the settlement, it explicitly included the value of that case's *cy pres* award as well as the amount of money paid to counsel in calculating the value of the settlement. *Id.* at 277. And after doing so, the court awarded over 30% of that amount. *Id.*

Finally, Objector Frank relies on the Third Circuit's recent decision in *In re Baby Prods. Antitrust Litig.*, 12-1165, 2013 WL 599662 (3d Cir. Feb. 19, 2013), a decision that is not binding on this Court. However, the Amendment provides for direct payments for all Claimed and Recorded Purchases effectively relegating *cy pres* payments to far less than the amounts class members will receive. The concerns in *Baby Products* are not present here as "the amount of the fund that would be distributed to *cy pres* beneficiaries rather than being distributed directly to the class" is expected to be lower. *Id.* at *2. Thus, there is no reason "to determine whether to decrease attorneys' fees where a portion of the fund will be distributed by *cy pres*." *Id*. at *10. As

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MD 2004-1613 RJD MDG, 2011 WL 7945548, at *5 (E.D.N.Y. Aug. 25, 2011) ("Okeke argues that due to the reversionary aspect of the fund, the proper analysis is to compare the fees sought to the actual claims made by the class members rather than to the entire common fund. However, Okeke ignores controlling Second Circuit law on the issue.") (*report and recommendation adopted*, 2012 WL 1886352, at *1 (E.D.N.Y. May 23, 2012)).

[30] Specifically, the plaintiffs' attorneys reported a lodestar of $5,289,781.25. *Parker*, 631 F. Supp. 2d at 270. The Court awarded an adjusted lodestar of $3,301,572.97. *Id.* at 277.

[31] Over Frank's objection, the Second Circuit reiterated its holding in *Masters*. *Blessing v. Sirius XM Radio Inc.*, 11-3696-CV, 2012 WL 6684572, at *1 (2d Cir. Dec. 20, 2012). The Second Circuit affirmed a $13 million fee negotiated only after settlement terms were decided (specifically, a price freeze but no direct cash payments to class members) and where the district court "independently inspected applicable time and expense records before judging the reasonableness of the requested fee, which – after accounting for expenses – represented less than sixty percent of the lodestar calculation." *Id.* at *2.

such, there can be no insinuation that class counsel would be overcompensated at the expense of the class. *Id.*[32]

The fee here, $4,500,000, reflecting 30% of the fund and just 53% of counsel's reported lodestar, is reasonable. The Objectors, particularly Frank, pay no attention to the public policy of fairly compensating counsel. *See Lonardo*, 706 F. Supp. 2d at 790 ("Mr. Frank's perspective…ignores one very important aspect of the Court's supervisory role with respect to class action settlements – that counsel is fairly compensated for amount of work done as well as for results achieved.") (quotation omitted). Plaintiffs ask that the Court award the requested fee.

2. It is proper for litigants to negotiate attorneys' fee awards.

Objectors Padgett, Frank and Johnson contend the settlement includes a "clear sailing provision." Padgett Obj. at 2; Frank Obj. at 14; Johnson Obj. at 6. However, the challenged settlement provision was fairly and properly negotiated at arm's length. Bayer's agreement that it "will not object" to Plaintiffs' fee and expense request occurred only after extensive settlement negotiations (including a failed mediation attempt). And, it occurred only after class relief was negotiated and the size of the common fund was determined. Further, the attacked provision recognizes that an award of attorneys' fees, if any, remains in the Court's sole discretion.

[32] *Baby Products* also rejected the idea that courts should be required "to discount attorneys' fees when a portion of the award will be distributed *cy pres*," as "[t]here are a variety of reasons that settlement funds may remain even after an exhaustive claims process" and "[c]lass counsel should not be penalized for these or other legitimate reasons unrelated to the quality of representation they provided." *Id*. at *10. Moreover, the Third Circuit noted that "[w]here a district court has reason to believe that counsel has not met its responsibility to seek an award that adequately prioritizes direct benefit to the class, we therefore think it appropriate for the Court to decrease the fee award here," a matter it left to be determined case by case according to the district court's discretion. *Id.* Not knowing the full circumstances before it, the Third Circuit left "the determination of the appropriate fee award to the District Court, which is more familiar with the performance and skill of counsel, the nature and history of the litigation, and the merits of the lawsuits." *Id.* at *11. No such reason for reducing the fee exists here.

Rule 23(h) provides that class action courts may award reasonable attorneys' fees "that are authorized by law *or by the parties' agreement*." Fed. R. Civ. P. 23(h) (emphasis added). As the Supreme Court directed in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), "[a] request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." *Id.* at 437. NEWBERG ON CLASS ACTIONS explains further:

> Sometimes, the defendants will agree that they will not object to a fee award of up to a certain amount with the understanding that petitioning counsel find this ceiling acceptable and will not petition for a higher sum. This technique will still limit the defendants' obligation to pay fees and avoids any appearance of conflict on the part of class counsel negotiating the settlement. Yet it preserves an important aspect of a satisfactory settlement for the class.

4 NEWBERG ON CLASS ACTIONS § 12:3 (4th ed. 2002). Moreover, the fact that this case involves a common fund as opposed to a separately negotiated fee agreement along with a clear sailing agreement, further calls for final approval. *See also Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 961 (9th Cir. 2009) ("Objectors suggest that the 'clear sailing' provision by which West and Kaplan agreed not to contest attorney's fees or incentive awards of no more than $25,000 evinces collusion. However, both payments were to be made from the settlement fund, capped at $49 million. This scenario does not signal the possibility of collusion because, by agreeing to a sum certain, West and Kaplan were acting consistently with their own interests in minimizing liability."); *Staton v. Boeing Co.*, 327 F.3d 938, 972 (9th Cir. 2003) ("[T]he parties may negotiate and agree to the value of a common fund (which will ordinarily include an amount representing an estimated hypothetical award of statutory fees) and provide that, subsequently, class counsel will apply to the court for an award from the fund, using common fund fee principles. In those circumstances, the agreement as a whole does not stand or fall on the amount of fees. Instead, after the court determines the reasonable amount of attorneys' fees, all the remaining value of the fund belongs to the class rather than reverting to the defendant.").

In one of Objector Frank's cases, *In re Bluetooth Headset Prod. Liab. Litig.*, the Ninth Circuit noted a subtle sign of collusion could include where "the parties negotiate a 'clear sailing' arrangement providing for the payment of attorneys' fees *separate and apart from class funds*, which carries the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class." 654 F.3d 935, 947 (9th Cir. 2011) (emphasis added internal quotation omitted).[33] This is not the case here and no evidence of collusion has been suggested. If it were it would be baseless and wholly devoid of evidentiary support in violation of Fed. R. Civ. P. 11. This objection should be rejected.

3. The fees provision is not objectionable under Rule 23(h) because Lead Counsel commonly determine the allocation of Court-approved fees.

Objector Frank alone declares that Section III.F.2.d of the Settlement Agreement, which provides that any award of attorneys' fees and expenses by this Court "shall be paid to Counsel for allocation and distribution to Class Counsel at Lead Class Counsel's sole discretion and judgment," is prohibited by Fed. R. Civ. P. 23(h). Frank Obj. at 18. *But see* Fed. R. Civ. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees and nontaxable costs

[33] *Bluetooth* cited other "subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations" noting "when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded" or "when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund." *Bluetooth*, 654 F.3d at 947 (internal quotation omitted). Just as this case does not involve a clear sailing provision tied to a separate attorney fee payment, these other subtleties are not present. Plaintiffs' fee request is in line with what courts award in this Circuit and this is clearly not a settlement where no monetary distribution will take place. Likewise, any fees not awarded will not revert to Bayer. *See* Settlement Agreement, § II.II.

The article relied upon by Objector Padgett as her sole support, similarly focused on factually different situations: "A clear sailing agreement (or clause) is a compromise in which a class action defendant agrees not to contest the class lawyer's petition for attorneys' fees. This article argues that a clear sailing provision is used to facilitate collusive settlements in cases involving nonpecuniary relief or common funds in which a defendant retains a reversionary interest." *See* William Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 Tul. L. Rev. 813 (2003).

that are authorized by law or the parties' agreement."). However, Frank's proclamations do not warrant denial of Plaintiffs' motion for fees, let alone denial of final approval.

First, the settlement language contested by Frank refers to the discretion to award fees between Bayer and Plaintiffs. This provision prevents Bayer from interjecting itself into the allocation of fees and expenses among Plaintiffs' attorneys. *See generally* Settlement Agreement, § VII.B. Frank ignores this fact. Moreover, the language in no way prevents the Court from analyzing the allocation that may be agreed to among Lead Class Counsel and other Plaintiffs' counsel of record. Indeed, the Settlement explicitly confirms "that the award of attorneys' fees to Class Counsel is a matter in the MDL Court's sole discretion." *Id.*

In contesting the exercise of discretion by Plaintiffs' Lead Counsel in allocating a fee derived from a common fund, the Second Circuit decision in *Victor v. Argent Classic Convertible Arbitrage Fund L.P.*, 623 F.3d 82 (2d Cir. 2010), rejects this point. In *Victor* the Second Circuit recognized that "[u]nder the common fund doctrine, attorneys who create a fund for the benefit of a class of plaintiffs are entitled to reasonable compensation from that fund." *Id.* at 84. After the parties reached a $245 million class settlement the district court "awarded lead counsel $52.4 million in attorneys' fees, a substantial multiplier over their lodestar amount." *Id.* Lead counsel "then allocated $155,610 of the attorneys' fees award to" another law firm who filed one of several cases in the litigation, "an amount that represents C & T's lodestar with no multiplier." *Id.* However, "C & T petitioned the District Court for an increase to $17 million in fees, arguing that but for the claims it had raised, a settlement would not have been reached." *Id.* After C & T appealed, the Second Circuit confirmed that district courts still retain the ability to review any allocation, even after lead counsel have made an allocation decision. *Id.* at 89-90 (affirming the

district court's decision).[34] This is because courts "acknowledge that, by working together and communicating daily, often from the case's inception, class counsel is best positioned to determine the weight and merit of each other's contributions." *In re Initial Pub. Offering Sec. Litig.*, 2011 WL 2732563, at *7 (internal quotation omitted).

As a final matter, Frank notes that "[t]his Court must inquire whether there is any fee-division agreement between Lead Class Counsel and ancillary class counsel; if so, it must be revealed to both the Court and to the class." Frank Obj. at 20. While Plaintiffs' disagree with Frank's legal premises here, no such agreements or prior understandings exist. *See generally In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 262 (D. Del. 2002), *aff'd*, 391 F.3d 516 (3d Cir. 2004) ("The court finds unpersuasive the objections lodged to the attorneys' fees themselves. The court determines a reasonable award to the class counsel in the aggregate, and the counsel then determine how to allocate the award among themselves. Counsel asserts that there is no preexisting agreement as to the distribution of the fee award, but that the shared understanding is that it will be based on lodestar amounts as well as other factors. This is a private matter for the attorneys to resolve."). Frank's Rule 23(h) objection should be overruled.

[34] *See also In re Initial Pub. Offering Sec. Litig.*, 21 MC 92 SAS, 2011 WL 2732563, at *7 (S.D.N.Y. July 8, 2011) (citing *Victor*, 623 F.3d at 87) ("District courts routinely give lead counsel the initial responsibility of devising a fee allocation proposal 'as they deem appropriate, based on their assessments of class counsel's relative contributions.'") (citation omitted); *Childs v. Unified Life Ins. Co.*, 10-CV-23-PJC, 2011 WL 6016486, at *16 n.7 (N.D. Okla. Dec. 2, 2011) ("'The allocation of the fee award between the various firms and attorneys who made up class counsel is left to those parties.'") (quoting *In re Copley Pharm.*, Inc., 1 F. Supp. 2d 1407, 1416 (D. Wy. 1998)); *Turner v. Murphy Oil USA, Inc.*, 582 F. Supp. 2d 797, 808 (E.D. La. 2008) ("Ideally, allocation is a private matter to be handled among class counsel. This is so because class counsel are generally better able to evaluate the weight and merit of each other's contribution to the case. Furthermore, in this case it seemed particularly appropriate for the attorneys to have a chance to recommend the proper allocation because it was all their money. The fund is in addition to and separate and distinct from the claimants' portion. The claimants' portion was not reduced or affected in any way.") (internal quotation omitted).

C. Named Representatives Exist for Both Classes

Lastly, Objector Johnson notes that "[t]he Court should inquire if the named class representatives were in both subclasses." Johnson Obj. at 7. This argument is a weak suggestion that settlement class should not be certified because a subclass does not have a class representative. *See, e.g.*, *Burka v. New York City Transit Auth.*, 110 F.R.D. 595, 601 (S.D.N.Y. 1986) ("When plaintiffs attempt to certify two or more subclasses…each subclass and its respective representative must independently meet the requirements for maintenance of a class action.") (internal quotation omitted). Presumably a vestigial statement from a prior canned objection, this information has already been considered by the Court. *See* Preliminary Approval Order, ¶ 2(a)-(b) (identifying named plaintiffs appointed as class representatives for each settlement class); Proffer of Facts Supp. Pls.' Mot. Class Certification, ¶¶ 178-182.

IV. CONCLUSION

Thus, Plaintiffs request that the Court (1) overrule all objections; (2) finally approve the Settlement, as amended; (3) approve the allocation plan between classes; (4) approve the amended distribution plan proposed contemporaneously herewith, including direct payments for all Claimed Purchases and Recorded Purchases, subject to *pro rata* reductions; (5) approve the distribution of excess amounts, if any, to the AARP Foundation and AHA; (6) find that the distribution of the Class Notice was adequate and satisfied due process; (7) certify two Settlement Classes under Rule 23(a) and (b)(3); and (8) award reasonable attorneys' fees of $4,500,000, reimbursement of expenses of $600,000, and $2,500 service awards. Plaintiffs further request the Court grant all such other relief that the Court deems necessary and appropriate.

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Respectfully submitted,

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