Sam A. Miorelli, E.I., Esq. (Fla. Bar # 99886) (*pro hac vice application pending*)
Law Office of Sam Miorelli, P.A.
1141 Mission Ridge Court
Orlando, FL 32835
Telephone: 352-458-4092
E-Mail: sam.miorelli@gmail.com

David A. Makman, Esq. (SBN 178195)
The Law Offices of David A. Makman
483 Seaport Court, Suite 103
Redwood City, CA 94063
Telephone: 650-242-1560
E-Mail: david@makmanlaw.com

Attorneys for Objector Lindberg

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

THEODORE BROOMFIELD, *et al.*, Plaintiffs, v. CRAFT BREW ALLIANCE, INC., *et al.*, Defendants.	Case No.: 5:17-cv-01027-BLF **OBJECTION TO CLASS ACTION SETTLEMENT OF ERIC MICHAEL LINDBERG** Date: December 19, 2019 Time: 1:30 p.m. Judge: Hon. Beth Labson Freeman Courtroom: 3, 5th Floor

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I. Mr. Lindberg is a class member represented by counsel who intend to appear at the final fairness hearing.

Eric Michael Lindberg ("Mr. Lindberg") is a Class Member (capitalized terms used in this Objection have the same meaning as used in the Settlement Agreement unless otherwise defined). Mr. Lindberg purchased at least five twelve-packs of Kona Beers in the United States during the Class Period. His counsel's contact information is in the appropriate blocks on the first page and signature block of this filing. Mr. Lindberg's objection applies to the entire Class. Mr. Lindberg is also a Claimant as he submitted a Claim Form, with online confirmation number 67F6FE4A.

Mr. Lindberg hereby provides notice of intent to appear at the Fairness Hearing by and through counsel. To the extent that other class members file objections which are not inconsistent with the objections raised herein, Mr. Lindberg reserves the right to adopt those objections and address them at the Fairness Hearing as well. To the extent that any objector participates in discovery relating to the Settlement Agreement or seeks to unseal any portion of the record of the instant case, Mr. Lindberg joins their motion to do so and requests equal access to such proceedings. Mr. Lindberg also hereby requests the opportunity to depose and cross-examine any witness presenting evidence in support of the Settlement Agreement.

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

A district court must act as a "fiduciary for the class who must serve as a guardian of the rights of absent class members." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 534 (3d Cir. 2004). "Both the United States Supreme Court and the Courts of Appeals have repeatedly emphasized the important duties and responsibilities that devolve upon a district court pursuant to Rule 23(e) prior to final adjudication and settlement of a class action suit." *In re Relafen Antitrust Litigation*, 360 F.Supp.2d 166, 192-94 (D. Mass. 2005) (*citing, inter alia, Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617, 623 (1997) ("Rule 23(e) protects unnamed class members from 'unjust or unfair settlements' agreed to by 'fainthearted' or self-interested class 'representatives.'")); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279-80 (7th Cir. 2002) ("district judges [are] to exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions").

"Under Rule 23 (e) the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members . . . [T]he court cannot accept a settlement that the proponents have not shown to be fair, reasonable and adequate." *In re General Motors Corp. Pickup Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d. Cir. 1995) ("*GM Pickup Truck*") (internal quotations and citations omitted). "A trial court has a continuing duty in a class action case to scrutinize the class attorney to see that he or she is adequately protecting the interests of the class." Herbert Newberg & Alba Conte, Newberg on Class Actions § 13:20 (4th ed. 2002). "Because class actions are rife with potential conflicts of interest between class counsel and class members, district judges presiding over such actions are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole." *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 785 (7th Cir. 2004). "Both the class representative and the courts have a duty to protect the interests of absent class members." *Silber v. Mabon*, 957 F.2d 697, 701 (9th Cir. 1992). *Accord Diaz v. Trust Territory of Pacific Islands*, 876 F.2d 1401, 1408 (9th Cir. 1989) ("The district court must ensure that the representative plaintiff fulfills his fiduciary duty toward the absent class members").

There should be no presumption in favor of settlement approval: "[t]he proponents of a settlement bear the burden of proving its fairness." *True v. American Honda Co.*, 749 F. Supp. 2d 1052, 1080 (C.D. Cal. 2010) *citing* 4 Newberg on Class Actions § 11:42 (4th ed. 2009). *See also* American Law Institute, *Principles of the Law of Aggregate Litig.*, § 3.05(c) (2010).

It is insufficient that the settlement happened to be at "arm's length" without express collusion between the settling parties. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 948 (9th Cir. 2011) (*quoting Staton v. Boeing*, 327 F.3d 938, 960 (9th Cir. 2003). Because of the danger of conflicts of interest, third parties must monitor the reasonableness of the settlement as well. *Id.* "Because in common fund cases the relationship between plaintiffs and their attorneys turns adversarial at the fee-setting stage, courts have stressed that when awarding attorneys' fees from a common fund, the district court must assume the role of fiduciary for the class plaintiffs." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052 (9th Cir. 2002) (*quoting In Re Washington Public Power Supply Syst. Lit.*, 19 F.3d 1291 (9th Cir. 1994)). "Accordingly, fee applications must be closely scrutinized." *Id.*

Since the class certified for settlement purposes is much broader than the California-only class certified by the Court in September 2018, this Settlement Agreement must be evaluated by the Court as a pre-certification settlement with all the attendant heightened judicial scrutiny required in such cases.

III. The Settlement Agreement is not fair, reasonable, or adequate because it releases the claims of persons who reside in the same household even if such persons do not each individually submit claims and does not permit two cohabitating Class Members to submit independent claims.

The Settlement Agreement releases the claims of Persons who reside in the same household even if they do not all submit claims. This is improper. The nature of the injury alleged in the complaint is consumer confusion *at the time of purchase. See, e.g.*, Dkt. 65 at 32. Additionally, the window during which an individual could have made the purchase which would make them a Class Member is more than six years. The household a person was in at the time they made the Kona Beer purchase which qualifies them as a Class Member could be different than the household they are in today. As such, there should be no household restriction on Claimants. If, for example, a newly-married couple of Kona Beer enthusiasts who lived separately in 2014 tried to seek compensation today, they would be limited to one $10 or $20 claim, despite having not lived together in a household when they made their qualifying purchases. Only one of the two in this hypothetical Kona Beer couple would receive compensation, but both would be bound by the Release! The Settling Parties cite no authority for releasing claims of Class Members who are prohibited from receiving compensation simply by accident of their living arrangement on the date compensation is paid. Approving such a Settlement Agreement would invite error.

The extension of the definition to cover an entire household can only be construed as being a means to discourage claims in this claims-made settlement which Class Counsel already expects very-few claims from. Why would a reasonable Class Counsel and/or Class Representative who has the Class Members' interest at heart agree to such a one-sided provision? The only logical explanation is that Class Counsel and the Class Representative, by virtue of how the Settlement Agreement is structured, did not mind if the claims rate was low since their payout was protected elsewhere.

IV. The claims-made process includes certifications which exceed the scope of the Settlement Agreement and function only to decrease the claims rate.

Class Counsel and Defendant have designed a claims-made settlement which requires the estimated 7.8 million class members to submit claim forms in order to receive settlement payments.

(Settlement Agreement at Exhibit 1). That claim form includes a certification which exceeds the scope of the Settlement Agreement. As such, to benefit from the Settlement Agreement, a Class Member would have to make a certification under oath which is not necessary for such Class Member to be included in the Release, which is impermissible.

The Claims Form requires Class Members to certify that they were 21 years old when they made their purchase, but the Settlement Agreement's definition of Class Members does not have any such restriction. The second bullet point on the required affirmation reads "I was 21 years or older at the time that I purchased the Kona Beers listed above." Settlement Agreement Exhibit 1 at 2. Yet the definition of Class Member (and as such, the definition of who is bound by the Release) does not have any such restriction. (Settlement Agreement at ¶ 74). While in some states it may be illegal to purchase alcohol when one is less than 21 years old, that does not bear on whether that consumer was misled by Defendant's packaging into underage-buying Kona Beer instead of, for instance, Natural Light. Clearly Defendants recognize this for purposes of their Release, which is not restricted to how old a Class Member was at the time of purchase, but the claims form makes such purchasers unable to benefit from the Settlement Agreement despite their claims being extinguished. On this basis alone the Claims Form is fatally defective, preventing final approval and requiring a new notice to the Class.

But even some persons who purchased Kona Beer *legally* would have been less than 21 years old at the time of their purchase. The geographic scope of the Class Member definition includes "[a]ll Persons who purchased any … Kona Beers in the United States, its territories, or at any United States military facility…" *Id.* As such, Class Member includes Persons who made their purchase in the United States Virgin Islands or Puerto Rico, where the minimum age to purchase alcohol is 18 years, not 21. 14 V.I.C. § 485(a)(4); 13 L.P.R.A. § 32565. Even assuming that the Release was not mismatched to the claims form for underage purchasers in a state (or that such mismatch could be ignored for illegal underage buyers) the effect of this impermissible additional required affirmation is that all Class Members who were *located in* the U.S. Virgin Islands or Puerto Rico when they made their purchase are bound by the Release but unable to avail themselves of any of the benefits of the Settlement Agreement. It would obviously be a due process violation for a class action settlement agreement to release claims for an entire subclass of purchaser (here those who were 18-20 years old at the time of purchase in the U.S. Virgin Islands or

Puerto Rico) yet provide that subclass zero recovery when the main Class receives up to $10 or $20 each. If *any* difference was going to be applied in how this subclass is treated, then it would have required separate counsel at the settlement negotiation to police the subclass' rights. Since it does not appear that the Settling Parties intended to create a less-favored subclass, the obvious solution would be to fix the claims form, re-notice the settlement, and re-open the claims, opt-out, and objection period.

Because the Claims Form demands affirmations beyond those which the Settlement Agreement necessitates to bind a Class Member to the Release, the Court must reject final approval.

V. The Settlement displays many of the *Bluetooth* indicia of Class Counsel self-dealing.

Because the interests of Class Counsel and the absent Class Members becomes adversarial at the fee-setting stage, the Court must pay "special attention when the record suggests that settlement is driven by fees; that is, when counsel receive a disproportionate distribution of the settlement…" *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1021 (9th Cir. 1998); *accord Bluetooth*, 654 F.3d at 947. As stated previously, it is not enough that the settlement was reached during "arm's length" negotiations without explicit collusion, it must be objectively reasonable and *actively avoid* self-dealing by Class Counsel.

"If fees are unreasonably high, the likelihood is that the defendant obtained an economically beneficial concession with regard to the merits provisions, in the form of lower monetary payments to class members … than could otherwise have obtained." *Staton*, 327 F.3d at 964; *accord Bluetooth*, 654 F.3d at 947. This Court "must be particularly vigilant not only for explicit collusion but also for more subtle signs that class counsel have allowed pursuit of their own self-interests … to infect the negotiations." *Bluetooth*, 654 F.3d at 947 (citing *Staton*, 327 F.3d at 960). Objectors do not need to prove that *explicit* collusion occurred (after all, this would be impossible without an admission against interest and likely breach of attorney-client privilege by one of the participants in the so-called arms-length settlement negotiations), it is sufficient simply to point out the existence of signs of self-dealing. Indeed, explicit collusion is not the standard for self-dealing since even acquiescence is sufficient, "a defendant is interested only in disposing of the total claim asserted against it" and "the allocation between the class payment and the attorneys' fees is of little or no interest to the defense." *Staton*, 327 F.3d at 964 (quoting *GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 819-20 (3d Cir. 1995)); *accord Bluetooth*, 654 F.3d at 949. The Ninth Circuit, in *Bluetooth*, identified three possible (and nonexclusive) signs of self-

dealing: (1) disproportionate distribution to counsel; (2) a clear sailing agreement; and (3) reversion of the excess fees to the defendant. *Bluetooth*, 654 F.3d at 949. Each of these signs is present here.

A. It is highly likely that a disproportionate amount of the total constructive settlement fund will be distributed to Class Counsel.

While Class Counsel argues that the claims-made nature of the Settlement Agreement means this case is not a common fund case, that simply is not true. The Ninth Circuit is clear that when evaluating a settlement, the Court should consider the entire agreement as a constructive common fund when evaluating the reasonableness of the attorneys' fee award. *Bluetooth*, 654 F.3d at 943-945 (vacating and remanding a district court approval of a lodestar-based attorneys fee for a reasonableness reevaluation using the constructive common fund method). "Although under the terms of each settlement agreement, attorneys fees technically derive from the defendant rather than out of the class' recovery, in essence the entire settlement amount comes from the same source. The award to the class and the agreement on attorney fees represent a package deal. Even if the fees are paid directly to the attorneys, those fees are still best viewed as an aspect of the class' recovery." *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996).

Since the vast majority of the class is likely to be only eligible for $10 and the Settlement Agreement has a challenging (and flawed) claims process, the claims rate is likely to be significantly below 10% of the 7.8 million Class Members, and as such also significantly below the 1 million claimant cap in the Settlement Agreement. *See, e.g., In re Carrier IQ, Inc., Consumer Privacy Litig.,* Case No. 3:12-md-02330-EMC, 2016 WL 4474366 at *4 (N.D. Cal. Aug. 25, 2016) (response rate of 0.14% from a 30 million person class for a $138.35/each recovery and quoting the settlement administrator's declaration that "in our experience the claims rate in this settlement is consistent with many other settlement administrations with similar class characteristics."); *LaGarde v. Support.com*, Case No. 12-0609 JSC, 2013 WL 1994703 (N.D. Cal. May 13, 2013) (a $10 refund resulted in a claims rate of 0.17% of the class members despite a direct e-mail notice plan that reached 92% of the class members). "Given the tiny sum per person, who would bother to mail a claim." *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006) The Settlement Administrator agrees that a low claim rate is likely. Dkt. 115-4 at ¶ 29. Class Counsel, in moving for preliminary approval, agreed as well. Dkt. 115 at 31-32.at 31-32.

Yet when Class Counsel moved for attorneys' fees, their opinion apparently changed. Where they estimated in May 2019 that between 78,000 and 546,000 claims would be filed when seeking preliminary approval, by September 2019 when they sought their fee, they asked the Court to assume 1 million approved claims. *Compare* Dkt. 115 at 31:26-32:13 *with* Dkt. 121 at 12:25-13:6. Conveniently, this unexplained optimism reduces the estimated percentage of the constructive common fund going to the lawyers.

Regardless of the wide variation in estimates, *Bluetooth* requires the Court to look at the *actual* claims payment rate, not a hypothetical number, when evaluating the reasonableness of the fee award. *Bluetooth*, 654 F.3d at 943-945. Until that information is available, it is impossible to evaluate whether the requested fee is reasonable. Once that information is available, Objector will file a supplemental statement with the Court and will address the specific math at the final approval hearing before the Court.

But until that time, it is already clear that the requested fee is far more than will ever be justifiable. Returning to the 1-7% rate on which Class Counsel and the Settlement Administrator previously agreed, the likely cash aspect of the Class' recovery would be in the range of $780,000 to $5,460,000. Comparatively, this means that Class Counsel is asking the Court to award potentially almost four-times as much money to the lawyers as the entire Class may receive combined!

But the question at hand is not just whether the requested fee is excessive, but what that excessive fee tells us about the fairness of the Settlement Agreement overall. *Hanlon, Staton,* and *Bluetooth* teach that when the Settling Parties present to the Court a Settlement Agreement which, on its face, would result in a disproportionate amount of attorneys' fees, that is a red flag indicator "that the settlement is driven by fees" and "that class counsel have allowed pursuit of their own self-interests … to infect the negotiations." *Hanlon*, 150 F.3d at 1021; *Bluetooth*, 654 F.3d at 947. This Settlement Agreement clearly shows such characteristics and, pursuant to *Hanlon*, *Staton*, and *Bluetooth*, the appropriate solution is for the Court to reject the Settlement Agreement entirely as a collusive and unfair proposal.

B. The Settlement Agreement contains *Bluetooth*'s second warning sign: a clear sailing agreement.

The Settlement Agreement contains a textbook example of a clear sailing agreement: Class Counsel agrees not to seek more than $2.9 million in combined attorneys' fees and costs and Defendant

agrees not to object to Class Counsel's request. (Settlement Agreement at ¶ 106); *Bluetooth*, 654 F.3d at 947; *accord Redman v. RadioShack Corp.*, 768 F.3d 622, 637 (7th Cir. 2014). "Such a clause by its nature deprives the court of the advantages of the adversary process." *Weinberger v. Great N. Nekoosa Corp.,* 925 F.2d 518, 525 (1st Cir. 1991). This occurs right at the very moment when the interests of Defendant and Class Counsel align *against* the Class Members.

> Because it's in the defendant's interest to contest that request in order to reduce the overall cost of the settlement, the defendant won't agree to a clear-sailing clause without compensation – namely a reduction in the part of the settlement that goes to the class members, as that is the only reduction class counsel are likely to consider. The existence of such clauses thus illustrates the danger of collusion in class actions between class counsel and the defendant, to the detriment of the class members.

Redman, 768 F.3d 622, 637; *see also Malchman v. Davis*, 761 F.2d 893, 907-08 (2d Cir. 1985) ("a 'clear sailing' clause creates the risk that a fee request within the negotiated ceiling will not be challenged, placing upon the courts the burden of examining the basis for the fee, unaided by the challenges of an adverse party.")

The Ninth Circuit's view of clear sailing agreements may be the most negative of any Court of Appeals, finding that the "very existence" of a clear sailing agreement "increases the likelihood that class counsel will have bargained away something of value to the class." *Bluetooth*, 654 F.3d at 948 (quoting *Weinberger*, 925 F.2d at 525). As soon as a clear sailing clause enters a pre-certification class action settlement agreement, it "suggests, strongly" that it was used by the lawyers to "urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees" and the Court must place the fee request "under the microscope of judicial scrutiny." *Weinberger*, 925 F.2d at 518, 524-25; *accord Redman*, 768 F.3d at 637.[1]

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[1] Majority opinions of the circuits are not alone in their distaste for clear sailing agreements, Justice Sandra Day O'Connor issued a statement respecting the denial of a petition for a writ of certiorari for a class action settlement which included a clear sailing provision that distributed $13.3 million in attorneys' fees but only $6.49 million to class members in a deal, much like this one, that did not link the attorneys' fee to the class recovery. *Int'l Precious Metals Corp. v. Waters*, 530 U.S. 1223 (2000). Justice

If Class Counsel's request of many times more money for themselves than the entire 7.8-million-person Class will recover was not enough evidence that this is an unfair deal, the clear sailing provision should remove all doubt. The Court has a heightened duty to "peer into the provision and scrutinize closely the relationship between attorneys' fees and benefit to the class, being careful to avoid awarding 'unreasonbly high' fees simply because they are uncontested." *Bluetooth*, 654 F.3d at 948 (quoting *Staton*, 327 F.3d at 954). This objection provides the Court a bright red warning flag: the Ninth Circuit now requires the Court to scrutinize, and ultimately deny, approval of the Settlement Agreement.

C. The kicker clause completes the *Bluetooth* trifecta and proves the unfairness of the Settlement Agreement.

If the two prior *Bluetooth* warning signs were not enough for the Court, the Settlement Agreement completes the collusion trifecta with a "kicker clause." A "kicker" is a provision that causes any reduction in attorneys' fees, costs, or incentive awards to revert to the defendant rather than the class. The "kicker" comes from the Settlement Agreement's structuring the attorneys' fee to be paid separately from the Class' Settlement Benefit, meaning that any amount awarded less than $2.9 million would stay with Defendant rather than be paid to the Class Members. (Settlement Agreement at Art. VII). *Bluetooth* holds that the "kicker," in addition to being an independent warning sign of unfairness in a settlement agreement, also "amplifies the danger" of the clear sailing provision. *Bluetooth*, 654 F.3d at 949. "The clear sailing provision reveals the defendant's willingness to pay, but the kicker deprives the class of that full potential benefit if class counsel negotiates too much for its fees." *Id.*

O'Connor wrote that there could be several troubling consequences of "the approval of attorney's fees absent" any "inquiry into whether there must be some rational connection between the fee award and the amount of the actual distribution to the class." *Id.* "They potentially undermine the underlying purposes of class actions by providing defendants with a powerful means to enticing class counsel to settle lawsuits in a manner detrimental to the class." Additionally, there are calls in the academy for a *per se* ban on settlement agreements that incorporate a clear sailing provision. William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 Tul. L. Rev. 813, 816 (2003).

This Settlement Agreement exhibits just such a problem. Even if the Court ignored the fundamental problems with the Settlement Agreement and granted final approval, it would still be required to reduce the excessive attorneys' fee award. In a settlement without a kicker, that reduction would inure to the benefit of the Class. But in this case, it would only benefit Defendant because of the "kicker." Combined with the fact that the claims-made arrangement means a very small amount will be paid in the first place, everything points toward a much smaller payment by Defendant than is suggested by the top-line numbers. Despite the efforts of Class Counsel to structure the Settlement Agreement with multiple accounts of money, the economic reality is "that a settling defendant is concerned only with its total liability." *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2003).

The combination of an enormous fraction of the funds going to Class Counsel, the clear sailing provision, and the "kicker" are three red flags that each independently point toward a self-dealing settlement. The combination of all three is effectively conclusive evidence that the Settlement Agreement is unreasonable. The Settling Parties owe the Court a "clear explanation" justifying this structure which plainly makes the Class worse off than a traditional common fund would and they have not provided any such "clear explanation." *See Bluetooth*, 654 F.3d at 949. Accordingly, Final Approval must be rejected. *Id.*

VI. The *Bluetooth* trifecta creates a Rule 23(g) representative adequacy problem with the Settlement Agreement and Class Counsel's ongoing representation of the class.

By agreeing to the Settlement Agreement, with its obvious indicia of self-dealing, Class Counsel has also rendered itself unable to adequately represent the Class as required by Federal Rule of Civil Procedure 23(g)(4). *See Lobatz v. U.S. W. Cellular of Cal., Inc.*, 222 F.3d 1142, 1147 (9th Cir. 2000) (class counsel breached their fiduciary duty to the class when they "agreed to accept excessive fees and costs to the detriment of class plaintiffs…"); *Gallego v. Northland Group, Inc.*, 814 F.3d 123, 129 (2d Cir. 2016) (affirming denial of class certification as "within the range of permissible decisions when it appeared that the intended result of the settlement was 'mass indifference, a few profiteers, and a quick fee to clever lawyers.'"); *In re Razorfish, Inc. Sec. Litig.*, 143 F.Supp.2d 304, 311 (S.D.N.Y. 2001) ("an excessive compensation proposal can cast in doubt the ability of proposed lead counsel to adequately represent the class.").

Additionally, the Class Representatives, who allowed this money-grab to occur under their supposedly watchful eyes, have shown themselves not to be the trustworthy Class Representatives required by Rule 23(a)(4). Presumably the Class Representatives have agreed to the collusive Settlement Agreement because they hope to be paid $5,000 each – essentially paid by Defendant for helping to sell out the Class to Class Counsel's fee request. This renders each of them an inadequate representative for the Class moving forward. *See Radcliffe v. Experian Information Solutions, Inc.*, 715 F.3d 1157, 1165 (9th Cir. 2013), *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 960 (9th Cir. 2009).

By supporting this collusive Settlement Agreement, the Class Representatives have also destroyed the Court's prior order certifying a California Class. Since they have now revealed themselves to be willing to be bought, they cannot reasonably be adequate representatives who "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4).

On this basis, the Court should reconsider its prior order granting certification of the California Class, deny final approval of the Settlement Agreement, and consider dismissing the case unless new class members *and new lawyers* seek to continue representing the Class in the fair manner that Rule 23 requires.

VII. The Court cannot approve the Settlement Agreement when the Settling Parties have not presented any evidence showing that the Settlement Agreement is fair, reasonable, and adequate when compared to the Class' potential recovery if the case went to trial.

Class Counsel claims in their Motion for Preliminary Approval that the Settlement Agreement is fair, reasonable, and adequate. Yet while Class Counsel describes various estimates supposedly showing that the compensation exceeds the damages the Class could have received at trial, their supporting evidence is so excessively redacted as to prevent any Class Member from making an informed decision about whether they agree with that estimate.

Class Counsel cites the declarations of one of their own legal team, Timothy Peter, and their economic expert, Stefan Boedeker for their proposition that the recovery exceeds the likely trial outcome. Dkt. 115 at 10-11. Yet Mr. Peter does not even claim that he has personal knowledge of evidence supporting his conclusion that the negotiated recovery exceeds the damages available at trial, only vaguely stating that "Class Counsel was able to determine" such. Dkt. 116 at ¶ 14. It seems unlikely that Mr. Peter's unsupported statement would be admissible if Mr. Peter was called upon to testify to this "fact" stated in his declaration. *See, e.g.*, Fed. R. Evid. 802. Class Counsel's statements are also deceptive because

they do not say that the *total* recovery of the Settlement Agreement exceeds the Class' likely recovery at trial, only that the "per-product" recovery does. But when the 1 million claims cap and other claims-reducing elements of the Settlement Agreement are considered, it seems likely that the *total* recovery for the Class will be a small fraction of the alleged damages in the 1ACCAC.

The available evidence to the Class from Mr. Boedeker does not help clarify the topic much either. Mr. Boedeker's report helpfully provides unredacted most of the methodology he used and raw data that resulted in his estimate of a 12.7% economic loss for the nationwide class of consumers. Dkt. 79-14. But that and his other reports in the record do not show what the gross value of that economic loss would be to the entire Class. There is also no data in the public part of the record showing the numerical value of Kona Beer sales during the Class Period from which a Class Member could evaluate how 12.7% economic loss rate compares to the $10 offered in settlement.

Since the Settling Parties bear the burden of proof that the Settlement Benefit is good for the Class compared to the probable outcome at trial, and they have not presented *any* evidence bearing on that consideration, they clearly have not met the minimum burden of proof to permit the Court to approve the Settlement Agreement. Even if such evidence was provided at this point, it has not been available to the Class during the claim and opt-out period, and as such the notice is inadequate even if the data was provided by the Settling Parties today.

VIII. A class action settlement should not be approved when the primary beneficiaries are the class representatives and class counsel.

Under the Settlement Agreement and Class Counsel's Fee Motion, while Class Members will get small cash payments, the Class Representatives will receive $5,000 cash each. This means that most absent Class Members will receive about 0.2% of what the Class Representatives do, a disparity of 500x.

These incentive awards are also purely conditional – they are only paid if the settlement with all of its many fatal defects is approved. (Settlement Agreement at ¶ 114). That conditionality makes the incentive awards even more odious since it gives each class representative 500 times the reason to not oppose the Settlement Agreement's final approval, no matter their personal opinion of it.

A. A large disparity between the recovery of the Class Representatives and the Class Members is not permitted under Ninth Circuit precedent.

Courts around the country, including the Ninth Circuit, while often approving incentive awards

to class representatives, regularly reverse when those awards represent a large disparity when compared to the absent class members. In *Radcliffe*, the Ninth Circuit reversed an approved settlement due to a 6.67-192.3 times disparity between class representatives' recovery and that of absent class members. *Id.*

The Sixth Circuit has also rejected a large disparity between the named plaintiffs and absent class members' treatment in *Vassalle v. Midland Funding, LLC*, 708 F.3d 747 (6th Cir. 2013). The Sixth Circuit found the settlement was unfair and that the district court abused its discretion by approving it. *Id.* at 756.. at 756.

The Second Circuit also is skeptical of the fairness of incentive payments. In *Plummer v. Chemical Bank*, 668 F.2d 654 (2d Cir. 1982) representative class members received between $8,500 and $17,500 each. The district court held that "where representative plaintiffs obtain more for themselves by settlement than they do for the class for whom they are obligated to act as fiduciaries, serious questions are raised as to the fairness of the settlement to the class." *Plummer v. Chemical Bank*, 91 F.R.D. 434, 441-42 (S.D.N.Y. 1981), *aff'd*, 668 F.2d 654 (2d Cir. 1982).

The Eleventh Circuit directly cited that same district court language in *Plummer* when it rejected a class settlement which allocated approximately 6.25% of a lump sum settlement to the eight representative class members, while the absent class members each received, on average, approximately 0.42% of the settlement. *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1146, 1148 (11th Cir. 1983). The court found the 14.75 times disparity between representative and absent class member recovery was facially unfair and reversed the district court's approval of the settlement. *Id.* at 1151.

In *Radcliffe* the disparity between the class representatives and the absent members of the class was about 6 to 192 times, in *Vassalle* it was 374 times, in *Plummer* it was 8.5 to 17.5 times, and in *Holmes* the disparity was 14.75 times. In each of those cases, the appellate court rejected the settlement as unfair.

This District has also expressed concern about other proposed settlement agreements recently before it which suggested large-multiple incentive awards. In *Napoleon Ebarle, et. al. v. Lifelock, Inc.*, 2016 WL 234364 (N.D. Cal. Jan. 20, 2016), Judge Gilliam noted with caution that "Plaintiffs, thus far, have provided no explanation for why the named Plaintiffs deserve an award 100 times greater than the settlement value of the other Class Members." *Lifelock*, 2016 WL 234364 at *7.

In this case the disparity is likely to be 500x. That disparity is vastly above the levels which the Ninth, Second, and Eleventh Circuits have all rejected. This Court would invite error to approve this much-worse disparity. Class certification is not appropriate when the class representative and class counsel bring a lawsuit to benefit not the class, but themselves. *See In re Aqua Dots Prod. Liab. Litig.,* 654 F.3d 748, 752 (7th Cir. 2011). This Settlement Agreement, with its many illegal elements and (even without the plainly illegal elements) its enormous attorneys' fee and hundreds of times difference in recovery between the class representative and absent class members is just such a self-serving case and should be rejected.

IX. Class Counsel should not get an excessive attorneys fee even if the Settlement Agreement is approved.

As discussed *supra,* the Settlement Agreement cannot be approved in its current condition. Yet if the Court is inclined to approve the Settlement Agreement as-is or order various modifications prior to approval, it should also ensure that the attorneys fee is not excessive. In the Ninth Circuit, the 25% benchmark for calculating a contingent attorneys' fee in a class action is settled law, even if the fees are awarded on the basis of a lodestar and fee-shifting statute. *Bluetooth*, 654 F.3d at 942 (*citing Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 273 (9th Cir. 1989) (establishing that 25% of the fund is the "benchmark" award that should be given in common fund cases)). The "foremost" consideration in evaluating whether a fee award is reasonable is the benefit obtained for the class. *Bluetooth*, 654 F.3d at 942 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 434-36 (1983); *McCown v. City of Fontana*, 565 F.3d 1097, 1102 (9th Cir. 2009)).

A. The Court should calculate the 25% benchmark on the basis of the amount of money the Class Members receive.

As discussed *supra* in Section V.A., the actual amount of money the Class Members receive is likely to be in the range of $780,000 to $5,460,000 – far lower than the $10 million amount Class Counsel urged the Court to consider when conducting its *Bluetooth* cross-check. Class Counsel also urged the Court to consider the sought litigation costs, the estimated Settlement Administrator fees, and an outrageous estimate of tens-of-millions of dollars for worthless injunctive relief. Dkt. 121 at 12-14. For the reasons discussed below, none should be considered by the Court in a *Bluetooth* cross-check.

The Northern District of California "has had a longstanding preference for using the net" when calculating a contingent fee award in class action settlements. *In re Transpacific Passenger Air Transp. Antitrust Litig.*, No. C 07-05634 CRB, 2015 WL 3396829, at *1 (N.D. Cal. May 26, 2015) (J. Charles R. Breyer) ("*Transpacific*"). Judge Breyer is not alone in this preference for net-based calculations. The Northern District of California has approved net-based calculations for decades not only in consumer class actions, but also in securities cases and in employment class actions. *In re Wells Fargo Secs. Litig.*, 157 F.R.D. 467, 471 (N.D.Cal. Aug. 25, 1994) ("If an attorney risks losing some portion of his fee award for each additional dollar in expenses he incurs, the attorney is sure to minimize expenses."); *Miles v. AlliedBarton Security Svcs., LLC*, No. 12-5761 JD, 2014 WL 6065602 at *5 (N.D. Cal. Nov. 12, 2014); Advisory Committee Notes on 2003 Amendments to Rule 23 ("fundamental focus is the result actually achieved for class members"); id. (citing 15 U.S.C. §§ 77z-1(a)(6); 78u-4(a)(6) (fee award should not exceed a "reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class")). The Ninth Circuit, while not requiring a net-based analysis in every case, has remanded cases in the past where the fee award exceeded 25% of the constructive common fund when notice costs were excluded. *Bluetooth*, 654 F.3d at 945.

The Northern District of California's preference for a net-based analysis is well founded as the Seventh Circuit requires a net-based analysis. *Redman v. RadioShack Corp.*, 768 F.3d 622, 633 (7th Cir. 2014) ("Those [administrative] costs are part of the settlement but not part of the value received from the settlement by the members of the class. The costs therefore shed no light on the fairness of the division of the settlement pie between class counsel and class members.")

It is important to consider what the Court would encourage if it allowed a gross analysis instead. In that circumstance, for every additional dollar Class Counsel spent on litigation costs (i.e. the $8,542.40 in requested "Total Catering/Meals/Travel Expenses" – Dkt 121-1 at 12:16-23), Class Counsel would increase his own ability to seek a benchmark 25% fee by 25¢. Why not buy an extra bottle of wine at the post-hearing dinner when the $100 bottle gets reimbursed by the Class and also lets you ask for $25 more in attorneys fees at settlement? The Court should not encourage such lawyer largesse.

The same principle would apply to the Settlement Administrator – allowing their fees to be the basis for Class Counsel's benchmark would only encourage Class Counsel to hire inflated-price

administrators. But more than this, the Settlement Administrator costs are not even a benefit to the Class in the first place, they are a benefit for Defendants! *Myles v. AlliedBarton Sec. Servs.*, 2014 U.S. Dist. LEXIS 159790, at *16 (N.D. Cal. Nov. 12, 2014) ("the fees paid to the settlement administrator – do [] not constitute a benefit to the class members.") Settlement Administrator costs are a benefit to the Defendant instead of the Class because in the event of insufficient notice, it is the Defendant who bears the risk of the Release being unenforceable as a due process violation. *Hecht v. United Collection Bureau*, 691 F.3d 218, 224 (2d Cir. 2012). The Defendant has an incentive to spend additional amounts on notice because less expensive means of notice, such as constructive notice by a single publication, may be sufficient to satisfy due process only "as to persons whose whereabouts or interests cannot be determined through due diligence." *Id.* (quoting *In re Agent Orange*, 818 F.2d at 168). *See also, Redman*, 768 F.3d at 630, *Bluetooth*, 654 F.3d at 944, *and Twigg v. Sears, Roebuck & Co.*, 153F.3d 1222, 1228-9 (11th Cir. 1998). Notice certainly allows Class Members to make claims, but that is already accounted for in an attorneys' fee calculation in the form of the value of all of the claims that are made. If only 100 claims were made, Class Counsel would have a very hard time justifying any fee, but counting both the full value of all the claims made *and* the Settlement Administrator's expenses on a justification that those expenses were necessary for the claims to be made is just double-counting. This also comports with the Ninth Circuit's principle that costs imposed on the defendant are not the same as measuring the compensable class value. *Bluetooth*, 654 F.3d at 944 ("[T]he standard is not how much money a company spends on purported benefits, but the value of those benefits to the class.")

B. The lodestar sought by Class Counsel is excessive and any above-1.0 multiplier on this record would be outrageous.

Class Counsel seeks a very large lodestar with minimal documentation. Most glaringly, with regard to the 2,100.65 hours claimed by Farqui & Farqui, there is absolutely no explanation of what work which lawyers worked on to justify the thousands of hours billed. *See* Dkt. 121-1. Did partners bill $700 per hour doing document review? What normal law firm bills five partners to a matter but only two associates? In a case with thousands of pages of filings and expert witness reports, exactly what utility could two partners who billed less than 10 hours each have had for the Class in years of litigation? We are left only to imagine because Class Counsel has not carried their burden of proof to show that each

and every part of the millions of dollars claimed was actually beneficial to the Class. No normal hourly-fee client would pay a $1.1 million bill supported by only a half-page summary – neither should the Class.

Additionally, the rates claimed by Farqui & Farqui are exorbitant. Comparing those rates to other class action cases where the rates have been approved is not a reasonable basis to substantiate the rate. As very few class actions ever have objections, there is rarely an adversarial setting to test whether the amounts sought by Class Counsel are reasonable. The outcome is that the fees claimed by plaintiffs' lawyers in class actions have almost no basis in the reality of billable rates in today's legal market.

For example, Mr. Heikali is a lawyer with only four years of experience, yet Farqui & Farqui is billing him as a "partner" at $575 per hour. Dkt 121-4 at 25; Dkt. 121-1 at 8. Mr. Heikali may be a talented attorney justifying his stratospheric fee, but if he is, Class Counsel certainly has not presented any evidence demonstrating it. As a point of comparison, the U.S. Attorney's Office Fee Matrix would not support a $575 hourly rate until the lawyer had more than 20 years of experience. (Exhibit 1). Since this spot check shows that the lodestar of Farqui & Farqui is likely highly inflated (Mr. Heikali's lodestar of $364,320 is the single largest for any Farqui & Farqui attorney in this case), the Court, in its role as a fiduciary for the Class, must demand much more information and justification from Class Counsel for each of their billers, what these billers did, and how each attorney justifies his or her fee not just in class actions, but the open market generally. If Farqui & Farqui does not have any clients who pay them on an hourly rate, they should explain that business practice more thoroughly so the Court and the Class can better evaluate the reasonableness of their promotion, billing, and work assignment practices.

Ms. Wand's lodestar also bears careful examination by the Court. Ms. Wand has about one additional year of experience than undersigned counsel and apparently had some success convincing courts to award her an hourly rate of $525 in 2018. Dkt. 121-6 at ¶ 16. About two months ago, Ms. Wand bumped that rate to $550 per hour, roughly a 5% rate of increase over 2018. *Id.* at ¶ 17. Yet now she seeks to raise her fee about 10% more – annualized this would be a 60% rate of increase in her rate! *Id.* at ¶ 15. Considering that inflation (as measured by the Consumer Price Index) has been at or below 4% since 2012 when Ms. Wand began her career in private practice, her recent hourly-rate inflation is impossible to justify. *See* Exhibit 2. As discussed *supra*, the well-respected U.S. Attorney's Office Fee Matrix would not support such enormous hourly rates for a lawyer with so few years of experience. If

Ms. Wand really is worth $600 per hour, she should explain to the Court and the Class how many hourly-fee clients she represents who pay her that rate. It is also hard to understand why the Class should pay sky-high partner rates to Ms. Wand for 451.6 hours of low-complexity legal work like "Written Discovery, Document Production and Review, Depositions, and Expert Work." Dkt. 121-6 at 5-6. Considering her sought lodestar of $718,680 is about the same as the next-two billing lawyers' request combined, the Court and the Class deserve much more justification. The Court should also consider whether Ms. Wand's lodestar should be discounted when she is doing work that a more efficient firm might assign to a lower-paid associate. The Class should not be paying the costs of Ms. Wand's firm's apparently inefficient work assignment practices.

Ultimately the burden rests on Class Counsel to justify their requested lodestar and they have not done so. Considering that, awarding any multiple on the lodestar would be outrageous. Even if Class Counsel had adequately justified their requested lodestar, their justification of a multiplier is flimsy. They claim, for instance, that they should get an enhancement for their extensive experience and notoriety. Dkt. 121 at 9:6-7. Yet is that not already reflected in their astronomical hourly rates? They also claim they zealously litigated the case. *Id.* at 9:10-11. But they provide no evidence that they brought any more "zeal" to this case than any other, so why should they be awarded, in the case of Mr. Guber, $1,171.50 per hour? Class Counsel also justifies a multiplier on the basis of "a favorable settlement" but as explained *supra*, they have not provided any evidence on which the Court or the Class could independently decide whether the Settlement Agreement is actually favorable. *Id.* at 9:14-15. It is also unclear from Class Counsel's fee motion how they could simultaneously say they should receive high hourly rates because of their experience litigating similar beer-origin cases in the past, but also claim this copycat case "involved several complex issues" justifying a lodestar multiplier. If they already litigated the issues in the past against a different defendant, how could those issues still be complex the second time around?

C. The so-called injunctive relief is illusory.

The injunctive relief the Class supposedly benefits from is that the Defendant will add a very small additional bit of text to the outside of the packaging mentioning several additional cities. (Settlement Agreement, Exhibit 7). Hilariously, it also includes Defendants' General Counsel assigning an underling

to meet annually with Defendants' own marketing department. (Settlement Agreement ¶ 78.b). Both of these are worthless to the Class Members.

The Proof attached to the Settlement Agreement shows that this additional language is in the smallest font size of any words on the respective side of the package where it will be placed and does not even specify that the beer in the package was not made in Hawaii (which is the basis of the entire case and Plaintiffs' economic expert's theory of damages). In the 1ACCAC, Plaintiffs cited five major visual elements on the packaging which they claimed misled consumers: (a) "an image of a map of the major Hawaiian Islands, which depicts the location of the Kona Brewing Co. Brewery on the Big Island"; (b) "An image of the Hawaiian island chain embossed on the front of each bottle"; (c) "The phrase 'Liquid Aloha' embossed into the front of each bottle"; (d) the statement "We invite you to visit our brewery and pubs whenever you are in Hawaii. MAHALO!"; and (e) "Images of orchid flowers and palm trees on the packaging." Dkt. 65 at 9:11-21. As depicted in the proof attached to the Settlement Agreement, there appears (a) an image of a map of the major Hawaiian Islands, which depicts the location of the Kona Brewing Co. Brewery on the Big Island; (b) the phrase "Liquid Aloha" embossed on the top of the package; (c) a depiction of the location of the Kona Brewing Co. Koko Marina Pub on the map of the major Hawaiian Islands; and (d) images of orchid flowers and palm trees on the packaging. Of the five complained-of elements from the 1ACCAC, four are still on the packaging and the fifth has been changed from a sentence to a graphic conveying the same message. What's more, the statement that *has* changed does not actually tell the consumer the fact this entire case complained about: **that the beer inside that package was not brewed in Hawaii!** If the complained-of packaging elements have not changed and the added language does not tell consumers the detail which Plaintiffs' own expert determined was the critical detail for the 12.7% economic injury, how could these changes have any impact on a consumer, let alone convey a value to the Class?

Even Plaintiffs' economic expert does not assert that the packaging changes would prevent future consumer confusion, he just assumes they would for purposes of assigning them a value. Dkt. 121-9 at ¶ 11. This alone should be fatal to any claim of value from the injunctive relief. Class Counsel breezes right over the question of whether the changes to the packaging will do *anything*, declares they will *ipse dixit*, and then moves straight to an economic expert which makes the same baseless assumption. There is no

evidence in the record that the packaging change will have any impact and as such, the Court should reject any argument about "value" of these obviously useless changes.

But even if, *arguendo*, we ignore the futility of the packaging changes to consider Mr. Boedeker's report, we still are closer to useful information. Unlike his damages report which had minimal redactions, Mr. Boedeker's report submitted to support Class Counsel's fee request only shows his final answer, but none of his work. Every single input to his various analytical methods is redacted across all four pages where that analysis appears. Dkt. 121-9 at 4-7. Reading the redacted report is an exercise in absurdity, with only the "total" field of tables visible, and not even a word (presumably an adjective) describing the "annual revenue from 2014-2018" blacked out. *Id.* at ¶ 14. Even Mr. Boedeker's summary table's assumptions are redacted! *Id.* at Table 5. If the Court were to consider Mr. Boedeker's declaration, it would be unfairly considering evidence which the Class cannot see. The Class is entitled to understand the Settlement Agreement and *all* its terms. If those terms include provisions which give Class Counsel more money, like applying a $52.8 million valuation to changes which Plaintiffs' own expert does not endorse, then the Class must be able to review that in full. The Court, if it does consider granting attorneys' fees or final approval, should make it clear that it is not including in its consideration monetary value from this "injunctive relief."

The meeting between someone in Defendant's in-house legal department and their marketing department to discuss packaging is also obviously worthless. As a consumer products company, one of the in-house legal function's primary duties is review of marketing and packaging material. The Settling Parties have presented zero evidence suggesting that Defendant suffered some unique communications impasse between their legal and marketing departments. Even if the Court that Defendant conduct an internal meeting about an immaterial change to the packaging of Kona Beer, it is unimaginable how that meeting would be of any value whatsoever to the average Class Member.

Even if, *arguendo*, the injunctive relief has *some* generalized value to the public, that value would only be to the future Kona Beer customers. The question of value in a class action settlement is related to its value *to the class members*. Since the Class Members all made their purchases *in the past*, no injunctive relief changing future beer labels could provide the Class Members any relief *for those past purchases*. "The fairness of the settlement must be evaluated primarily based on how it compensates class members for

these past injuries." *Synfuel Technologies, Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 654 (7th Cir. 2006) (rejecting settling parties' estimate of the value of an injunction requiring changes to DHL's business practices because "[i]t is future customers who are not plaintiffs in this suit who will reap most of the benefit from these changes."). Some Persons may decide in the future to purchase Kona Beer who did not during the Class Period and some Class Members may decide not to purchase Kona Beer in the future. Awarding Class Counsel fees on the basis of value to these future purchasers is a different group of people than the Class Members who Class Counsel represents today. The Court would invite error to confuse the Class Members (past purchasers) with future Kona Beer buyers.

Consequently, if the Court does approve the Settlement Agreement despite the flaws identified herein, it should award significantly lower attorneys' fees than those requested after making appropriate reductions to Class Counsel's lodestar and then making a comparison to the Ninth Circuit's 25% benchmark and awarding the lesser of that reduced lodestar or 25% of the net Class recovery.

X. Class Counsel has requested costs which they are not entitled to reimbursement for and the Class should not pay for Mr. Boedeker's work creating a new declaration in support of Class Counsel's fee motion.

Class Counsel has sought a very high amount of costs. Some of these costs are not permitted pursuant to the applicable California fee-shifting statute, others should be disallowed as they were incurred only to benefit Class Counsel and not the Class.

California Code of Civil Procedure section 1033.5 sets forth the costs which a prevailing party in a civil action are entitled to seek from the Defendant. Section 1033.5(b) also sets forth which costs are not allowed: "(1) Fees of experts not ordered by the court, (2) Investigation expenses in preparing the case for trial, (3) Postage, telephone, and photocopying charges, except for exhibits, (4) Costs in investigation of jurors or in preparation for voir dire, (5) Transcripts of court proceedings not ordered by the court." It appears that at least $6,757.73 of the claimed expenses from Farqui & Farqui and $630 of WLF's claimed expenses are directly prohibited by section 1033.5(b). Dkt. 121-1 at 12 and 121-6 at 8. Since it is readily obvious that a significant amount of the costs request is prohibited by California law, the Court should demand a more detailed accounting and explanation of each of Class Counsel's expense lines (i.e. what are "Total IT Related Expenses"?) Also, while the costs of Plaintiffs' experts may be chargeable to the extent they moved the case forward, Mr. Boedeker's most recent declaration was only

in relation to Class Counsel's fee request. As such, that portion of his expense claim must also be identified and excluded.

XI. Any reduction in costs, incentive awards, or Class Counsel's fees should be paid to the Claimants *pro rata*.

If the Court approves the Settlement Agreement but reduces Class Counsel's fees or costs or the incentive awards, that reduction should benefit the Class instead of reverting to Defendants. The Court would be well within its discretion to make such an order. Any Defendant objection to this reversion to the Class Members should be rejected since the Defendant is partially at fault for engaging in a collusive settlement with Class Counsel. Defendant could not show any injury from such redistribution as they already agreed not to oppose paying the $2.9 million and incentive awards in the first place. If Defendant objected, it would be reasonable for the Court to demand explanation why Defendant would consent to the money going to Class Counsel but oppose it instead going to the Class Members (who are Defendant's customers). Objector Lindberg would seek leave of the Court to conduct discovery of each lawyer who participated in the settlement discussions if Defendant made such an objection as it would be yet another alarming indicator of collusion.

XII. The Settlement Agreement violates Rule 23(h).

In addition to its many other flaws, the Settlement Agreement violates Federal Rule of Civil Procedure 23(h) by impermissibly delegating distribution of attorneys' fees to the attorneys themselves without review by the Court or the Class. Rule 23(h) establishes procedures for Class Counsel to make an application for fees and expenses, rules which are designed to protect the Class. Instead, Class Counsel requests the Court award a lump sum, presumably for the lawyers to divide amongst themselves via secret agreement. Dkt. 121; Settlement Agreement ¶ 108. This impermissibly relieves the Court of its responsibility to determine attorneys' fees and allocates it to a group of attorneys who themselves have a large stake in the outcome of those proceedings.

In re High Sulfur Content Gasoline Prods. Liab. Litig., 517 F.3d 220 (5th Cir. 2008), is directly on point. The Fifth Circuit held that "the appointment of a committee does not relieve a district court of its responsibility to closely scrutinize the attorneys' fee allocation, especially when the attorneys recommending the allocation have a financial interest in the resulting awards." *Id.* at 227. "[T]he district

court abdicated its responsibility to ensure that the individual awards recommended by the Fee Committee were fair and reasonable." *Id.* For a district court to allocate fees in an *ex parte* proceeding was "inconsistent with well-established class action principles and basic judicial standards of … fairness." *Id.*

The Fifth Circuit's *High Sulfur* decision had its roots in an opinion of Judge Ambro of the Third Circuit regarding Rule 23(h). In *Diet Drugs Prods. Liab. Litig.*, 401 F.3d 143 (3d Cir. 2005), the Third Circuit considered the appeal of several class counsel challenging a district court's award and allocation of attorneys' fees. *Diet Drugs*, 401 F.3d at 145. Judge Ambro's concurring opinion asked whether it was appropriate for the district court to defer to class counsel's proposed allocation of attorneys' fees because "counsel have inherent conflicts." *Id.* at 172-3. Because class counsel "make recommendations on their own fees and thus have a financial interest in the outcome," Objector Lindberg joins Judge Ambro in asking: "how much deference is due the fox who recommends how to divvy up the chickens?" *Id.* at 173.

Class Counsel's plan to divvy up the fees also cannot be reconciled with *High Sulfur* because such allocation would be made as part of an out of court, secret deal among the lawyers without any judicial or Class Member involvement. This secrecy also suggests probable violation of Rule 23(e)(3), "[t]he parties seeking approval must file a statement identifying any agreement made in connection with the proposal." It is unimaginable that the firms in this case do not have an agreement about whether and how much they would be paid. Whatever these fee-split agreements are, they should be filed with the Court and disclosed to the Class. Class Counsel should be required to disclose any and all arrangements which have been made with other plaintiffs' attorneys pursuant to this litigation.

The Court also must be involved in allocating the fees because if one law firm has secretly agreed to accept less than its lodestar or a smaller multiplier than is being requested from the Court, it is the Class that is entitled to that giveback, not the law firm that has secretly extracted a greater return than approved by the Court. *Cf. Bluetooth*, 654 F.3d at 949 (a giveback going to someone other than the class is a sign of self-dealing because "there is no apparent reason the class should not benefit from the excess allotted for fees"); *cf. also* Fed. R. Civ. P. 23 (e)(3) (forbidding secret agreements in class action settlements).

XIII. CONCLUSION

For the reasons set forth herein, Objector Lindberg prays this honorable court:

(a) Deny final approval of the Settlement Agreement; and,

(b) Order replacement class representatives and Class Counsel; or

(c) If the Court chooses to approve the Settlement Agreement, to:

i. Reduce the attorneys' fees to the lesser of a reduced lodestar reflecting the Court's inquiry into the propriety of the billing rates and practices of Class Counsel or 25% of the net amount of money paid to Class Members after the claims period closes;

ii. Reduce the requested costs in accordance with California law after conducting additional aggressive scrutiny of the costs requested;

iii. Refuse to award any incentive payments or significantly reduce them; and

iv. Reserve jurisdiction to grant an incentive award to Objector Lindberg and reasonable attorney's fees and costs to his counsel for preventing the sell-out of the Class.

OBJECTOR CERTIFICATION

I have read the foregoing and consent to its filing as my objection in the above-captioned case. Additionally, with regard to the factual assertions relating to my membership in the class set forth in Section I, I swear under penalty of perjury pursuant to 28 U.S.C. § 1746 that such assertions are true and correct. Executed this 7th Day of October, 2019.

Eric Michael Lindberg

DATED: October 7, 2019

Respectfully submitted,

/s/ David A. Makman, Esq.
David A. Makman, Esq. (SBN# 178195)
The Law Offices of David A. Makman
483 Seaport Court, Suite 103
Redwood City, CA 94063
Telephone: 650-242-1560
E-Mail: david@makmanlaw.com

/s/ Sam A. Miorelli, E.I., Esq.
Sam A. Miorelli, E.I., Esq. (FL Bar # 99886)
(pro hac vice application pending)
Law Office of Sam Miorelli, P.A.
1141 Mission Ridge Court
Orlando, FL 32835
Telephone: 352-458-4092
E-Mail: sam.miorelli@gmail.com

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Objection to Class Action Settlement of Eric Michael Lindberg was filed with the Court via CM/ECF which will provide service to all parties registered for electronic filing.

/s/ David A. Makman, Esq.
David A. Makman, Esq.

EXHIBIT 1 – United States Attorneys' Office Attorney's Fee Matrix – 2015-2019

USAO ATTORNEY'S FEES MATRIX — 2015-2019

Revised Methodology starting with 2015-2016 Year

Years (Hourly Rate for June 1 – May 31, based on change in PPI-OL since January 2011)

Experience	2015-16	2016-17	2017-18	2018-19
31+ years	568	581	602	613
21-30 years	530	543	563	572
16-20 years	504	516	536	544
11-15 years	455	465	483	491
8-10 years	386	395	410	417
6-7 years	332	339	352	358
4-5 years	325	332	346	351
2-3 years	315	322	334	340
Less than 2 years	284	291	302	307
Paralegals & Law Clerks	154	157	164	166

Explanatory Notes

1. This matrix of hourly rates for attorneys of varying experience levels and paralegals/law clerks has been prepared by the Civil Division of the United States Attorney's Office for the District of Columbia (USAO) to evaluate requests for attorney's fees in civil cases in District of Columbia courts. The matrix is intended for use in cases in which a fee-shifting statute permits the prevailing party to recover "reasonable" attorney's fees. *See, e.g.,* 42 U.S.C. § 2000e-5(k) (Title VII of the 1964 Civil Rights Act); 5 U.S.C. § 552(a)(4)(E) (Freedom of Information Act); 28 U.S.C. § 2412(b) (Equal Access to Justice Act). The matrix has not been adopted by the Department of Justice generally for use outside the District of Columbia, or by other Department of Justice components, or in other kinds of cases. The matrix does **not** apply to cases in which the hourly rate is limited by statute. *See* 28 U.S.C. § 2412(d).

2. A "reasonable fee" is a fee that is sufficient to attract an adequate supply of capable counsel for meritorious cases. *See, e.g., Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010). Consistent with that definition, the hourly rates in the above matrix were calculated from average hourly rates reported in 2011 survey data for the D.C. metropolitan area, which rates were adjusted for inflation with the Producer Price Index-Office of Lawyers (PPI-OL) index. The survey data comes from ALM Legal Intelligence's 2010 & 2011 Survey of Law Firm Economics. The PPI-OL index is available at http://www.bls.gov/ppi. On that page, under "PPI Databases," and "Industry Data (Producer Price Index - PPI)," select either "one screen" or "multi-screen" and in the resulting window use "industry code" 541110 for "Offices of Lawyers" and "product code" 541110541110 for "Offices of Lawyers." The average hourly rates from the 2011 survey data are multiplied by the PPI-OL index for May in the year of the update, divided by 176.6, which is the PPI-OL index for January 2011, the month of the survey data, and then rounding to the nearest whole dollar (up if remainder is 50¢ or more).

3. The PPI-OL index has been adopted as the inflator for hourly rates because it better reflects the mix of legal services that law firms collectively offer, as opposed to the legal services that typical consumers use, which is what the CPI-

Legal Services index measures. Although it is a national index, and not a local one, *cf. Eley v. District of Columbia*, 793 F.3d 97, 102 (D.C. Cir. 2015) (noting criticism of national inflation index), the PPI-OL index has historically been generous relative to other possibly applicable inflation indexes, and so its use should minimize disputes about whether the inflator is sufficient.

4. The methodology used to compute the rates in this matrix replaces that used prior to 2015, which started with the matrix of hourly rates developed in *Laffey v. Northwest Airlines, Inc*. 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985), and then adjusted those rates based on the Consumer Price Index for All Urban Consumers (CPI-U) for the Washington-Baltimore (DC-MD-VA-WV) area. Because the USAO rates for the years 2014-15 and earlier have been generally accepted as reasonable by courts in the District of Columbia, *see* note 9 below, the USAO rates for those years will remain the same as previously published on the USAO's public website. That is, the USAO rates for years prior to and including 2014-15 remain based on the prior methodology, *i.e.*, the original *Laffey* Matrix updated by the CPI-U for the Washington-Baltimore area. *See Citizens for Responsibility & Ethics in Washington v. Dep't of Justice*, 142 F. Supp. 3d 1 (D.D.C. 2015) and Declaration of Dr. Laura A. Malowane filed therein on Sept. 22, 2015 (Civ. Action No. 12-1491, ECF No. 46-1) (confirming that the USAO rates for 2014-15 computed using prior methodology are reasonable).

5. Although the USAO will not issue recalculated *Laffey* Matrices for past years using the new methodology, it will not oppose the use of that methodology (if properly applied) to calculate reasonable attorney's fees under applicable fee-shifting statutes for periods prior to June 2015, provided that methodology is used consistently to calculate the entire fee amount. Similarly, although the USAO will no longer issue an updated *Laffey* Matrix computed using the prior methodology, it will not oppose the use of the prior methodology (if properly applied) to calculate reasonable attorney's fees under applicable fee-shifting statutes for periods after May 2015, provided that methodology is used consistently to calculate the entire fee amount.

6. The various "brackets" in the column headed "Experience" refer to the attorney's years of experience practicing law. Normally, an attorney's experience will be calculated starting from the attorney's graduation from law school. Thus, the "Less than 2 years" bracket is generally applicable to attorneys in their first and second years after graduation from law school, and the "2-3 years" bracket generally becomes applicable on the second anniversary of the attorney's graduation (*i.e.*, at the beginning of the third year following law school). *See Laffey*, 572 F. Supp. at 371. An adjustment may be necessary, however, if the attorney's admission to the bar was significantly delayed or the attorney did not otherwise follow a typical career progression. *See, e.g., EPIC v. Dep't of Homeland Sec.*, 999 F. Supp. 2d 61, 70-71 (D.D.C. 2013) (attorney not admitted to bar compensated at "Paralegals & Law Clerks" rate); *EPIC v. Dep't of Homeland Sec.*, 982 F. Supp. 2d 56, 60-61 (D.D.C. 2013) (same). The various experience levels were selected by relying on the levels in the ALM Legal Intelligence 2011 survey data. Although finer gradations in experience level might yield different estimates of market rates, it is important to have statistically sufficient sample sizes for each experience level. The experience categories in the current USAO Matrix are based on statistically significant sample sizes for each experience level.

7. ALM Legal Intelligence's 2011 survey data does not include rates for paralegals and law clerks. Unless and until reliable survey data about actual paralegal/law clerk rates in the D.C. metropolitan area become available, the USAO will compute the hourly rate for Paralegals & Law Clerks using the most recent historical rate from the USAO's former *Laffey* Matrix (*i.e.*, $150 for 2014-15) updated with the PPI-OL index. The formula is $150 multiplied by the PPI-OL index for May in the year of the update, divided by 194.3 (the PPI-OL index for May 2014), and then rounding to the nearest whole dollar (up if remainder is 50¢ or more).

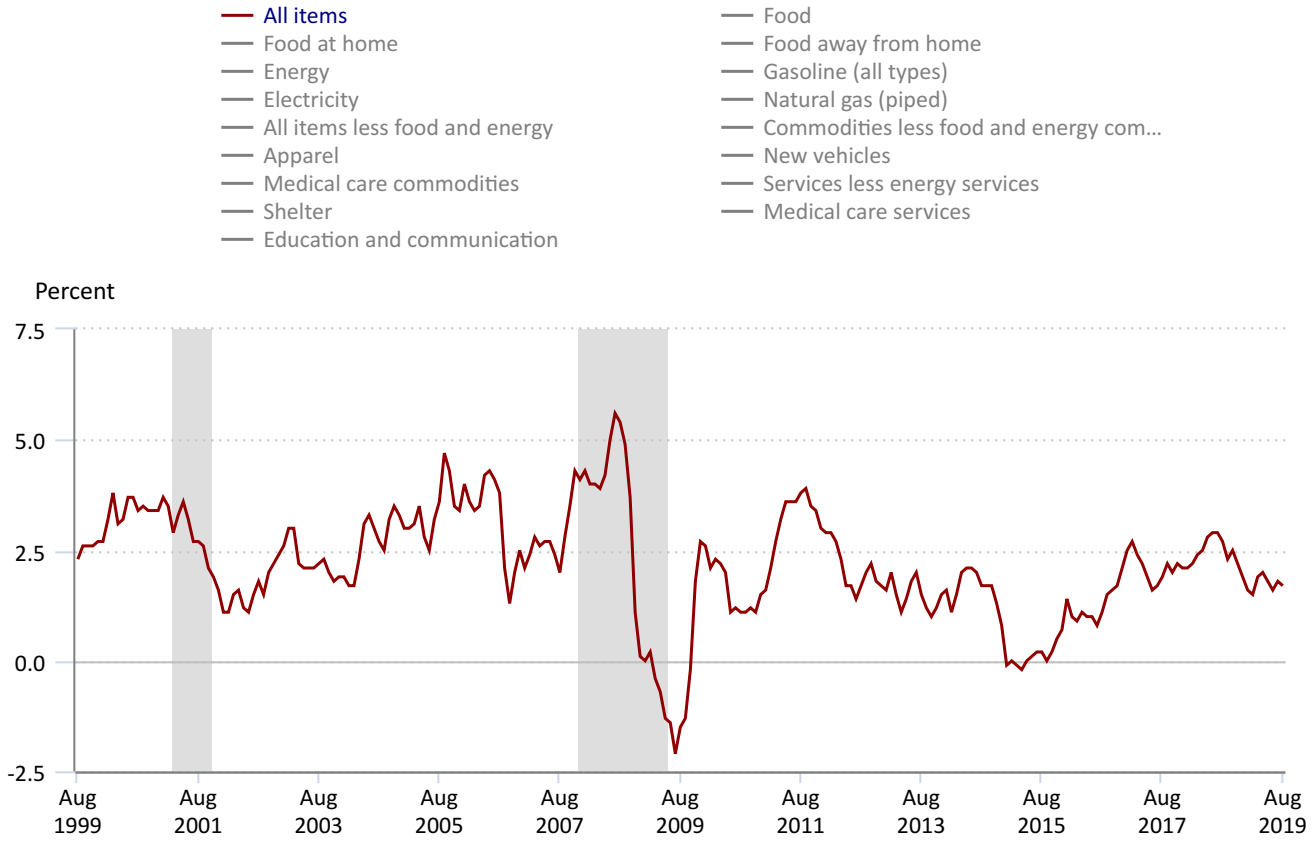
8. The USAO anticipates periodically revising the above matrix if more recent reliable survey data becomes available, especially data specific to the D.C. market, and in the interim years updating the most recent survey data with the PPI-OL index, or a comparable index for the District of Columbia if such a locality-specific index becomes available.

9. Use of an updated *Laffey* Matrix was implicitly endorsed by the Court of Appeals in *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516, 1525 (D.C. Cir. 1988) (en banc). The Court of Appeals subsequently stated that parties may rely on the updated *Laffey* Matrix prepared by the USAO as evidence of prevailing market rates for litigation counsel in the Washington, D.C. area. *See Covington v. District of Columbia*, 57 F.3d 1101, 1105 & n.14, 1109 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1115 (1996). Most lower federal courts in the District of Columbia

have relied on the USAO's *Laffey* Matrix, rather than the so-called "*Salazar* Matrix" (also known as the "LSI Matrix" or the "Enhanced *Laffey* Matrix"), as the "benchmark for reasonable fees" in this jurisdiction. *Miller v. Holzmann*, 575 F. Supp. 2d 2, 18 n.29 (D.D.C. 2008) (quoting *Pleasants v. Ridge*, 424 F. Supp. 2d 67, 71 n.2 (D.D.C. 2006)); *see, e.g., Joaquin v. Friendship Pub. Charter Sch.*, 188 F. Supp. 3d 1 (D.D.C. 2016); *Prunty v. Vivendi*, 195 F. Supp. 3d 107 (D.D.C. 2016); *CREW v. U.S. Dep't of Justice*, 142 F. Supp. 3d 1 (D.D.C. 2015); *McAllister v. District of Columbia*, 21 F. Supp. 3d 94 (D.D.C. 2014); *Embassy of Fed. Republic of Nigeria v. Ugwuonye*, 297 F.R.D. 4, 15 (D.D.C. 2013); *Berke v. Bureau of Prisons*, 942 F. Supp. 2d 71, 77 (D.D.C. 2013); *Fisher v. Friendship Pub. Charter Sch.*, 880 F. Supp. 2d 149, 154-55 (D.D.C. 2012); *Sykes v. District of Columbia*, 870 F. Supp. 2d 86, 93-96 (D.D.C. 2012); *Heller v. District of Columbia*, 832 F. Supp. 2d 32, 40-49 (D.D.C. 2011); *Hayes v. D.C. Public Schools*, 815 F. Supp. 2d 134, 142-43 (D.D.C. 2011); *Queen Anne's Conservation Ass'n v. Dep't of State*, 800 F. Supp. 2d 195, 200-01 (D.D.C. 2011); *Woodland v. Viacom, Inc*., 255 F.R.D. 278, 279-80 (D.D.C. 2008); *American Lands Alliance v. Norton*, 525 F. Supp. 2d 135, 148-50 (D.D.C. 2007). *But see, e.g*., *Salazar v. District of Columbia*, 123 F. Supp. 2d 8, 13-15 (D.D.C. 2000). Since initial publication of the instant USAO Matrix in 2015, numerous courts similarly have employed the USAO Matrix rather than the *Salazar* Matrix for fees incurred since 2015. *E.g.*, *Electronic Privacy Information Center v. United States Drug Enforcement Agency*, 266 F. Supp. 3d 162, 171 (D.D.C. 2017) ("After examining the case law and the supporting evidence offered by both parties, the Court is persuaded that the updated USAO matrix, which covers billing rates from 2015 to 2017, is the most suitable choice here.") (requiring re-calculation of fees that applicant had computed according to *Salazar* Matrix); *Clemente v. FBI*, No. 08-1252 (BJR) (D.D.C. Mar. 24, 2017), 2017 WL 3669617, at *5 (applying USAO Matrix, as it is "based on much more current data than the *Salazar* Matrix"); *Gatore v. United States Dep't of Homeland Security*, 286 F. Supp. 3d 25, 37 (D.D.C. 2017) (although plaintiff had submitted a "'great deal of evidence regarding [the] prevailing market rates for complex federal litigation' to demonstrate that its requested [*Salazar*] rates are entitled to a presumption of reasonableness, . . . the Court nonetheless concludes that the defendant has rebutted that presumption and shown that the current USAO Matrix is the more accurate matrix for estimating the prevailing rates for complex federal litigation in this District"); *DL v. District of Columbia*, 267 F. Supp. 3d 55, 70 (D.D.C. 2017) ("the USAO Matrix ha[s] more indicia of reliability and more accurately represents prevailing market rates" than the *Salazar* Matrix). The USAO contends that the *Salazar* Matrix is fundamentally flawed, does not use the *Salazar* Matrix to determine whether fee awards under fee-shifting statutes are reasonable, and will not consent to pay hourly rates calculated with the methodology on which that matrix is based. The United States recently submitted an appellate brief that further explains the reliability of the USAO Matrix vis-à-vis the *Salazar* matrix. *See* Br. for the United States as *Amicus Curiae* Supporting Appellees, *DL v. District of Columbia*, No. 18-7004 (D.C. Cir. filed July 20, 2018).

EXHIBIT 2 – 12-month percentage change, Consumer Price Index, selected categories, not seasonally adjusted, available at https://www.bls.gov/charts/consumer-price-index/consumer-price-index-by-category-line-chart.htm

12-month percentage change, Consumer Price Index, selected categories, not seasonally adjusted



Hover over chart to view data.
Note: Shaded area represents recession, as determined by the National Bureau of Economic Research.
Source: U.S. Bureau of Labor Statistics.