STATE OF WISCONSIN CIRCUIT COURT CIVIL DIVISION DANE COUNTY

STEVEN LIPTAI, 3 Fairview Ave Secaucus, NJ 07094 Individually and on behalf of all others similarly situated Plaintiff, v. SPECTRUM BRANDS HOLDINGS, INC. 3001 Deming Way, Middleton, WI 53562: APPLICA CONSUMER PRODUCTS, INC. 3633 South Flamingo Road, Miramar, FL 33027; and Does 1-10, inclusive, Defendants.	Case No.: 2018-CV-321 Classification Code: 30304 Amount claimed is greater than the amount under Wis. Stat. § 799.01(1)(d)

PLAINTIFF'S RESPONSE TO THE TWO OBJECTIONS

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I. INTRODUCTION

Plaintiff Steven Liptai respectfully submits this response to the Objections of Patrick S. Sweeney and Anna J. Carafas to the Settlement. As set forth in the Motion for Final Approval of Class Action Settlement ("Motion for Final Approval"), the reaction of the Settlement Class to the proposed Settlement has been overwhelmingly positive. Despite the extensive notice program, consisting of over 480,000 notices directly mailed to Class Members (as well as other notices issued through indirect means), only two (2) objections, an extraordinarily small percentage of the Class, were received. That alone undercuts the validity of these objections and favors final approval. *See Stoetzner v. United States Steel Corp.*, 897 F.2d 115, 118-19 (3d Cir. 1990) (holding that "only" 29 objections out of a 281 member class "strongly favors settlement"). Regardless, as outlined below, the objections are procedurally defective, lack merit, and/or are propounded by serial objectors (or suspected of covertly working with serial objectors) merely to extort payments from parties or their counsel. For example, Patrick Sweeney (a convicted felon recently disbarred from the practice of law), has filed objections in over 50 settlements and has been routinely criticized by various courts for filing bad faith, meritless objections. In *Chambers v. Whirlpool*, 214 F. Supp. 3d 877 (C.D. Cal. 2016), the court described Mr. Sweeney as "prolific in objecting to class action settlements" and "well-known for routinely filing meritless objections to class action settlements for the purpose of extracting a fee rather than to benefit the Class." *Id.* at 890, n. 7. For the reasons stated below, the Court should overrule both objections.

II. THIS COURT SHOULD OVERRULE THE SWEENEY OBJECTION

A. PATRICK S. SWEENEY LACKS STANDING TO OBJECT

Patrick Sweeney has the burden to demonstrate class membership in order to object. *See Agretti v. ANR Freight Sys.*, 982 F.2d 242, 246 (7th Cir. 1992) (only class members and parties to the settlement have standing to object to a settlement); *In re Yahoo Mail Litig.*, No. 13-cv-5326, 2016 U.S. Dist. LEXIS 115056, at *26 (N.D. Cal. Aug. 25, 2016) (citation omitted) ("The burden is on the objector to prove that he has standing to object."). Mr. Sweeney fails to do so here.

As set forth in his Objection, Mr. Sweeney claims merely that he "believes he is a member of the class." Sweeney Objection, p. 2. The Preliminary Approval Order, however, requires "a statement of his or her membership in the Settlement Class, including a verification under oath of Product(s) purchased and, to the extent known, the location, approximate date, and approximate price paid." 10/19/2018 Order, Dkt. No. 40 ¶18. Mr. Sweeney's statement, which is not based on personal knowledge, does not meet this standard and, given his prolific submission of objections without standing in other cases, should be viewed with skepticism. S*ee, e.g., Feder v. Electronic Data Systems Corp.*, 248 Fed. Appx. 579, 581 (5th Cir. Sept. 25, 2007) ("Allowing someone to object to settlement in a class action based on this sort of weak, unsubstantiated evidence would inject a great deal of unjustified uncertainty into the settlement process."); *In re Deepwater Horizon*, 739 F.3d 790, 809 (5th Cir. 2014) (holding that the district court did not abuse its discretion in deeming objectors who did not substantiate their membership in the class to have waived and forfeited their objections to settlement)

Furthermore, various courts have previously found that Mr. Sweeney's unadorned "belief" is insufficient to prove his standing to object. *See In re TRS*, No. 2:13-MD-2426-DBH,

2016 U.S. Dist. LEXIS 17837, at *20-21 n.16 (D. Me. February 10, 2016) (Sweeney did not have standing because "his claim to membership is based only 'on belief.'"); *see also Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc.*, 944 F.2d 1525, 1529 (9th Cir. 2001) (where a "declaration is not based on personal knowledge, but on information and belief, [it] does not raise a triable issue of fact"); *Harris v. J.B. Robinson Jewelers*, 627 F.3d 235, 239 n.1 (6th Cir. 2010) (a statement that "is not sworn, nor [] made under penalty of perjury … cannot be considered on summary judgment"); *Feder*, 248 Fed. Appx. 579, 581 (5th Cir. 2007) (settlement objector lacks standing because objector's "unsupported assertions of class membership" did not satisfy his "burden of proving standing"). Moreover, Mr. Sweeney and/or his objector clients have been caught objecting to settlements without having standing in at least 10 cases. *See* Supplemental Declaration of Antonio Vozzolo in Support of Final Approval ("Vozzolo Suppl. Decl."), ¶44.

Second and more disturbingly, Mr. Sweeney submitted a false statement in his claim form under penalty of perjury. Specifically, Sweeney states that he "filed a claim form on the settlement website." Sweeney Objection, p.2. In submitting the electronic claim form, Sweeney claimed under penalty of perjury that he purchased a Black & Decker coffee maker, model CM1100B, on March 1, 2015. Vozzolo Suppl. Decl. ¶46. In fact, however, Defendants did not release model CM1100B for sale to the public until December 31, 2015 -- 10 months after Mr. Sweeney swears he made the purchase. *Id.* and Exhibit B attached thereto. If this were an ordinary consumer, this could be considered an innocent mistaken recollection. But Mr. Sweeney is no ordinary consumer.

First, Mr. Sweeney has been convicted of felony bankruptcy fraud for "knowing and fraudulently" making "a material false declaration and statement under penalty of perjury." *Id.* at

¶48, and Exhibits D & E. Secondly, as detailed below, Mr. Sweeney is a serial objector whose purpose is not aimed at ensuring an adequate Settlement but is plainly brought for the improper purpose of holding hostage for personal gain a settlement aimed at rectifying the conduct at hand. Rather, his objections (which are often virtually identical boilerplate objections) have been routinely admonished and uniformly overruled by the Courts. *See infra*; Vozzolo Supp. Decl. ¶¶44-45. In sum, Mr. Sweeney has a history of making false statements to Courts, has been convicted of felony bankruptcy fraud, disbarred from the practice of law[1] and has a track record of rejected boilerplate objections in other class actions. *Id.* ¶¶44-48 & Exhibits C-L. Thus, the Court should view Mr. Sweeney's Objection as what it is: a sham objection by a disbarred felon convicted of fraud who is not even a member of the Class.

Therefore, the Court should overrule Mr. Sweeney's objection.

B. PATRICK S. SWEENEY IS A SERIAL OBJECTOR AND SERIAL OBJECTOR COUNSEL

Courts across the country have found that Sweeney is an unhelpful, self-serving "professional objector." *Larsen v. Trader Joe's Co.*, No. 11-cv-05188, 2014 WL 3404531, at *7 n. 4 (N.D. Cal. July 11, 2014); *see also In re Carrier IQ, Inc., Consumer Privacy Litig.*, No. 12-md-02330, 2016 WL 4474366, at *5 (N.D. Cal. Aug. 25, 2016) ("Mr. Sweeney is a serial objector."). "Serial" or "professional" objectors file objections merely to extort payments from parties or their counsel:

> Repeat objectors to class action settlements can make a living simply by filing frivolous appeals and thereby slowing down the execution of settlements. The larger the settlement, the more cost-effective it is to pay the objectors rather than suffer the delay of waiting for an appeal to be resolved (even an expedited appeal). Because of these economic realities, professional 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

[1] Mr. Sweeney was disbarred by the Wisconsin Stat Bar on February 19, 2019. *See* Vozzolo Supp. Decl. ¶ 48 and Exhibit G.

> are not restructured and the class, on whose behalf the appeal is purportedly raised, gains nothing.

Barnes v. FleetBoston Fin. Corp., No. 01-10395, 2006 WL 6916834, at *1 (D. Mass. Aug. 22, 2006); *see also In re Public Offering Secs. Litig.*, 721 F. Supp. 2d 210, 215 (S.D.N.Y. 2010) (Scheindlin, J.) ("[P]rofessional objectors undermine the administration of justice by disrupting the settlement in hopes of extorting a greater share of the settlement for themselves and their clients."). Judges are cautioned to "[w]atch out…for canned objections filed by professional objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests." *Managing Class Action Litigation: A Pocket Guide for Judges*, by Barbara J. Rothstein & Thomas E. Willging, Federal Judicial Center, p. 11 (2005). Indeed, "courts are increasingly weary of professional objectors: some of the objections were obviously canned objections filed by professional objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests." *O'Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 295 n.26 (E.D. Pa. 2003) (citation omitted). Courts have routinely discounted objections from such "professional" objectors. *See, e.g., Retta v. Millennium Products, Inc.*, No. CV15-1801-PSG(AJWx), 2017 WL 5479637, at *7 (C.D. Cal. Aug. 22, 2017) (citations omitted).[2]

In recognition of the potential for serial objectors, the Court's Preliminary Approval Order requires that if a Settlement Class Member or any Objecting Attorney objects to the Settlement, they must include a list of any other objections submitted by the Settlement Class member and/or his attorney(s) to any proposed class settlement in any state or federal court within the previous 5 years." 10/19/2018 Order, Doc. No. 40 ¶ 18. Mr. Sweeney violated the Court's Order and refused to list the cases in which he has previously objected to. Sweeney's

[2] Mr. Sweeney is not only a "serial objector," but he also acted as a serial objector's counsel before he was disbarred by the Wisconsin Stat Bar. *See* Vozzolo Supp. Decl. ¶¶44 and Exh. G. https://www.wisbar.org/directories/pages/lawyerprofile.aspx?Memberid=1020435 (last visited October 15, 2018) (suspended).

failure to comply with the candor required by this Court's order is an independent basis upon which to deny the objection. *See In re Automotive Parts Antitrust Litig.*, No.: 12-md-02311, 2017 WL 3499291, at *7 (E.D. Mich. July 10, 2017) ("The Court 'has the inherent authority and discretion to strike filings and materials that do not comply with the Court's rules.'").

And for good reason. Mr. Sweeney is a prolific serial objector, having objected to over 52 class action settlements in the past. *See* Vozzolo Supp. Decl. ¶44. Moreover, as a "serial objector" and "serial objector counsel," Mr. Sweeney has been routinely criticized by numerous courts across the country for filing frivolous boilerplate objections. For example, in *In re Polyurethane Foam Antitrust Litigation*, 178 F.Supp.3d 635 (N.D. Ohio 2016), Judge Jack Zouhary described Mr. Sweeney as having "shown bad faith and vexatious conduct, both in prior cases and in this action, in the pursuit of a payoff." *Id.* at 640. Judge Zouhary further declared that the conduct of Mr. Sweeney and the other objectors "resembles scavenger ants on a jelly roll, scrambling to extort money from the approved settlements." *Id.* Other courts have similarly criticized Mr. Sweeney. *See, e.g., Spann v. J.C. Penney Corp.,* 211 F. Supp. 3d 1244, 1260 n.11 (C.D. Cal. 2016) ("Mr. Sweeney is a known 'serial' objector" who "is so prolific in objecting to class action settlements that the court received an objection from him in a completely unrelated case" and "[i]n both cases, his objections set forth facts unrelated to either case."); *Chambers v. Whirlpool*, 214 F.Supp.3d 877, 890 n. 7 (C.D. Cal. 2016) (noting that Mr. Sweeney is "prolific in objecting to class action settlements" and "well-known for routinely filing meritless objections to class action settlements for the purpose of extracting a fee rather than to benefit the Class"); *Roberts v. Electrolux Home Prods., Inc.*, No. SACV12-1644-CAS(VBKx), 2014 WL 4568632, at *12-15 (C.D. Cal. Sep. 11, 2014) (holding that "[t]he Court has considered the objections of Mr. Sweeney, overrules them in their entirety, finds that they are not made for the purpose of

benefitting the Class, and finds that they are meritless in all respects."); *Brown v. Hain Celestial Grp., Inc.*, No. 3:11-cv-03082-LB, 2016 WL 631880, at *10 (N.D. Cal. Feb. 17, 2016) (noting that Sweeney was one of several professional objectors who had objected in the case, and that "courts across the country…have repeatedly turned aside their efforts to upend settlements"); *In re TRS Recovery Servs*., No. 2:13-md-2426, 2016 WL 543137, at *6 n.16 (D. Me. Feb. 10, 2016) (overruling Sweeney's objection and stating his "listed objections are without merit and appear to be a form document"); *In re Carrier IQ, Inc.*, 2016 WL 4474366, at *5 (N.D. Cal. Aug. 25, 2016) (overruling objection by Sweeney and labeling him a "serial objector" who lacked standing to object because the phone number he "provided on his claim form was actually the same number his wife, Pamela Sweeney, previously swore was hers in another case."); *Larsen*, 2014 WL 3404531, at *7 (overruling objections and recognizing that "attorney Patrick Sweeney also has a long history of representing objectors in class action proceedings"); *Martin v. Global Marketing Research Services, Inc.*, No. 6:14-cv-01290-GAP-KRS, Dkt. No. 139, at 2 (M.D. Fl. Nov. 4, 2016) ("Finally, the Court finds that the objection filed by Patrick Sweeney is frivolous and without merit.").

Mr. Sweeney's practice of filing objections, then withdrawing them after he is bought off, has been financially rewarding. When he was deposed in 2016, Sweeney admitted to receiving payments in seven cases in which he objected, in amounts up to $47,500. *See* Vozzolo Supp. Decl. Exh C, August 5, 2016 Deposition of Patrick S. Sweeney, Esq. in *In Re: Yahoo Mail Litigation*, 13-cv-04980 (N.D. Cal. May 26, 2015) ("Sweeney Deposition"), (ECF 197-2, at 8-9.) Accordingly, Mr. Sweeney's objection should be overruled.

C. PATRICK S. SWEENY HAS BEEN BARRED FROM THE PRACTICE OF LAW AND HAS BEEN CONVICTED OF FELONY BANKRUPTCY FRAUD

Sweeney has also been convicted of felony fraud. On July 21, 2017, Mr. Sweeney pled guilty to a violation of 18 U.S.C. § 152(3) for bankruptcy fraud. *See* Vozzolo Supp. Decl. Exhs. E (11/22/17 Judgment in a Criminal Case). Sweeney committed bankruptcy fraud when he falsely listed embezzled funds from three companies, Fairview Ridge, LLC; Fairview Ridge II, LLC; and Fairview Ridge III, LLC, as "loans to debtor" after he filed for bankruptcy in 2013. *Id.* Exh. D (7/12/17 Indictment of Patrick S. Sweeney). As part of Mr. Sweeney's plea deal, he was sentenced to five years probation with the first year on home confinement, and ordered to pay restitution in the amount of $481,970. *Id.* Exh. E, at 6. As a result, the Court should discount Mr. Sweeney's objection.

D. MR. SWEENEY'S OBJECTION IS FRIVOLOUS AND ILL-INFORMED

Sweeney's objection in this case consists of nearly identical arguments from a multitude of other objections filed by him in the past. In fact, it appears that Mr. Sweeney has simply cut-and-pasted from his prior objections in other cases as virtually all of his grounds for objecting are word-for-word identical to objections he has made in other cases. *See, e.g.*, *Tom's of Maine, Inc.*, Case No. 0:14-cv-60604-KMM, ECF No. 43, at 6 (recognizing Sweeney's objection as "the same recycled, boilerplate arguments they have previously (and unsuccessfully) used in the past").[3] Courts have specifically described Ms. Sweeney's objections as frivolous and "too vague . . . to properly analyze." *Rikos*, 2018 U.S. Dist. LEXIS 72722, at *36 (citation omitted).

[3] *See also In re Polyurethane Foam Antitrust Litig.*, 178 F. Supp. 3d at 640 (Sweeney's objections "amount to pure boilerplate language, wholly untethered from the actual terms of the settlement.").

Mr. Sweeney's objection in this case consists of nearly identical arguments from a multitude of other objections that he filed in the past. In fact, it appears that Mr. Sweeney has simply cut-and-pasted from his prior objections in other cases as virtually all of his grounds for objecting are word-for-word identical to objections he has made in other cases. *See* Vozzolo Supp. Decl. Exh. K (sample of Mr. Sweeney's objections in other settlements compared to this Settlement).

Even taken at face value, Sweeney's objection is wholly without merit. First, Mr. Sweeney complains that the "[c]laims administration process fails to require reliable future oversight, accountability and reporting about whether the claims process actually delivers what was promised." Sweeney Objection at 2. That statement is false. The Settlement, preliminarily approved by this Court, expressly provides: "To the full extent under Wisconsin law, the Court has, and shall continue to have, jurisdiction to make any orders as may be appropriate to effectuate, consummate, and enforce the terms of this Agreement, to approve awards of attorneys' fees and costs pursuant hereto, and to supervise the administration of this Agreement." Settlement, Sec. 4.1. In other words, if Class Counsel and the parties do not implement the Settlement as they have promised, this Court retains jurisdiction over them to enforce its order approving the settlement. In addition, Class Counsel is highly experienced and has implemented and overseen dozens of settlements without problem or complaint. There is no basis to conclude that anything different will happen here.

Next, Mr. Sweeney argues that the Court should withhold some amount of Class Counsel's attorneys' fees "to assure Class Counsel's continuing oversight and involvement in implementing the settlement." Sweeney Objection at 3. Once again, Mr. Sweeney cites no case requiring Class Counsel's fees to be withheld. In fact, it would also be unfair to Class Counsel to

withhold their attorneys' fees as they have worked without payment since the inception of the Action. Nor is such a withholding necessary as Class Counsel intends to continue their vigorous representation of the Class and ensure that payments are promptly made to the Class when the settlement becomes final and effective. *See* Vozzolo Suppl. Decl. at ¶28. Accordingly, no court-ordered withholding of attorneys' fees is necessary.

Fourth, Mr. Sweeney protests that "Attorney fees do not depend upon how much relief is actually paid to the Class Members." Sweeney Objection at 4. That objection is simply wrong and demonstrates Sweeney's ignorance of the Settlement and governing law. Sweeney fails to understand that Class Counsel have negotiated a Settlement pursuant to which Defendants have committed to pay Class Members up to $2.25 million and obtained equitable relief. Courts must consider the entire value of the settlement, including monetary and equitable relief, as well as the attorneys' fees and costs of administration, both in ruling on final approval and attorneys' fees. *See, Ciccarone v. B.J. Marchese, Inc.*, C.A. No. 03-CV-1660, 2004 U.S. Dist. LEXIS 25747, *8-*10, 2004 WL 2966932 (E.D. Pa. Dec. 22, 2004).

Finally, Mr. Sweeney argues that the "fee calculation is unfair in that the percentage of the settlement amount is too high." Sweeney Objection at 4. In support, Mr. Sweeney claims that there were "only 51 Docket Entries." *Id.* Sweeney, however, ignores the facts and arguments set forth in Plaintiff's Motion for an Award of Attorneys' Fees, Costs, and Expenses and Service Award (Dkt. No.'s 45-58) and supporting the supporting Declaration. In addition to the Docket entries, Plaintiff's counsel engaged in extensive informal and formal investigation and discovery, which are unaccounted for in Sweeney's analysis. Plaintiff further consulted experts, engaged in a contentious mediation before Honorable Angela Bartell (Ret.), a respected retired jurist. Moreover, there is no authority in Wisconsin or anywhere in the United States of

America adopting a methodology of reviewing attorneys' fees requests by counting the number of docket entries. In fact, this position has been recently rejected by the Hon. Analisa Torres, in *Gregorio v. Premier Nutrition Corp.*, C.A. NO 17 CIV 5987 (S.D.N.Y. Jan. 17, 2019) (Vozzolo Supp. Decl. Exhibit I) where Judge Torres rejected the same objection that attorney fees were "too high relative to the number of docket entries in this case, which is **a nonsensical approach that is unsupported by case law.**" *Id.* at p.10 (emphasis added).[4] The Court should overrule Mr. Sweeney's meritless objection.

III. THE COURT SHOULD OVERRULE THE CARAFAS OBJECTION

Ms. Carafas objects to the Settlement because it limits Class Members' recovery to $4.00 regardless of the number of products purchased. Carafas Obj. p. 2. Ms. Carafas further asks the Court to "only allow a settlement that provides a higher partial refund amount for each covered product purchased that is fair based on the cost of the products involved." *Id.* These objections ignore the substance of the claims asserted in the First Amended Complaint ("FAC"), as well as the law pertaining to the final approval of the Settlement.

First, Ms. Carafas' objection, which amounts to a bare assertion that class members should receive more, has been routinely rejected. The possibility "that the plaintiff might have received more if the case had been fully litigated is no reason not to approve the settlement." *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); *see also In re Polyurethane Foam Antitrust Litig.*, 168 F. Supp. 3d 985, 1001 (N.D. Ohio 2016) (citation omitted) ("'[T]hat the settlement could have been better … does not mean the settlement presented was not fair, reasonable or adequate[.]'"); *In re Ford Motor Co. Spark Plug & Three Valve Engine Prods. Liab. Litig.*, No. 1:12-MD-2316, 2016 U.S. Dist. LEXIS 188074, at *15 (N.D. Ohio Jan. 26,

[4] This objection was also found to "lack merit" when asserted on behalf of Pamela Sweeney in *Barron et al v. Snyder's-Lance, Inc.*, No. 0:13-cv-62496 (S.D. Fla. Nov 13, 2013) (Dkt. No. 213).

2016) (overruling objection that a settlement should have provided full recovery); *In re Whirlpool Corp.*, No. 1:08-WP-65000 (MDL 2001), 2016 U.S. Dist. LEXIS 130467, at *49-52 (N.D. Ohio September 23, 2016) (overruling objections that a settlement's cash or rebate benefits were not enough, stating "there was a very real risk of complete non-recovery, and the ratio of actual recovery to best-possible recovery is above average"). "'[I]t is well-settled that a cash settlement amounting to only a fraction of the potential recovery will not *per se* render the settlement inadequate or unfair. Indeed, there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.'" *In re Polyurethane Foam*, 168 F. Supp. 3d at 1001 (quoting *In re Bear Stearns Cos., Inc. Sec. Litig.*, 909 F. Supp. 2d 259, 270 (S.D.N.Y. 2012)).

Moreover, Courts have long recognized that a settlement is a resolution of a disputed matter which often leaves neither party fully satisfied with the result. *See In re Polyurethane Foam*, 168 F. Supp. 3d at 1001 (citation omitted) ("'Settlement is the offspring of compromise', and therefore 'the question … is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion.'"). Ms. Carafas essentially asks this Court to substitute its judgment for that of the parties and the mediator. "Although a trial court must consider the terms of a class action settlement to the extent necessary to protect the interests of the class, judges should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel." *Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1148-1149 (8th Cir. 1999) (quotation omitted). Thus, the "trial court should not make a proponent of a proposed settlement 'justify each term of settlement against a hypothetical or speculative measure of what concessions might have been gained; inherent in compromise is a yielding of absolutes and an abandoning of highest hopes.'" *Cotton v. Hinton*, 559 F.2d 1326,

1330 (5th Cir. 1977). The very object of a compromise "is to avoid the determination of sharply contested and dubious issues." *Young v. Katz*, 447 F.2d 431, 433 (5th Cir. 1971).

Here, Ms. Carafas does not present any expert testimony testifying to the magnitude of damages in this case. Rather, Ms. Carafas simply suggests that "Black & Decker products have distinctive branding and the allure of purchasing products from Black & Decker as a well-known high-end brand name affected my decision to purchase them over other similar products." Carafas Obj. at 2. In this case, the damages calculation is complicated and the subject of competing expert testimony. How a jury would respond to Plaintiff's damage proof is difficult to predict. Regardless, Ms. Carafas, like other Class Members, has a fully functioning toaster and toaster oven. Accordingly, the only appropriate damages model that could be supported is a price premium model[5] or the price difference between an appliance manufactured and warranted by Black & Decker, as opposed to one manufactured by Defendants. *See e.g., Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 760 (7th Cir. 2014) (Court discussing price premium model as "the difference between the actual value of the package [consumers] purchased" and "the inflated price [consumers] paid" thinking the product was as advertised.) In light of the opinion of the experts consulted, the recovery represents a meaningful benefit to consumers who are entitled to retain a fully functioning appliance. While Ms. Carafas would prefer to pass up this opportunity to settle the action for a substantial percentage of the potential damages at trial, she improperly assigns no value to the risks of going to trial. Moreover, even if Plaintiff and the class prevailed

[5] This is in contrast to a "full refund" model, which has been rejected by numerous courts where the product at issue provides some value. *See, e.g., Werdebaugh v. Blue Diamond Growers*, No. 12-cv-2724-LHK, 2014 WL 2191901, at *22 (N.D. Cal. May 23, 2014) ("[F]ull refund model is deficient because it is based on the assumption that consumers receive no benefit whatsoever from purchasing the accused products.")

at trial, the different damages theories and conflicting expert testimony could result in a substantially smaller recovery than achieved in this settlement, or no recovery at all.

Second, Ms. Carafas' objection misconstrues the Court's role at this stage: the Court may grant or deny approval of the Settlement, not revise its terms. *See* Manual for Complex Litigation (Fourth) § 21.61 (2004) ("The judicial role in reviewing a proposed settlement is critical, but limited to approving the proposed settlement, disapproving it, or imposing conditions on it. The judge cannot rewrite the agreement."); *see also Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982) (citation omitted) (noting that although the court possesses "broad discretion" in determining that a proposed class action settlement is fair, the court's role "must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.")

Ms. Carafas also ignores the significance of the mediation before Judge Bartell, by stating "a mediator serves to facilitate a settlement between parties present but can't ensure that the interests of parties who aren't present." Carafas Obj. p. 3. Unlike Ms. Carafas' viewpoint, "Courts have held that negotiations involving counsel and a mediator . . . raise a presumption of reasonableness." *Netzel v. W. Shore Grp.*, No. 16-cv-2552, 2017 U.S. Dist. LEXIS 214868, 2017 WL 1906955, at *6 (D. Minn. May 8, 2017).

Ms. Carafas also argues that the equitable relief provides no benefit for the Settlement Class Members. As a factual matter this is incorrect. Defendants have agreed to change their marketing and labeling practices and thereby prevent Settlement Class Members from being misled with regards to the manufacturer or warrantor of Defendants' products in the future. Courts have recognized that on final approval the "total value of the combined monetary and

equitable relief" must be considered. *Ciccarone*, 2004 U.S. Dist. LEXIS 25747, *8, 2004 WL 2966932 (E.D. Pa. Dec. 22, 2004).

Finally, Ms. Carafas objects to the requested attorneys' fees. For the same reasons set forth above, this objection to attorneys' fees is meritless.

For each of these reasons, Ms. Carafas' Objection should be overruled in its entirety.

Dated: March 13, 2019

By: *Electronically signed by John D. Blythin*
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