No. 16-3554

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN RE: SEARS, ROEBUCK AND CO. FRONT-LOADING WASHER PRODUCTS LIABILITY LITIGATION,

APPEAL OF: SEARS, ROEBUCK AND CO. and WHIRLPOOL CORPORATION

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
Nos. 1:06-cv-07023, 1:07-cv-00412, and 1:08-cv-01832

The Honorable Magistrate Judge Mary M. Rowland

CORRECTED BRIEF AND CIRCUIT RULE 30(a) APPENDIX FOR APPELLANTS SEARS, ROEBUCK AND CO. AND WHIRLPOOL CORPORATION

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 16-3554

Short Caption: In Re: Sears, Roebuck and Co. Front-Loading Washer Products Liability Litigation

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Sears, Roebuck and Co.; Whirlpool Corporation

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Wheeler Trigg O'Donnell LLP; Barnes & Thornburg LLP; Bartlit Beck Herman Palenchar & Scott LLP;

Mayer Brown LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

For Sears, Roebuck and Co.: Sears Holdings Corporation / For Whirlpool Corp.: None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

For Sears, Roebuck and Co.: Sears Holdings Corporation / For Whirlpool Corp.: None

Attorney's Signature: s/ Timothy S. Bishop Date: October 5, 2016

Attorney's Printed Name: Timothy S. Bishop

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** _____

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Attorney's Signature: s/ Joshua D. Yount Date: October 5, 2016

Attorney's Printed Name: Joshua D. Yount

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Attorney's Signature: s/ Logan A. Steiner Date: January 10, 2017

Attorney's Printed Name: Logan A. Steiner

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Attorney's Signature: s/ Michael T. Williams Date: October 5, 2016

Attorney's Printed Name: Michael T. Williams

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

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Attorney's Signature: s/ Allison R. McLaughlin Date: October 5, 2016

Attorney's Printed Name: Allison R. McLaughlin

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes and Rules

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

JURISDICTIONAL STATEMENT

District Court Jurisdiction. The district court had subject matter jurisdiction pursuant to the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d)(2). The complaint alleged that the amount in controversy exceeds $5,000,000 and that certain class members are citizens of different states than defendants. SA230-26 ¶¶ 6-17.[1] Defendant-Appellant Sears, Roebuck and Co. ("Sears") is a New York corporation with its principal place of business in Illinois. SA235 ¶ 15. Defendant-Appellant Whirlpool Corporation ("Whirlpool") is a Delaware corporation with its principal place of business in Michigan. SA236 ¶ 16. The complaint alleged a nationwide class as to Kenmore-brand machines and a California class as to Whirlpool-brand machines (SA247 ¶ 55), and named plaintiffs Kevin Barnes, Alfred Blair, Alan Jarashow, Joseph Leonard, Lawrence L'Hommedieu, Victor Matos, and Victoria Poulsen are residents and citizens of Texas, California, New Jersey, Minnesota, Washington, and Kentucky. SA230 ¶¶ 6-7; SA232-35 ¶¶ 10-14.

Appellate Court Jurisdiction. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. This consolidated action originally alleged two types of defects in Whirlpool-manufactured front-loading washing machines: (1) a defect in the central control unit, sometimes referred to as the "CCU"; and (2) a "biofilm" defect. *E.g.*, SA1-2 ¶ 2; SA50-51 ¶ 2. The district court severed the control unit from the biofilm

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[1] The same is true in all three of the control-unit-related actions that were ultimately consolidated in the final operative complaint. *See* SA2-3 ¶¶ 4-10; *Seratt* v. *Sears Roebuck & Co.*, No. 1:07-cv-412 (N.D. Ill.), ECF No. 1 ¶ 10; *Poulsen* v. *Whirlpool Corp.*, No. 1:09-wp-65003 (N.D. Ohio), ECF No. 1 ¶ 7.

claims for trial purposes (SA173), but left the two cases under the same caption. On February 19, 2015, the parties consented to have Magistrate Judge Mary M. Rowland conduct all further proceedings, including entry of final judgment. Dkt. 456; *see* 28 U.S.C. § 636(c)(1).

The court granted final approval to a class settlement of the control unit claims in February 2016 and, pursuant to Fed. R. Civ. P. 54(b), directed entry of final judgment on all control unit claims. SA390; SA393. On September 13, 2016, the district court granted in part class counsel's motion for attorneys' fees for their work on the CCU litigation. A1-55. Whirlpool and Sears timely filed a notice of appeal from that order on September 28, 2016. SA394; *see* 28 U.S.C. § 636(c)(3). Later that same day, having learned that the biofilm claims had been resolved in separate proceedings, the district court dismissed the consolidated action in its entirety and with prejudice. SA396.

The order granting attorneys' fees is a final appealable decision for two reasons. First, the order determined fees arising from the control unit claims on which the district court entered a Rule 54(b) final judgment, which made the order appealable even before resolution of the remaining issues in the consolidated action. *See Estate of Drayton* v. *Nelson*, 53 F.3d 165, 167 (7th Cir. 1994) ("a *final* award of fees [is] an appealable final decision even if . . . the underlying suit ha[s] not been resolved"); *Johnson* v. *Orr*, 897 F.2d 128, 130-32 (3d Cir. 1990) (fee order associated with a portion of the case resolved by Rule 54(b) judgment was final and appealable).

Second, even if the fee order had been interlocutory when entered, it became final and appealable when the district court dismissed the consolidated action in its entirety. At that point, the notice of appeal would have become effective. *Garwood Packaging, Inc.* v. *Allen & Co.*, 378 F.3d 698, 701 (7th Cir. 2004) (under Fed. R. App. P. 4(a)(2) "a premature notice of appeal lingers until the final decision is entered").

Prior Appellate Proceedings. This Court decided earlier consolidated appeals in this case that addressed class certification, *Butler* v. *Sears, Roebuck & Co.*, 702 F.3d 359 (7th Cir. 2012) ("*Butler I*"), and, after vacatur and remand by the Supreme Court, *Butler* v. *Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013) ("*Butler II*").

INTRODUCTION

When this Court approved class certification, it predicted that this case would end in settlement. *Butler II*, 727 F.3d at 798. This Court also predicted that if only a few class members were injured, the result would largely exonerate the defendants. *Id.* at 799. Both of this Court's predictions proved to be accurate. Plaintiffs entered into a settlement in which over 95% of the class is not eligible for relief, less than one percent of the class has submitted valid claims, and those claims will total less than $900,000 (compared to more than $100 million sought in plaintiffs' complaints).

Settlement on those modest terms would have been an efficient way to resolve this litigation soon after this Court's 2013 remand, by which time class counsel had the information they needed to know that such limited relief was all they could ever obtain. Instead, class counsel made an unrealistic settlement

demand for more than $10 million and piled up over 5,500 hours of additional work over a year and a half that added nothing of value to the class. Only then, shortly before trial was to begin, did class counsel agree to a settlement worth less than 10 percent of their prior demand. That settlement potentially benefitted only 5 percent of the class, and actually resulted in payouts to under 1 percent of the class. Despite class counsel achieving modest class benefits totaling less than $900,000, the district court awarded them nearly $4.8 million in attorneys' fees. That enormous award included a remarkable $2 million over and above class counsel's lodestar figure (reasonable hours expended times reasonable hourly rates), which was already inflated by 18 months of post-remand wheel-spinning that did nothing to improve the position of the class.

This fee award contravenes Supreme Court and Seventh Circuit precedent intended to rein in excessive awards. It creates perverse incentives to bring marginal claims, prolong litigation, run up enormous fees, and enter collusive settlements. And it defies common sense by giving class counsel more than *five times* the compensation obtained for their clients, the class. The fee award should be vacated.

STATEMENT OF ISSUES

1. Did the district court err when it disregarded the ratio analysis mandated by this Court as a cross-check of the lodestar methodology for calculating attorneys' fees?

2. Did the district court err when it misapplied the degree-of-success analysis that is a key part of the lodestar methodology?

3. Did the district court err when it applied a 1.75 lodestar multiplier that was arbitrary and unexplained and double-counted factors already subsumed in its lodestar calculation?

STATEMENT OF THE CASE

A. Plaintiffs Originally Alleged Class-Wide Defects And Injury.

In 2006, plaintiffs filed consumer class actions asserting federal and state warranty-law claims on behalf of purchasers of Kenmore front-loading clothes washers manufactured by Whirlpool and sold by Sears beginning in 2001. A1-3. In their complaint and in amended complaints filed in 2007 and 2009, plaintiffs alleged that the washers contained a defective "central control unit," or "CCU," which controls the washer. SA1-2 ¶ 2; Dkt. 66 ¶¶ 20-21; Dkt. 137 ¶ 50; SA74 ¶ 50.[2] The alleged defects purportedly caused malfunctions that interrupted wash cycles, prevented the washer door from locking or unlocking, and made the washer display error codes. SA74 ¶ 50.

Plaintiffs alleged that the control unit failures were caused by defective relays, which they characterized as a design defect. SA75 ¶ 51; SA80-82 ¶¶ 67-69, 73; SA113-114 ¶ 239; SA117 ¶ 259. Consistent with this theory, plaintiffs alleged that *all* washers purchased by class members contained a defective control unit. SA74 ¶ 50; SA82-83 ¶¶ 75-76. Plaintiffs alleged that Whirlpool and Sears injured *all* washer buyers at the point of sale because the buyers paid too much—a

[2] Plaintiffs also alleged "biofilm claims" based on a separate alleged defect that purportedly caused some washers to emit a moldy smell. *See, e.g.*, SA1-2 ¶ 2; SA66 ¶ 36. Those claims are not at issue in this appeal.

"premium price"—for a defective product. SA80 ¶ 66; *see also* SA47 (in opposing motion to strike class allegations, plaintiffs agued that "all HE Series owners have suffered an injury in the form of paying too high a price for the Machines").[3]

B. Class Counsel Altered Their Theory, But Still Sought Certification Of A Broad Class.

During class-certification discovery, class counsel learned that control unit malfunctions were attributable not to a design defect but to small solder cracks that developed in certain control units manufactured between 2004 and 2007 when human assemblers inserted the unit into its cradle too forcefully. SA144-147. Plaintiffs therefore sought class certification on the theory that a manufacturing defect harmed washer purchasers. SA136.[4]

Before certification, class counsel knew that few washer purchasers ever experienced error code problems or required a control unit repair. *See* SA30-31 ¶ 2; SA34-35 ¶ 10 & tbls. 2-5; SA41-44 ¶¶ 6, 8 & tbls. 2-3. Sears' service data showed that even during the height of control-unit-related issues in 2005, only 6.1% of washer buyers reported any error code problem (for any reason, even those

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[3] Plaintiff in the *Poulsen* case made the same claims on behalf of a California-only class of buyers of Whirlpool-brand washers. After unsuccessfully seeking to settle that case as a nationwide class, plaintiffs ultimately consolidated the claims of the California class of Whirlpool-brand buyers with the nationwide class of Kenmore-brand buyers for purposes of settlement. *See* Dkt. 508 (Consolidated Complaint). The *Poulsen* plaintiff, like the *Butler* plaintiffs, consistently alleged that, because of the defect, buyers had overpaid for their washers. *See Poulsen*, ECF No. 1 ¶¶ 31, 43 (Complaint); ECF No. 12 at 13 (Opp'n to MTD); ECF No. 31 ¶¶ 43, 58 (Amended Complaint); ECF No. 35 at 17, 32 (post-remand Opp'n to MTD). For the sake of simplicity we refer in text, for the period prior to consolidation, to the pleadings and the course of proceedings in the *Butler* case.

[4] In the same motion, plaintiffs sought certification of a "Biofilm Class." SA137.

unrelated to solder cracks). SA156 ¶ 20; SA41-42 ¶ 6 & tbl. 2. The complaint rate dropped to 1.4% in 2006 and 0.8% in 2007 as manufacturing changes addressed the problem. SA41-42 ¶ 6 & tbl. 2. Sears' data also showed that a large percentage of those who reported a control unit problem received free repairs under their warranties by contacting Sears' warranty service department. *E.g.*, SA32-35 ¶¶ 8-10 & tbls. 2-5; SA149-150; *see also* SA145-147 (parties agreed that the control unit malfunction was covered by the two-year written warranty); SA38 (warranty that was included with each Kenmore washer); SA32 ¶ 8; Dkt. 231-2 ¶¶ 21-22.

Despite this, class counsel did not limit their proposed class to those who experienced control unit malfunctions and paid out of pocket for repairs (or replacement). Instead, they requested a class of "[a]ll persons or entities who purchased, not for resale, a front-load washing machine manufactured from 2004 to 2007 with a Bitron CCU." SA137.[5] They identified as issues "common to Plaintiffs and all Class members" whether the washers "are defective because of the step in the manufacturing process which results in cracking of the solder pads of the CCU during insertion into their cradles," whether class members "have been damaged," and "the proper measure of such damages." SA138-139.

In 2011, the district court certified the requested control unit class. SA160-172. On appeal, this Court upheld certification of a liability-only class. *Butler I*, 702 F.3d at 363. After the Supreme Court vacated and remanded, this Court reaffirmed

[5] The operative complaint alleged defects in washers nationwide, but plaintiffs chose to brief class certification in piecemeal fashion, seeking a six-state class first for purchasers in California, Indiana, Illinois, Kentucky, Minnesota, and Texas. SA137-138 nn.1-2.

its ruling, concluding that whether the washers were defective presented a "single, central, common issue of liability" warranting class certification even if "the amount of harm to particular class members" was an "individual issu[e]" that would require "individual hearings." *Butler II*, 727 F.3d at 798-799, 801. This Court also predicted that the "parties probably would agree on a schedule of damages," and "the case would probably be *quickly settled*." *Id.* at 798 (emphasis added).

In the course of the appellate proceedings, class counsel presented their claims narrowly to make class certification appear more reasonable. They told this Court and the Supreme Court that they were pursuing a manufacturing defect theory that "will provide relief, if at all, only to individuals whose machines have manifested the defect." *Sears, Roebuck & Co.* v. *Butler*, No. 12-1067, 2013 WL 1836534, at *2, *8 (U.S. Apr. 30, 2013) (Br. in Opp'n); *Butler* v. *Sears, Roebuck & Co.*, No. 11-8029 (7th Cir. Oct. 24, 2011) (Br. in Opp'n) ("Plaintiffs seek relief for only those whose CCUs have failed, for breach of warranty"). But once the appeals concluded, class counsel revived their demands for far broader class-wide relief and introduced a new *design* defect theory.

C. Class Counsel Overvalued And Overlitigated The Case After Remand.

Over the seven-plus years that passed between the filing of this case (in 2006) and the conclusion of appellate proceedings on class certification (in 2014), class counsel devoted little effort to plaintiffs' control unit claims, focusing instead on the biofilm claims. *E.g.*, A21-24 (attributing less than a quarter of plaintiffs' primary appellate counsel's time to CCU issues); SA144-147 (devoting only four

pages of class certification motion to CCU claims); SA159 (devoting only one paragraph of reply brief to CCU claims). Only "[a]bout 10% of the time" reported in counsel's fee petition—around 613 hours valued at some $325,000—predates the Court's remand. *See* SA346 n.20; A20 at 20; *see also* SA346 ("the bulk of the lodestar reported in [class counsel's] fee petition [was] accumulated following the Seventh Circuit's reinstatement of the class certification decision"); A21-24 ($109,507 was for CCU-related class certification appellate work).

Class counsel racked up the remaining 5,520 hours (valued at $2.9 million) in 1.5 years of wheel-spinning after the remand became final. Class counsel's work did not include presenting any witnesses or briefing the merits of the case, and it involved only three depositions. *See* SA274 ¶ 12. The great bulk of their time was instead devoted to document review, a new expert opinion, and other tasks that easily could have been avoided by proposing a reasonable settlement promptly after the Supreme Court's denial of certiorari in *Butler II*, if not before then. *See* SA274-277 ¶¶ 12, 14-15 (class counsel's description of post-remand work); A25, A40 (thousands of hours spent on document review). Indeed, class counsel inexplicably assigned senior lawyers to spend over 2,300 hours on document review in a ten-month period post-remand. *See* SA294-310; SA338-341; SA357-358.

Long before the remand, class counsel had learned that control unit malfunctions resulted from manufacturing defects due to occasional human assembly error and affected only a small portion of the class. And in appellate proceedings, counsel had asserted that only buyers who experienced malfunctions

would receive relief. But instead of promptly negotiating a settlement recognizing that the control unit claims were likely to result in less than $1 million in class benefits, class counsel decided to first record thousands of hours of work while pretending that the claims were actually worth tens (if not hundreds) of millions of dollars. Dkts. 574-578.

In July 2014, almost six months after the remand became final, class counsel proposed what would have been a substantial $10 million-plus settlement for a nationwide class of all buyers of Kenmore-brand and Whirlpool-brand washers with Bitron control units. SA353; *see supra* n.3. That proposal would have required reimbursement of all repair and replacement costs almost without limitation and with automatic reimbursement for repair and replacement costs reflected in the defendants' records (*i.e.*, without the need for those class members to file a claim). *Id.* Sears and Whirlpool rejected that proposal because it bore no logical relationship to the facts of the case or to the nature of the actual manufacturing defect.

The soundness of that decision was confirmed three months later when Whirlpool prevailed at a class action trial on biofilm claims involving the same washers, brought by many of the same plaintiffs' lawyers handling this case. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, No. 08-wp-65000 (N.D. Ohio), ECF No. 491. That trial exposed the many obstacles that plaintiffs in this case would face in proving class-wide defects and class-wide injury on their control unit claims. It also showed that Whirlpool was willing to litigate a product defect

class action to a jury verdict, rather than enter into an extortionate class settlement.

Class counsel nonetheless continued to litigate this case full bore. *See* Dkts. 574-577. In early March 2015, they disclosed an expert report articulating a new and more expansive liability theory. SA291-293. Now they claimed that the relevant control unit (the "CEM-1 Matador 1") had a *design* defect because it was not sufficiently flexible and robust for the washer environment. SA292-293.

But with a July 2015 trial date approaching, class counsel abandoned their prior settlement demands and made a new offer containing "substantial revisions" that were all highly favorable to Whirlpool. SA354 ¶ 7. Those changes included limiting the class to washers with CEM-1 Matador 1 control units, eliminating automatic reimbursement of class members' known out-of-pocket repair costs and imposing instead a claim requirement, reducing reimbursements for failures that manifested more than four years after purchase, and eliminating payments for failures that manifested more than eight years after purchase. SA354-355.[6] Whirlpool and Sears negotiated further large reductions in the class relief, including limiting the coverage period to three years after purchase and restricting the Whirlpool-brand settlement to California residents only. *Id.*

Before submitting the settlement for court approval, plaintiffs amended their complaint to separate the Sears control unit claims from the Sears biofilm claims,

[6] The removal of automatic payments was particularly consequential because about 85% of those who would have been eligible for an automatic payment ultimately did not submit a claim. *See infra* p. 17.

consolidate the claims of California buyers of Whirlpool-brand washers, and clarify the nature and scope of the claims being settled. SA174; SA228. This consolidated complaint alleged that the control units had "defects in their design." SA239 ¶ 29; SA245 ¶¶ 46-48; SA246 ¶ 53. And it described the "actual damages" suffered by class members as their having "overpaid for the Machines because the value of the Machines was diminished at the time they were sold to consumers" and having had to "pay for costs associated with service calls, buy replacement parts, purchase specialized cleaning materials, pay for washing items at Laundromats, and buy extended warranties." SA245; *see also* SA259. Plaintiffs also alleged that the amount in controversy "exceeds $5,000,000" (SA236 ¶ 17), repeating allegations made in the Sears and Whirlpool cases since their inception (*see supra* n.1) and confirming that class counsel always valued their CCU claims as worth tens of millions of dollars.

D. The Parties Settled The Case On Terms Overwhelmingly Favorable To Whirlpool And Sears.

Consistent with Whirlpool's and Sears' longstanding theory of the case and contrary to plaintiffs' allegations that all class members overpaid for their washers, the parties entered a claims-made settlement that sharply restricted the relief available to washer buyers. This settlement limited the classes to buyers (or gift recipients) of Kenmore and Whirlpool washers built between June 8, 2004, and February 28, 2006, with a Bitron-manufactured Matador 1 CCU and a new-washer warranty package. SA188; SA193-194. Although one class included all U.S.

residents who bought or received Kenmore washers, the other included only *California* residents who bought or received Whirlpool-branded washers. *Id.*

The settlement provided that a "prequalified class member"—someone who could be identified in defendants' databases as having paid for a qualifying repair or a qualifying service contract within three years after purchase—would be eligible for compensation if he or she submitted a claim form. SA189; SA202. A non-prequalified class member would be eligible for compensation only if he or she provided documentary proof that he or she (1) experienced a control unit-related performance problem within three years after purchase and (2) paid for a qualifying repair or a qualifying service contract related to that problem. SA190; SA200-203.

The settlement's limitation to repairs for control unit problems that occurred within three years of purchase was significant, for parts of that period were already covered by Sears' warranty. Class members by definition had bought or received washers with written warranties that provided one-year coverage for labor and two-years coverage for parts. SA188-189; SA193-194; A7. Many class members who experienced control unit problems had already made warranty claims that fully or partially covered their costs. *See* SA33-35 ¶¶ 9-10 & tbls. 2-5; SA200-208.

The settlement made four types of compensation available to class members with valid claims (subject to offset for any prior, voluntary compensation received from Sears or Whirlpool). First, those with valid claims would receive reimbursement for the documented costs of a first paid repair and, subject to time limits, a second paid repair. SA204-05. If the fact but not the amount of such a

repair was documented, claimants would receive $150 per repair. *Id.* Second, those who chose to replace rather than repair their washers would receive the documented price paid for a replacement washer up to a $300 maximum. SA204.[7] Third, those who bought a qualifying service contract used to obtain free repair service would receive $100 to partially offset the cost of that contract. SA206. Fourth, those who had a service technician replace their control unit three times within four years after purchase would receive their choice of the documented price paid for the washer or reimbursement of the documented costs of the first, second, and third paid repairs. SA206-207.

These settlement terms—although fair to class members given the many weaknesses in plaintiffs' claims—provide only a small fraction of the relief demanded by class counsel over the course of the case:

	2009 Complaints	Class Certification Motion	July 2014 Settlement Proposal	March 2015 Settlement Proposal	2015 Complaint	Settlement Agreement
Class Washers	Kenmore front-load washers (*Butler*); Whirlpool front-load washers (*Poulsen*)	Kenmore front-load washers with Bitron CCU (*Butler*); Whirlpool front-load washers with Bitron CCU (*Poulsen*)	Kenmore and Whirlpool front-load washers with Bitron CCU	Kenmore and Whirlpool Matador 1 washers with Bitron CEM-1 CCU	Kenmore and Whirlpool front-load washers with Bitron Matador 1 CCU and new-washer warranty package	Kenmore and Whirlpool front-load washers with Bitron Matador 1 CCU and new-washer warranty package

[7] This cap is important because class members paid $1,000 or more for their Kenmore and Whirlpool front-loading washers and likely did not replace their washers with inexpensive top-loading washers.

	2009 Complaints	Class Certification Motion	July 2014 Settlement Proposal	March 2015 Settlement Proposal	2015 Complaint	Settlement Agreement
Class Period (mfg. date)	None	2004-2007 (*Butler*); 2/04 – 3/06 (*Poulsen*)	Appropriate time limits	Open to negotiation	6/8/04 – 2/28/06	6/8/04 – 2/28/06
Class Geography	Nationwide (*Butler*); California (*Poulsen*)	Six states, initially (*Butler*); California (*Poulsen*)	Nationwide (both brands)	Open to negotiation	Nationwide (Kenmore); California (Whirlpool)	Nationwide (Kenmore); California (Whirlpool)
Class Members			1,466,301	1,136,950	542,869	542,869
Premium Price Damages	Yes	No,on appeal (*Butler*); Unspecified (*Poulsen*)	No	No	Yes	No
Limits on Repair Damages	None	None	None	Reasonable average cost to replace CCU	None	Two repairs (unless CCU replaced 3 times)
Limits on Replacement Damages	None	None	None	Reasonable average cost to replace CCU	None	$300
Limits on Service Contract Damages	None	None	None	Reasonable average cost to replace CCU	None	$100
Manifestation Time Limit	None	None	None	8 years	None	3 years
Prorated Re-imbursement	n/a	n/a	Unspecified sliding scale	75% after 4 years; 50% after 6 years	n/a	None
Automatic Payments	n/a	n/a	Yes	No	n/a	No

Poulsen, ECF No. 1 ¶¶ 31, 43, 52; *Poulsen*, ECF No. 15 at 1; SA49; SA136; SA183; SA228; SA400-01; *see also* SA356 (value of claims as pleaded exceeded final settlement value by $133 million).

Because only class members who, within three years after purchase, experienced a control unit malfunction and paid out-of-pocket for repairs, replacement, or a service contract were eligible for relief, *at least 95 percent of the class received no relief at all*. SA287. And of the five percent of the class eligible for relief, the parties knew that most would not submit a valid claim with the required documentation in light of past claim rates for similar settlements. SA289-90 & nn.5-6. Yet all class members released all CCU-related claims. SA190-191; SA219-220. The settlement thus was highly favorable for Whirlpool and Sears, which were able to settle the class claims for less than the cost of continuing to defend against them. SA354-355.

E. Class Counsel Demanded Fees Totaling More Than Six Times The Class Benefits.

Sears and Whirlpool were unable to agree with class counsel on a fee award because counsel demanded fees far in excess of any reasonable estimate of the money that would go to the class. The parties therefore agreed that, while class counsel was entitled to "reasonable attorneys' fees," the amount of those fees would be determined by the district court and would have no impact on the amount of any benefits paid to class members. SA216-217.

Submitting hundreds of pages of heavily researched and documented briefing of the sort they never managed to pull together on the merits or class certification of these claims, class counsel asked the district court for $6 million in attorneys' fees, representing a claimed $3.25 million lodestar and a 1.85 multiplier. SA265; SA347

n.35.[8] As the district court recognized, $6 million far exceeded any reasonable estimate of class benefits at the time of the final approval hearing. A13. At that time—which was after the claims period ended—only 1.9% of class members had submitted claims, and only 0.3% had submitted valid claims. SA289; SA349-50.[9] The value of the valid claims was just under $475,000. SA349.

	Class Members	Timely Claims	Valid Claims	Valid Claim Rate	Value of Valid Claims
Prequalified	8,493	1,247	1,247	14.7%	$314,971.28
Non-prequalified	534,376	9,257	475	0.08%	$159,051.57
Total	542,869	10,504	1,722	0.3%	$474,022.85

Id.; SA355. Additional claims adjudication work remained to be done, but the district court accepted defendants' estimate that the total payout to the class would not exceed $900,000. A13; SA286-87. A report on final claims data is expected in the next few months, and defendants will provide an updated total—likely less than $900,000—to this Court as soon as it is final.

Based on the limited class benefit achieved, defendants urged the district court to award no more than $890,000 in attorneys' fees and, at the very least, to reject any upward multiplier. Dkt. 564 at 18-34, 49-53; Dkt. 584 at 7-17, 29.[10]

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[8] Class counsel originally requested a lower lodestar and a higher multiplier but the same $6 million total, making clear that they based their choice of multiplier solely on the number needed to get to $6 million. SA265; SA347 n.35.

[9] The actual claim rate is far lower than the 16% trumpeted by class counsel below. Dkt. 573 at 12. That 16% figure was an overestimated claim rate for *prequalified* class members, who comprise only 1.6% of the class.

[10] Whirlpool and Sears also challenged the claimed lodestar as unsupported and inflated. Dkt. 564 at 35-48; Dkt. 584 at 18-27.

F. The District Court Awarded Class Counsel Over Five Times The Class Benefits In Fees.

The district court awarded class counsel $4,770,834 in fees. A1. It acknowledged that this Court has "set forth a ratio to assess the reasonableness of a fee request, namely 'the ratio of (1) the fee to (2) the fee plus what the class members received.'" A12. But the district court held that it was "not bound" by that precedent because this case involved "an exceptional settlement that actually makes the class whole." A14-15. The court emphasized that "qualified" class members will receive "nearly all the money they spent repairing or replacing their faulty washer," but did not acknowledge that the vast majority of the class gave up their claims without any opportunity to recover under the settlement. A15. And the court relied on a self-serving joint declaration by two *class counsel* to erroneously conclude that "[b]oth parties" had "attest[ed]" that the settlement provides class members with "'full, make-whole relief for repairs (and significant compensation for washer replacements)" if a control unit malfunctioned within three years of purchase and had "agree[d] that class members are enjoying a 'substantial recovery.'" A18 (quoting SA181 ¶ 12).

Based on these determinations, the district court applied the lodestar method for calculating attorneys' fees—multiplying counsel's hourly rates by the claimed number of hours they expended on the litigation—without any cross-check using a ratio analysis. A19. The district court repeatedly cited the nine-year length of the litigation as justifying a lodestar-based award, without any analysis of whether class counsel's dilatory efforts were prudent or justified. A13; A19. And it regarded

the parties' inability to settle fees in a particular amount as a reason to be less "wary" of class counsel's request for a lodestar-based award. A15-19.

The district court calculated a lodestar of $2,726,190 after making a few limited reductions to class counsel's claimed lodestar hours (A22-27), but approved generous rates for appellate and other counsel (A31-32; A37-38). The court then applied a lodestar multiplier of 1.75 to increase the fee award by $2,044,644, without explaining why it chose that multiplier amount. A48-54.

In a cursory analysis, the district court ruled that three factors supported an upward multiplier. First, the court held that class counsel achieved a high degree of success. A48-50. Disregarding the scope of the claims pleaded in the complaints and the many concessions class counsel made to reach a settlement, the district court—based on class counsel's self-serving declaration—concluded that class counsel achieved virtually all they ever hoped for and so deserved a multiplier. *Id.* Second, the court held that novelty and complexity justified a multiplier because this Court issued two opinions in this litigation addressing class certification standards, the second of which has been widely cited. A50-52. Third, the court concluded that the "public interest[s] advanced" justified a multiplier because "this settlement encourages manufacturers to expeditiously identify and cure defects in their products." A52.[11]

[11] Sears and Whirlpool, of course, were already doing this under warranty programs in effect before this litigation was filed. SA38. And Whirlpool had taken several steps to correct the human errors in manufacturing before this litigation was filed. SA153 ¶¶ 7-8; SA155-156 ¶¶ 15-19, 22; Dkt. 231-20.

Adding the multiplier to the lodestar, the district court awarded class counsel $4,770,834 in attorneys' fees—five times the upper limit of class benefits. And class counsel has announced their intent to seek another $295,000 in attorneys' fees racked up in litigating over attorneys' fees—about the same amount they claimed for all of their pre-remand work in this case. SA398. It is no exaggeration to say that this protracted nine-year litigation has concerned fees and little else.

SUMMARY OF ARGUMENT

The district court's award of $4.8 million in attorneys' fees for a settlement worth no more than $900,000 contravenes controlling Supreme Court and Seventh Circuit precedent in three independent ways.

First, the district court cast aside the ratio analysis that this Court has adopted for fee awards in connection with class action settlements. That analysis was not optional, as the district court believed. Nor did the settlement here provide the "full recovery" that the district court thought justified bypassing the ratio analysis. Conducting the required ratio analysis would have shown that the enormous disproportion between the fee award and the maximum class recovery produces a 0.84 ratio that far exceeds the 0.5 presumptive cap applied by this Court. To bring the fee award under that cap, the award must be reduced to no more than $900,000.

Second, the district court failed to apply a downward multiplier to reduce the lodestar based on class counsel's lack of success. Success is judged by comparing what the class recovered to both the effort expended and relief sought by counsel. Both comparisons call for a greatly reduced fee. It was unreasonable and inefficient

for class counsel to incur a $2.7 million lodestar in pursuing a $900,000 maximum recovery. And class counsel recovered only a small portion of the tens or hundreds of millions of dollars originally sought in this litigation and in settlement negotiations. Again, the fee awarded should be adjusted downward to $900,000 or less.

Third, the court erroneously granted an arbitrary 1.75 upward multiplier that added $2 million to class counsel's lodestar. The district court's reasons for doing so—degree of success, novelty and complexity, and public interest—are unsupported, subsumed in the lodestar, or both. The Supreme Court has forbidden upward multipliers resting on the threadbare grounds offered by the district court.

The approach taken by the district court would encourage prolonged litigation to drive up class counsel's hours with no added value to the class. It would encourage the types of collusive class action settlements this Court has warned against. And it would lead to more fee appeals. The fee award should be vacated with instructions to enter an award less than $900,000.

STANDARD OF REVIEW

This Court "review[s] *de novo* the district court's methodology to determine whether it reflects procedure approved for calculating awards" of attorneys' fees. *Harman* v. *Lyphomed, Inc.*, 945 F.2d 969, 973 (7th Cir. 1991). This Court reviews the reasonableness of the amount of fees awarded for an abuse of discretion. *Id.* Defendants here challenge the district court's failure to apply the correct legal standards for awarding attorneys' fees, which is reviewed *de novo*; but even on deferential review, the enormous fee award here is unreasonable.

ARGUMENT

I. THE DISTRICT COURT ERRED AS A MATTER OF LAW BY AWARDING FEES FAR IN EXCESS OF CLASS BENEFITS.

Neither this Court nor the Supreme Court has hesitated to overturn attorneys' fee awards that are out of proportion to the benefits generated by counsel's work. In doing so, courts have employed one of two alternative analyses. In settled class actions, this Court has applied a ratio analysis assessing the reasonableness of the ratio of the fee compared to the fee plus the class recovery. *Pearson* v. *NBTY, Inc.*, 772 F.3d 778, 781 (7th Cir. 2014). More generally, courts have applied a degree-of-success analysis, adjusting the lodestar based on comparing the results counsel achieved to what counsel sought and the work they put in. *Hensley* v. *Eckerhart,* 461 U.S. 424, 436 (1983); *Montanez* v. *Simon*, 755 F.3d 547, 556 (7th Cir. 2014).

The legal principle underlying both analyses is the same—a fee award must be assessed in light of the benefits produced by the litigation and, barring exceptional circumstances, should be no greater than the value of those benefits. Under either analysis, the disproportionate result here—an award five times the maximum amount the class will receive—must be set aside.

A. A Ratio Analysis Warrants A Fee Award No Greater Than The Amount Of Class Benefits.

Fee awards in class actions warrant heightened judicial scrutiny. *Redman* v. *RadioShack Corp.*, 768 F.3d 622, 629 (7th Cir. 2014). Class actions are different from other cases because class counsel "don't have clients with whom they negotiate billing. Class members do not tell class counsel how much time to expend on a case

and how much they can charge per hour." *Id.* at 635; *accord Pearson*, 772 F.3d at 787 ("Class counsel rarely have clients to whom they are responsive"). Mindful of these considerations, this Court has determined that "hours can't be given controlling weight in determining what share of the class action settlement pot should go to class counsel." *Redman*, 768 F.3d at 635. Although a district court can "start with hours," it cannot "rightly stop there." *Id.* It must assess "the value of class counsel's work to the class." *Id.*

To assess whether a contemplated fee award is proportional to "the value of class counsel's work to the class," this Court has prescribed a ratio for lower courts to apply: "the ratio of (1) the fee to (2) the fee plus what the class members received." *Id.* at 630, 635; *Pearson*, 772 F.3d at 781 (same). Thus if the fee were $500,000 and class members received $1 million, the ratio would be 0.33 ($500,000 ÷ ($500,000 + $1,000,000)). The "presumption" in consumer class actions is that a fee award "should not exceed a third or at most a half of the total amount of money going to class members and their counsel." *Id.* at 782. In other words, the maximum ratio is 0.5, or a one-to-one relationship between a fee award and class benefits.

The ratio analysis mandated in *Redman* and *Pearson* shows that the district court's fee award is far out of line with what this Court has deemed acceptable. As the district court acknowledged, the settlement provided no more than $900,000 in value to the class. A13. For this recovery, the court awarded class counsel nearly $4.8 million. A1. This means the court approved a fee with a ratio of at least 0.84

($4,770,834 ÷ ($4,770,834 + $900,000))—well in excess of the presumptive cap of 0.5 set forth in *Pearson*. 772 F.3d at 782.

This Court has overturned a much lower 0.69 ratio as "outlandish." *Id.* at 781 ($1.93 million fee award for class benefits of $865,284). And it has done the same for 0.55 and 0.56 ratios. *See Redman*, 768 F.3d at 631 (0.55 ratio was too high); *Eubank* v. *Pella Corp.*, 753 F.3d 718, 723-727 (7th Cir. 2014) (0.56 ratio was too high). Under these authorities, the 0.84 ratio approved by the district court is too high on its face.

The fee award here also is significantly out of step with class action fee standards in other circuits. For instance, the Ninth and Eleventh Circuits have adopted benchmark requirements that attorneys' fees be no greater than 25% of class recovery. *E.g.*, *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015); *Faught* v. *Am. Home Shield Corp.*, 668 F.3d 1233, 1242-1243 (11th Cir. 2011).

Further, empirical studies show that fee awards overwhelmingly are limited to a percentage of class recovery. Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Legal Stud. 248, 279 (2010). Between 1993 and 2008, "attorney fees in class action cases have displayed a strikingly strong linear relation to class recoveries." *Id.* at 281. The percentages vary, but they are all *fractions of total recovery*—not multipliers of it. For example, where recovery, as in this case, is under $1.1 million, the mean fee is 38% of recovery. *Id.* at 265. In high-risk consumer class actions it is 31%, in low-

risk ones 25%. *Id.* Here, far from being a fraction of recovery, the fee award more than quintupled the class recovery.

The district court was able to enter such an enormous fee award only by holding the ratio analysis set forth in *Pearson* and *Redman* to be inapplicable. That was legal error.

Mere Presumption. The district court thought *Pearson* set forth a "ratio presumption" by which lower courts are "not bound." A15. But the *Pearson* "presumption" is not a presumption that the ratio should be considered; it is a presumption about what ratio is reasonable. 772 F.3d at 782 ("the presumption should we suggest be that attorneys' fees awarded to class counsel *should not exceed a third or at most a half of the total amount of money going to class members and their counsel*" (emphasis added)). Lower courts do not have license to ignore the ratio analysis. This Court held in *Redman* that a judge "*must assess* the value of the settlement to the class." 768 F.3d at 629 (emphasis added); *see also Pearson*, 772 F.3d at 781.

The value to the class must be assessed even if the lodestar method is applied. *See Redman*, 768 F.3d at 633 ("the *central consideration* is what class counsel achieved for the members of the class rather than how much effort class counsel invested in the litigation" (emphasis added)); *id.* at 635 ("hours *can't* be given controlling weight . . . the amount of the class action settlement allocable to class counsel *should depend critically* on the value of class counsel's work to the

class" (emphasis added)). The ratio analysis must be applied as a cross-check on the lodestar method.

No Collusion. The district court also believed that it could disregard the ratio analysis because it did not see any evidence of settlement collusion between class counsel and defendants. The district court misunderstood both the relevant precedents and the undisputed facts.

Collusion in agreeing to attorneys' fees as part of a broader settlement was not the only concern animating *Pearson* and *Redman*. This Court expressed great concern that class counsel "don't have clients with whom they negotiate billing" and thus have an incentive to run up hours to achieve higher fees with no added benefits to the class. *Redman*, 768 F.3d at 635; *see also Pearson*, 772 F.3d at 782; *Eubank*, 753 F.3d at 720 ("class counsel, un-governed as a practical matter by either the named plaintiffs or the other members of the class, have an opportunity to maximize their attorneys' fees").

That concern is present where, as here, defendants litigate rather than agree to an excessive fee request. When the parties settle fees, a court knows that the fee request is at least somewhat constrained by the defendant's desire to minimize its overall cost of settlement. When fees are litigated following settlement of the merits claims, there is no such assurance. In those cases, only class counsel is vouching for the reasonableness of their requested fees. As a result, contested fee requests should be scrutinized carefully, and close scrutiny is especially important when cases are settled for modest relief after many years of litigation. *See Eubank*, 753

F.3d at 727-729 (disapproving attorneys' fee award out of proportion with class benefits after eight years of drawn-out litigation).

Without careful judicial scrutiny using the ratio analysis for *all* fee requests, whether contested or settled, class counsel will have no reason to value a case accurately early in the proceedings and thereby avoid wasting judicial and party resources on unjustified litigation efforts. To the contrary, class counsel's deliberate inflation of class claims, though it prolongs litigation and deters settlement, will result in class counsel receiving more money in fees. *See Redman*, 768 F.3d at 633; *Reynolds* v. *Beneficial Nat'l Bank*, 288 F.3d 277, 286 (7th Cir. 2002) (criticizing class counsel for prolonging litigation and racking up millions in attorneys' fees for only a modest incremental increase to a settlement).

Here, the district court cited the fact that the parties did not settle the fee amount as a reason to be less "wary" of class counsel's lodestar request. A15-18. That was legal error. Although litigated class action fee requests are rare, courts have not hesitated to look critically at class benefits in those cases and to award less than class counsel requested. *See Heien* v. *Archstone*, 837 F.3d 97, 100-02 (1st Cir. 2016) (upholding award of $29,000—a 93% reduction from class counsel's $429,000 demand—based in part on the actual $180,000 payout to class members and the $59,000 lodestar); *Yamada* v. *Nobel Biocare Holding AG*, 825 F.3d 536, 546-547 (9th Cir. 2016) (upholding discount of the lodestar by 20% based on class counsel's lack of success).

When fees are settled, a "kicker clause" often results in any reduction of class counsel's fee award reverting to the defendant rather than benefitting the class, thereby discouraging class member objections to requested fees. *See Pearson*, 772 F.3d at 780. Here, the district court placed weight on the supposed lack of a "kicker clause" that would cause any reduction in fees to "inure not to the class but to the defendant." A16. In fact, the settlement agreement treats attorneys' fees in exactly that way. SA216-17. Every dollar not awarded in fees stays in Whirlpool's pocket, and no part of any reduction in attorneys' fees goes to the class. The lack of objectors to class counsel's fee request—far from being evidence of the reasonableness of that request, as the district court erroneously believed (A18 n.5)—revealed a need for *more* scrutiny because there was no incentive for objectors to challenge the fee request.

The district court also drew comfort from the supposed fact that "the claim submission rate in this case is high." A17. But that is demonstrably incorrect. The court reached that conclusion based solely on the claim submission rate for *prequalified* claimants (*id.*), who were the most likely to submit claims but make up less than 2% of the class. *See supra* p. 13 & n.9. The (timely) claim submission rate for the *entire* class was 1.9%. SA289. The *valid* claim rate was 0.3%. *See supra* p. 17. By no stretch of the imagination are those claim rates "high." They are miniscule and in line with the "often quite low" claim rates in consumer class actions in which fee requests warrant special scrutiny. A17; *see Pearson*, 772 F.3d at 782.

Full Recovery. For the district court, the "most significan[t]" factor in its decision to bypass the ratio analysis was its belief that "qualified class members are receiving a full recovery." A18. But the court relied on the false assumption that defendants had joined in a self-serving declaration by *class counsel* that the settlement provided a "substantial recovery" and "make-whole relief for repairs." *Id.* (quoting SA181 ¶ 12). Even a cursory analysis of the settlement shows that there are sharp limitations on the relief provided, which resulted in the class receiving far less than class counsel sought. And the real-world claims data confirmed that *most* "qualified" class members received nothing at all.

Class counsel sought damages for all class members based on a premium price theory but ultimately agreed to a settlement that provided no possibility of relief to over 95% of the class because relief is available only to those who experienced a control unit-related malfunction. And a host of limitations apply to that relief. First, the malfunction must have occurred within three years after purchase. SA189; SA200-201. Second, the malfunction must have caused the class member to incur out-of-pocket expenses (despite the fact that class members were already covered by Sears' two-year warranty). *Supra* p. 13. Third, in almost all cases, repair costs will be reimbursed for only the first two repairs. SA204-205. Fourth, reimbursement for replacement costs is capped at $300—far less than what class members paid for their Kenmore and Whirlpool front-loaders. SA204. Fifth, only partial reimbursement ($100) is available for service contract costs. SA206. Finally, non-prequalified class members—the vast majority of the class—must

submit supporting documentary proof to recover. SA201. The settlement was anything but a complete victory. Indeed, *95 percent of the class were ineligible for any relief, and fewer than 1 percent of class members submitted valid claims*. The $900,000 maximum class recovery is over $100 million less than the damages alleged in the complaints and at least $10 million less than class counsel's original settlement demand. *See* SA354-357. The minimal class recovery here gives no reason to disregard *Pearson* and *Redman* and the ratio analysis they require.

Southwest Airlines. The district court thought that *In re Southwest Airlines Voucher Litigation*, 799 F.3d 701 (7th Cir. 2015), permitted it to forgo the ratio analysis. It misunderstood *Southwest Airlines*, which is legally and factually inapposite here.

Southwest Airlines does not change the central holdings in *Pearson* and *Redman*. It principally focused on a narrow question of statutory interpretation: whether the CAFA provision governing coupon settlements "allowed the district court to use the lodestar method to calculate the fee award for class counsel." *Id.* at 706. The Court concluded that the lodestar method could be used in coupon settlements. *Id.* at 710.

Like *Pearson* and *Redman*, *Southwest Airlines* also explained that a district court cannot stop after a rote application of the lodestar method in a class action settlement. Rather, "[w]hen a district court considers using the lodestar method," it "need[s] to bear in mind the potential for abuse . . . and should evaluate critically the claims of success on behalf of a class." *Id.* at 710. Doing so is necessary because

the "conflicts of interest" that "are inherent in class action suits" and that "come to the fore when attorney fees for class counsel are the issue" make a "powerful argument" for restraining excessive fee requests in "most cases." *Id.* at 711-712.

Southwest Airlines was unlike this and most cases because the settlement occurred shortly after a ruling on a motion to dismiss and provided every single class member with precisely the coupons that the defendants had cancelled wrongfully. *Id.* at 704-705. "What makes this settlement so distinctive," this Court explained, "is that the class members will receive essentially everything they could have hoped for." *Id.* at 712. "When counsel come away from the negotiating table with everything the client could hope for," the Court continued, "they should be compensated accordingly." *Id.* That obviously is not the outcome here, as class counsel's unsuccessful settlement demands show.

Further, abuse of the lodestar method was not a concern in *Southwest Airlines*. There was no evidence that class counsel had overlitigated to drive up fees. And a ratio analysis would not have revealed any problem with the fee award. Class members claimed over 503,000 of the $5 coupons, creating a class benefit of over $2.5 million. *See Levvitt* v. *Southwest Airlines Co.*, No. 1:11-cv-08176 (N.D. Ill.), ECF No. 264-1. The fee award totaled approximately $1.65 million. *Southwest Airlines*, 799 F.3d at 705. The *Pearson*/*Redman* ratio thus was less than 0.40, well under the presumptive maximum.

This case is nothing like *Southwest Airlines*. It does not involve a coupon settlement. The class did not receive "essentially everything they could have hoped

for"—indeed, 95% of class members received *nothing*. And the *Pearson*/*Redman* ratio is a stratospheric 0.84, with a fee five times larger than the class benefit.

Other Seventh Circuit decisions cited by class counsel below provide no more support for the $4.77 million fee award here. It is true that *Americana Art China Co.* v. *Foxfire Printing & Packaging, Inc.*, 743 F.3d 243 (7th Cir. 2014), upheld the use of the lodestar method where the fee award exceeded the ultimate payout to the class. But *Americana Art* predates *Pearson* and *Redman*. In addition, *Americana Art* was an uncontested appeal brought by class counsel in an effort to obtain a larger fee than the one awarded by the district court. *Id.* at 245. In *rejecting* that effort, this Court held that the district court properly "consider[ed] the paucity of the class recovery as compared to the requested fee award" in refusing to apply a "percentage method" that would have resulted in an even larger fee. *Id.* at 247. This Court also ruled that it would be perfectly appropriate for a court to "consider the litigation's ultimate degree of success" in making a fee award. *Id.*

The district court committed legal error by disregarding the ratio analysis established in *Pearson* and *Redman* and awarding fees five times greater than the maximum class recovery.

B. A Degree-of-Success Analysis Warrants A Fee Award No Greater Than The Amount Of Class Benefits.

The degree-of-success analysis adopted by the Supreme Court and this Court leads to the same conclusion reached under the ratio analysis that *Pearson* and *Redman* require: the district court's fee award must be reduced to no more than $900,000.

"'[T]he most critical factor' in determining the reasonableness of a fee award" under the lodestar method "is the degree of success obtained." *Farrar* v. *Hobby*, 506 U.S. 103, 114 (1992). Counsel's degree of success is measured through two comparisons. How does the relief achieved compare to effort expended? And how does the relief achieved compare to the relief sought? *See Hensley,* 461 U.S. at 434, 439. When those comparisons reveal a low degree of success, courts apply a downward or fractional multiplier to arrive at a fee award that is *only a portion of the lodestar*. *See, e.g.*, *Montanez*, 755 F.3d at 556 (affirming 50% attorney fee reduction from the lodestar where counsel obtained limited damages compared to what he sought and in light of the time expended to achieve that result); *Richardson* v. *City of Chicago*, 740 F.3d 1099, 1103 (7th Cir. 2014) (affirming 80% fee reduction from the lodestar); *Spegon* v. *Catholic Bishop*, 175 F.3d 544, 558 (7th Cir. 1999) (affirming reduction of lodestar by 50% for limited success).

The district court here did not consider how the relief achieved compared to the effort counsel expended. And it fundamentally misunderstood how the relief achieved compared to the relief sought. This legally faulty "methodology" is not a "procedure approved for calculating awards" of attorneys' fees and requires that the award be set aside as a matter of law. *Harman*, 945 F.2d at 973. A proper degree-of-success analysis forecloses any fee award exceeding the $900,000 in maximum class benefits achieved by the settlement. Only a fraction of the lodestar could be reasonable.

Effort Expended. A court assessing fees under the lodestar method must ask whether "the plaintiff achieve[d] a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award." *Hensley*, 461 U.S. at 434. As this Court has put it, "the reasonableness of a fee cannot be assessed in isolation from what it buys." *Redman*, 768 F.3d at 633; *see also Reynolds*, 288 F.3d at 286 ("class counsel's compensation must be proportioned to the *incremental* benefits they confer on the class"). Accordingly, when considering a fee request, it is crucial to assess whether the relief achieved justified the effort expended.

The district court did not make that assessment here, resulting in a fee award that compensates counsel for spinning their wheels for years and overvaluing their case. Even after the modest reductions made by the district court, class counsel's lodestar stood at over $2.7 million. A44. But the maximum relief achieved through the settlement is only $900,000. A13. No reasonable litigant would pay $2.7 million, much less $4.8 million, to get $900,000. That is the very definition of an unreasonable fee.

Below, class counsel argued that they were forced to devote so much effort to the case by defendants' litigation strategy, which supposedly led to several years of appellate proceedings and otherwise prolonged the litigation. SA345-346. But the appellate proceedings focused largely on the biofilm claims, which are not a basis for the fees at issue here. *See, e.g.*, A21-24. And the same is true of the other proceedings that predated the remand. *Butler v. Sears, Roebuck & Co.*, No. 11-8029 (7th Cir. Oct. 24, 2011) (Br. in Opp'n) (class counsel explained that the "mold claim"

"dominated the past five years of litigation" and the "majority of briefing and evidence in the court below concern that issue"). Class counsel's pre-remand fees totaled only a modest $325,000. Class counsel racked up 90% of their reported hours on the control unit claims only *after* the remand. SA346 & n.20.

By that time, this Court had made clear that damages determinations would be individualized. Class counsel had stated that they would seek damages only for buyers whose machines manifested a defect. And they had long since received Sears' undeniable evidence that defect rates were very low. At that point (if not sooner), class counsel should have valued their case realistically and begun negotiating the modest six-figure settlement ultimately adopted. Had they done so, this case would have come to the quick resolution predicted by this Court, protecting the parties and the courts from over a year of additional discovery, motion practice, and futile trial preparation.

Instead, class counsel doubled down by putting in thousands of hours on document review, concocting a new design defect theory, and submitting a new expert report, while demanding an eight-figure settlement. There is no evidence that this strategy brought any additional benefit to the class. It dragged out the litigation and increased the lodestar in an inefficient and unreasonable way. *See Reynolds*, 288 F.3d at 286 (criticizing class counsel for incurring millions of dollars in fees for only a modest increase to the settlement amount they likely could have achieved years earlier). Put differently, class counsel put off a reasonable

settlement so that they could seek millions in additional fees. And the district court rewarded them by giving them not only their lodestar but an upward multiplier.

This Court made clear in *Redman* that "attorneys' fees don't ride an escalator called risk into the financial stratosphere. Some cases should not be brought, because the litigation costs will exceed the stakes, and others are such long shots that prudent counsel will cut his expenditure in litigating them of time, effort, and money to the bone." 768 F.3d at 633.

The record in this case shows that class counsel were anything but prudent. "[T]he significance of the overall relief obtained"—a maximum of $900,000—relative to the hours expended does not justify a nearly $4.8 million fee award. *Hensley*, 461 U.S. at 435. As this Court predicted, this case should have settled "quickly," before class counsel ran up their massive fees post-remand. *Butler II*, 727 F.3d at 798. Class counsel never spent a minute in trial or incurred any risk of loss at trial.

Relief Sought. "[A] district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." *Riverside* v. *Rivera*, 477 U.S. 561, 585 (1986). And "[a] reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." *Hensley*, 461 U.S. at 440; *see Spegon*, 175 F.3d at 559 ("In light of the fact that [the plaintiff] recovered substantially less than *originally sought* . . . we cannot say the district court abused its discretion in reducing the modified lodestar by one-half" (emphasis added)).

The district court here concluded that "class counsel achieved a high degree of success" because "*all* persons with CCU units that have failed will be fully compensated." A48-50. But, as we have described, that conclusion relies on mischaracterizations of the relief sought and obtained by class counsel.

Any success in obtaining relief for "persons with CCU units that have failed" is outweighed by class counsel's failure to obtain *any relief* for 95% of class members they represented. It is hard to see how a lawyer who obtains nothing for 95% of his clients, except a release of their claims against the defendants, has a "high degree of success," especially when that lawyer alleged that all overpaid.

The district court thought the lack of relief for 95% of the class did not matter because plaintiffs supposedly were seeking damages only for manifested control unit defects. A48-49. To be sure, during appellate proceedings regarding class certification class counsel strategically asserted that they would seek relief only for those whose control units failed. But their complaints filed before *and after* those appellate proceedings alleged that the "actual damages" of class members included overpayment by everyone for washers with defective control units. *E.g.*, SA4-5 ¶ 20; SA80 ¶ 66; SA245 ¶ 46; SA259 ¶ 121. Indeed, class counsel always defined the class to include *all* buyers of the relevant washers, not just those who experienced a control unit failure or repair—which confirms that they were always angling for class-wide relief. *E.g.*, SA4-5 ¶ 20; SA7 ¶¶ 39-40; SA74 ¶ 50; SA82 ¶¶ 75-76; SA228-229 ¶ 2; SA239 ¶¶ 2, 28-29; SA247 ¶ 55. And the overbroad allegation that all class

members were harmed by control unit defects magnified the scope and burden of the litigation.

As *Hensley* and *Spegon* hold, degree of success should be measured against the full scope of the litigation, including the relief originally sought. Otherwise, class counsel in every case could seek less relief in settlement than was originally sought, then claim total victory when the case settled for a greatly reduced amount.

Beyond this, the district court's statement that "*all* persons with CCU units that have failed will be fully compensated" is incorrect. A failure must have occurred within three years of purchase (a period only modestly longer than the two-year warranty honored by Sears and Whirlpool pre-suit). SA189; SA200; A7. In almost all cases, only the first two repairs will be reimbursed. SA204-205. Reimbursement for washer replacement is capped at $300. SA204. And service contract costs are only partially reimbursed. SA205.

Class counsel demanded much more in the eight-figure July 2014 settlement proposal that Sears and Whirlpool rejected. Class counsel were able to reach agreement with Sears and Whirlpool only *after* they accepted strict limits on the available relief. The result was a six-figure settlement that does not remotely provide "full compensation" to all whose control units failed, let alone to the entire class.

Whether one compares the less than $900,000 class recovery to the more than $100 million sought in the complaints (SA356) or the more than $10 million class counsel sought in their July 2014 proposal (SA353), the actual class recovery is

dwarfed. Recovering something between less than 1% and less than 10% of what class counsel sought does not reflect a high degree of success—just the opposite. Class counsel's stunning lack of success should have led the district court to apply a downward multiplier so that the fee award did not exceed the class benefit. That is what happened in *Spegon*, where counsel sought fees totaling six times his client's recovery, but this Court affirmed the district court's application of a downward multiplier to award counsel an amount less than his client's recovery. 175 F.3d at 548, 557-559. It was reversible error for the district court to fail to do the same here.[12]

II. THE DISTRICT COURT ERRED AS A MATTER OF LAW BY APPLYING AN UPWARD LODESTAR MULTIPLIER.

Even if a downward multiplier or ratio cap on attorneys' fees were not required, the district court still erred as a matter of law when it applied an upward multiplier to enhance class counsel's lodestar by 75%. Use of a multiplier to enhance a lodestar is appropriate only in "rare and exceptional circumstances." *Perdue* v. *Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010) (internal quotation marks omitted). An enhancement "may not be awarded based on a factor that is subsumed in the lodestar calculation." *Id.* at 553. And "[i]t is essential that" a district court "provide a reasonably specific explanation" for its choice of multiplier. *Id.* at 558. The district court's fee ruling flouts all three of those commands.

The district court offered the thinnest of explanations for applying a 1.75 multiplier. A54. Just as in *Perdue*, this choice of multiplier "appears to have been

[12] That would remain true even if the Court reviewed the fee award only for abuse of discretion, as the award far exceeds the bounds of permissible discretion.

essentially arbitrary. Why, for example, did the court grant a 75% enhancement instead of the [higher] increase that [class counsel] sought? And why 75% rather than 50% or 25% or 10%?" 559 U.S. at 557. The district court failed to explain why any of the factors on which it relied—degree of success, novelty, and public interest—warranted a 75% enhancement. Nor did the district court explain how those factors made this routine products case, never litigated on the merits, "rare and exceptional." *Id*. at 554. And the district court failed to recognize that each of the three factors already was "subsumed in the lodestar." *Id.* at 553.

Perdue warns against this kind of standardless lodestar enhancement because "in future cases, defendants contemplating the possibility of settlement will have no way to estimate the likelihood of having to pay a potentially huge enhancement." *Id.* at 558-59. Analysis of each enhancement factor invoked by the district court confirms that the upward multiplier is far out of step with *Perdue*.

Degree of Success. *Perdue* explained that "superior results are relevant only to the extent it can be shown that they are the result of superior attorney performance." 559 U.S. at 554. And superior performance generally is captured in the lodestar through higher rates. *See id.* at 554-555 (allowing enhancement where the lodestar "does not adequately measure the attorney's true market value"); *accord Pennsylvania* v. *Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 566 (1986) ("lower courts erred in increasing the fee award . . . based on the 'superior quality' of counsel's performance" where lodestar already captured quality of performance).

Here, the lodestar already incorporated the district court's award of generous rates to class counsel and appellate counsel. A31-32; A37-38. Any success class counsel achieved was fully compensated by those rates. And as we already described (*supra* Part I.B), far from warranting enhancement, the limited degree of success achieved by class counsel, after years of foot-dragging, requires a substantial *downward* adjustment of the lodestar.[13]

Novelty and Complexity. *Perdue* held that the "novelty and complexity of a case generally may not be used as a ground for an enhancement because these factors 'presumably [are] fully reflected in the number of billable hours recorded by counsel.'" 559 U.S. at 553. The district court nonetheless rested its application of an upward multiplier on its conclusion that class counsel addressed "novel and complex issues" in the interlocutory class certification appeal. A50-51. But the lodestar already included all hours spent on control-unit-related appellate work (based on the hourly rates of the premier appellate lawyers hired by class counsel). A22-27; A31-32. The enhancement based on novelty and complexity thus improperly double counted. *See Perdue*, 559 U.S. at 553. Beyond this, the overwhelming majority of the lodestar hours to which the district court applied its multiplier were *not* spent on class certification appeals, but on post-remand proceedings, which even the district

[13] Indeed, in striking class counsel's late-filed expert opinion pre-certification, the court ruled that "Plaintiffs' counsel, also representing the plaintiffs in the Whirlpool [biofilm] action, appear to have deliberately chosen to prioritize the Whirlpool [biofilm] action and the allegations present there over those [CCU allegations] in this case. While a tactical decision, . . . Plaintiffs should not be allowed to benefit from their disregard of the federal rules and the court's schedule to further delay the progression of this case." SA134-135.

court acknowledged were neither novel nor complex. *See* A50-51 (most issues were not novel or complex enough to warrant a multiplier); SA346 & n.20 (90% of hours were spent on post-remand work).

If anything, a novelty-and-complexity analysis supports a lodestar *reduction* because this product litigation was "run-of-the-mill"—not "groundbreaking, first-time-ever-in-this-district." *Cooke* v. *Stefani Mgmt. Servs., Inc.*, 250 F.3d 564, 570 (7th Cir. 2001) (affirming 50% lodestar reduction).

Public Interest. The final factor invoked by the district court—the "Public Interest Advanced" (A52)—is not one of the factors that courts consider in evaluating the reasonableness of a fee award. *See Hensley*, 461 U.S. at 429-430 & n.3. That is for good reason: "public interest" is the reason for fee shifting in the first place. *See* Kathryn A. Sabbeth, *What's Money Got to Do with It?: Public Interest Lawyering and Profit*, 91 Denv. U. L. Rev. 441, 465-468 & nn.203-222 (2014) ("Congress created fee-shifting provisions where it decided that pursuit of litigation, with the assistance of counsel, was in the public interest"). To allow public interest to serve as a basis for a multiplier as well would be double counting.

To be sure, this Court has sometimes considered public benefits achieved by counsel in evaluating a lodestar. But in those cases, its focus has been on benefits to the public, such as vindicating constitutional rights or achieving injunctive relief that serves social justice. *See Spegon*, 175 F.3d at 558 & n.7; *Cooke*, 250 F.3d at 570. The minimal settlement here creates no similar public benefit. *See* SA183-226. There is no constitutional or other public right at issue. Nor is there any injunctive

or equitable relief. The only relief is out-of-pocket, breach-of-implied-warranty damages for a limited number of class members (less than one percent of the class).

By class counsel's own description, their primary purpose in this routine litigation was to recover private damages. SA228 ¶ 1. In such cases, courts have found downward lodestar adjustments appropriate based in part on a lack of social impact. *Spegon*, 175 F.3d at 558 n.7 (affirming 50% reduction where "[n]o important social benefits were furthered" because the suit's "primary purpose" was "the recovery of private damages" and it did not result in injunctive relief or vindicate constitutional rights); *Cooke*, 250 F.3d at 570 (affirming 50% lodestar reduction in "case with no broad social impact").

If the settlement here provided public benefits warranting an enhancement, enhancements would be necessary in every routine contract or warranty case. But enhancements are supposed to be "rare and exceptional," not routine. *Perdue*, 559 U.S. at 554. At a minimum, this Court should reverse the improper award of a lodestar enhancement.

III. TYING FEE AWARDS TO CLASS BENEFITS SERVES IMPORTANT POLICY OBJECTIVES.

Because "inflated attorneys' fees are an endemic problem in class action litigation," courts must give "beady-eyed scrutiny" to class counsel's fee applications and ensure that "class counsel's compensation" is "proportioned to the *incremental* benefits they confer on the class." *Reynolds*, 288 F.3d at 286. Only in that way can courts ensure that "class action attorneys" are rewarded based on the true "value" they provide "to class members and society." Deborah R. Hensler et al., *Class Action*

Dilemmas: Pursuing Public Goals for Private Gain 490 (2000). Over-rewarding class counsel encourages inefficiency in class litigation and undermines the value of the class action device by making settlements more difficult, more likely to be collusive, and more likely to be appealed.[14]

A. The District Court's Fee Award Encourages Wasteful Litigation And Delayed Settlement.

The district court's use of the lodestar method without any proportionality cross-check motivates class counsel to prolong litigation and drag out settlement to run up their fees, with no incremental benefit to the class.

Problems with an unchecked application of the lodestar method have been widely recognized. Thirty years ago, a Third Circuit Task Force explained that the lodestar method "creates a disincentive for the early settlement of cases." Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 248 (1986). The lodestar's "emphasis on hours worked" means that lawyers "have little or no incentive to settle cases at the earliest appropriate opportunity. To the contrary, there appears to be a . . . desire to keep the litigation alive despite a

[14] A district court in California recently awarded an unjustified fee of $15 million to counsel in a class action alleging defects in Whirlpool dishwashers—the merits of which were settled for relief that will not exceed $2.5 million. *Chambers* v. *Whirlpool Corp.*, No. 8:11-cv-01733 (C.D. Cal. Oct. 11, 2016), ECF No. 351. Unless the legal errors in these two litigated awards are corrected, it is highly unlikely that any class action defendant will ever again choose to settle the merits without also settling attorneys' fees, inviting the collusion that this and other courts have criticized. This Court's decision correcting the legal errors in the fee award here would provide valuable guidance in *Chambers*, in which the award of fees, amounting to six-times class benefits, has been appealed by both Whirlpool and objectors to the Ninth Circuit.

reasonable prospect of settlement, to maximize the number of hours to be included in computing the lodestar." *Id.*

As a more recent evaluation likewise observed, "[t]he lodestar approach has been criticized for its potential to overpay attorneys who invest unnecessary time in the litigation (or pad their bills)." Hensler, *supra*, at 490; *accord* Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. Rev. 296, 343 (1996) ("Reliance on the lodestar, with its hourly rates, may create incentives to 'pad' hours, waste time, or prolong the litigation").

Justice O'Connor was concerned enough about fee awards untethered to actual class benefits to identify the issue as one warranting Supreme Court review. *Int'l Precious Metals Corp.* v. *Waters*, 530 U.S. 1223 (2000) (O'Connor, J., statement respecting denial of cert.). She explained that the "approval of attorney's fees absent any . . . inquiry" into whether there is a "rational connection between the fee award and the amount of the actual distribution to the class" "could have several troubling consequences." *Id.* It "decouple[s] class counsel's financial incentives from those of the class." *Id.* And it "encourage[s] the filing of needless lawsuits where, because the value of each class member's individual claim is small compared to the transaction costs in obtaining recovery, the actual distribution to the class will inevitably be minimal." *Id.*

To prevent consequences like these, the Third Circuit Task Force concluded that district courts should have "flexibility to reward or deter lawyers so that desirable objectives, such as early settlement, will be fostered." 108 F.R.D. at 248.

Consistent with that objective, the advisory committee notes accompanying the 2003 adoption of Fed. R. Civ. P. 23(h) "emphasize the importance of the reviewing court's focus on realistically assessing the value of what class members actually receive in the settlement in setting the fee award for class counsel." Report of the Judicial Conference of the United States on Class Action Settlements 4 (2006), http://www.uscourts.gov/file/cafareportpdf; *see* Fed. R. Civ. P. 23(h), 2003 adv. comm. note.

This Court made clear in *Redman* that a fee award system cannot allow class counsel to profit greatly from mistakenly overvaluing the litigation while the class ends up with only a modest recovery:

> It would be absurd to approve a settlement that awarded class counsel ten times the damages awarded the class . . . on the basis of the amount of time class counsel reasonably expended working on the action even if the expenditure was reasonable given what class counsel reasonably but mistakenly had thought the case worth to the class. For that would be a settlement in which class counsel had been able to shift the entire risk of the litigation to their clients.

768 F.3d at 635 (internal quotation marks omitted). As the Supreme Court has put it, "[t]he product of reasonable hours times a reasonable rate" cannot "end the inquiry"—a fee award must reflect counsel's "degree of success obtained" for the client. *Hensley*, 461 U.S. at 434, 436.

In short, courts must control fee awards in a way that reduces the incentives to run up unnecessary fees, delay settlement, and "bring cases that will not result in a sufficient number of people actually receiving benefits." Lee H. Rosenthal, *One Judge's Perspective on Procedure As Contract*, 80 Notre Dame L. Rev. 669, 676

(2005). Strict application of the ratio analysis adopted in *Pearson* and *Redman*, the degree-of-success analysis articulated in *Hensley* and other precedents, and the upward enhancement analysis described in *Perdue* all do this. The district court eschewed application of those principles to give class counsel an exorbitant fee that will only encourage overlitigation of marginal claims.

B. The District Court's Fee Award Encourages Collusive Settlements And Fee Award Appeals.

Awards with arbitrary multipliers untethered to degree of success create uncertainty and "disparate" results that will leave "defendants contemplating the possibility of settlement" with "no way to estimate the likelihood of having to pay a potentially huge enhancement." *Perdue*, 559 U.S. at 558-559; *see also id.* at 559 ("many a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney's fees in whatever amount the court might fix on motion of the plaintiff"); Resnik, *supra*, at 343 ("if judges are permitted to 'enhance' the hourly rate by multiplying it by some amount (e.g., 1.5 or 2.5), they gain wide-ranging discretion, potentially exercised in an arbitrary fashion").

The hard-to-quantify risk of large fee awards results, in turn, in the types of collusive settlements that this Court worried about in *Redman*, *Pearson*, and *Eubank*. No defendant will want to litigate fees if faced with the possibility of an arbitrary multiplier unchecked by class benefits. That will increase the already common practice of settling fees and including "kicker" and "clear-sailing" clauses in settlement agreements, which allow defendants to manage their risks. *E.g.*, *Gooch* v. *Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 425 (6th Cir. 2012) ("Clear sailing"

clauses, in which defendants agree not to contest class counsel's fee request, are "included in class action settlements so that defendants have a more definite idea of their total exposure"). Ironically, under the approach taken by the district court, defendants that want careful scrutiny of unreasonable fee requests would be better off *agreeing* to an excessive fee request with clear-sailing and kicker provisions. That is not the result this Court intended in *Redman*, *Pearson*, and *Southwest Airlines*.

Allowing district courts unfettered discretion in making fee awards uncabined by the legal principles we have described would mean more fee appeals, contrary to this Court's stated desire to minimize fee appeals. *Nightingale Home Healthcare, Inc.* v. *Anodyne Therapy, LLC*, 626 F.3d 958, 965 (7th Cir. 2010) ("a proceeding for an award of attorneys' fees is not a suit; it is a tail dangling from a suit. We don't want the tail to wag the dog"); *accord Hensley*, 461 U.S. at 437 ("A request for attorney's fees should not result in a second major litigation"). Cases that approve excessive fees will encourage class counsel to appeal whenever lower courts rely on limited class benefits to cut back on fee awards. And cases that deny excessive fees will encourage defendants or objectors to appeal whenever lower courts award a full lodestar or upward multiplier despite limited class benefits. Such appeals can be avoided by reaffirming the simple legal rule that, in nearly all class actions, class counsel should be awarded attorneys' fees that are less than, or at most equal to, the benefits paid to the class.

CONCLUSION

For the reasons stated above, Sears and Whirlpool ask this Court to vacate the district court's award of attorneys' fees and direct entry of a new order awarding class counsel fees less than $900,000.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32

I certify that the foregoing Corrected Opening Brief of Appellants:

(i) complies with the type-volume limitation in 7th Cir. R. 32(c) because it contains 12,979 words, excluding the parts of the brief exempted under Fed. R. App. P. 32(f); and

(ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(b), as well as the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007, in 12-point Century Schoolbook and Arial Narrow fonts.

s/ Timothy S. Bishop

Timothy S. Bishop

CERTIFICATE OF COMPLIANCE WITH RULE 30(d)

Pursuant to Circuit Rule 30(d), I certify that all materials required by Circuit Rule 30(a) are included in the Required Short Appendix and all materials required by Circuit Rule 30(b) are included in the Separate Appendix.

s/ Timothy S. Bishop

Timothy S. Bishop

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2017, I caused the Corrected Opening Brief and Required Short Appendix of Appellants to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system, which will send notice to the following CM/ECF users:

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CIRCUIT RULE 30(a) REQUIRED APPENDIX

TABLE OF CONTENTS

Page

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re: SEARS, ROEBUCK AND CO. FRONT-LOADING WASHER PRODUCTS LIABILITY LITIGATION	Case No. 06 C 7023 Consolidated with Case Nos. 07 C 0412 and 08 C 1832
This Document Relates to CCU Claims	Magistrate Judge Mary M. Rowland

MEMORANDUM OPINION AND ORDER

This Court previously granted final approval to the parties' "CCU Settlement Agreement," which resolved certain claims brought against Sears and Whirlpool by purchasers of Kenmore- and Whirlpool-branded front load washing machines. Dkt. 590 (*Final Approval Order*). The *Final Approval Order* left open the question of class counsel's attorney fees and expenses. Dkt. 590 at 2.

The parties submitted numerous briefs and exhibits on the fee issue and also appeared for oral argument.[1] Having fully considered all of the parties' submissions, the Court concludes class counsel is entitled to: (1) a fee award in the amount of $4,770,834 and (2) reimbursement of expenses in the amount of $167,717. The Court orders Whirlpool to make these payments in accord with the provisions in Section X.F of the CCU Settlement Agreement. Dkt. 502-1 (S.A.) at 35–36 (discussing the timing of wire transfer of funds).

[1] The following docket entries relate to the attorney fee issue: 530–36, 564, 573–84, 587–88, 591.

I. OVERVIEW

In 2001, Whirlpool began manufacturing front-load washing machines and selling them under its own brand. In 2005, Sears began to sell the same Whirlpool-manufactured machines under the Sears brand. When buyers began to experience problems, they filed lawsuits against both Whirlpool and Sears, asserting two types of defects: (1) the "biofilm defect," which caused mold and mildew to grow inside the machines; and (2) the "CCU defect," which caused the machines' central control unit to malfunction. The cases against Sears are all pending in this Court. The cases against Whirlpool were joined through multidistrict litigation and are all pending in the Northern District of Ohio. *See In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, No. 08-WP-65000, MDL No. 2001 (N.D. Ohio).

In 2015, after almost ten years of litigation, the parties in both the *Sears* and *Whirlpool* cases settled all claims. Rather than agree to a "Sears Settlement" and a "Whirlpool Settlement," however, the parties agreed to a "CCU Settlement" and a "Biofilm Settlement." The parties filed their CCU Settlement papers (resolving CCU claims against both Sears and Whirlpool) in this Court; they filed their Biofilm Settlement papers (resolving biofilm claims against both Sears and Whirlpool) in the MDL Court.

On February 29, 2016, this Court entered the *Final Approval Order* granting final approval to the CCU Class Action Settlement Agreement. In addition to setting out the settlement benefits defendants will pay to class members, the Settlement Agreement provides that defendants will pay attorney fees and costs to class coun-

sel and incentive awards to the named class members. Accordingly, class counsel moved for an award of attorney fees, reimbursement of expenses, and incentive awards for representative plaintiffs. Dkt. 530. Defendants object to the requested amounts of fees and expenses, but do not object to the requested amount of incentive awards. After hearing argument, the Court: (a) ordered an incentive award of $4,000 to be paid to each of the nine representative plaintiffs, for a total of $36,000; and (b) took the matter of fees and costs under advisement. Dkt. 590 at 2.

II. PROCEDURAL HISTORY

On December 19, 2006, a group of five plaintiffs filed this action against Sears, complaining that the Kenmore-brand, front-load washers they had purchased from Sears suffered serious performance problems. After two other groups of plaintiffs filed similar lawsuits against Sears, the three cases were consolidated in this Court for pretrial purposes. Dkt. 36, 96. Just over two years later, on March 24, 2009, plaintiff Victoria Poulsen filed a similar action against Whirlpool in the U.S. District Court for the Eastern District of California. The MDL Panel transferred the *Poulsen* action to the *Whirlpool* multidistrict litigation in the Northern District of Ohio.

In 2011, this Court certified a class of all Illinois, Indiana, Kentucky, Minnesota, Texas, and California purchasers of the Kenmore-brand washers who suffered the alleged CCU defect. Dkt. 285. The Seventh Circuit upheld that ruling on appeal, but clarified that the class was properly certified only for liability proceedings, not for a determination of classwide damages. Sears vigorously opposed class certification

and stood its ground through several rounds (and years) of litigation. *See Butler v. Sears, Roebuck & Co.*, 702 F.3d 359 (7th Cir.), *rehearing and rehearing en banc denied* (7th Cir. 2012), *cert. granted, judgment vacated*, 133 S. Ct. 2268 (2013), *judgment reinstated, affirmed in relevant part*, 727 F.3d 796 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014). Having finally resolved the class certification issue, the parties and the Court agreed to conduct the first trial on behalf of the Illinois class only, which the Court scheduled for July 2015.

Two months before the scheduled trial, after all fact and expert discovery had been completed, the parties settled plaintiffs' CCU claims. Dkt. 483. For purposes of accomplishing the *nationwide* class settlement in this Court, plaintiffs amended the complaint solely to add Poulsen's California state claims. Dkt. 508 (Consolidated CCU Complaint). The Court then granted the parties' joint motion for final approval of the CCU Settlement on February 29, 2016. Dkt. 589, 590.

III. THE CLAIMS AT ISSUE

The nine representative plaintiffs assert that Sears and Whirlpool sold them certain models of front-load washing machines that "had as component parts Matador 1 Central Control Unit (CCU) boards manufactured by Bitron . . . on a CEM-1 printed circuit board." Consolidated CCU Complaint ¶ 2. Plaintiffs allege these CCU circuit boards were defective, causing problems including "but not limited to, (a) premature and repeated mechanical failure; (b) stopping or not starting; (c) door remaining locked; and (d) displaying a variety of error codes such as F11 and FDL." *Id.* Plaintiffs' expert opined that the CCUs were defective because they were printed

on a material known as CEM-1, which is brittle, rather than a more flexible material such as CEM-3; when consumers operated the washers, normal vibrations stressed the brittle CEM-1 material, causing micro-fractures to the CCU's solder connections and breaking the electronic circuits. Dkt. 564-1 (report of plaintiffs' expert Michael Pecht). The consolidated complaint contains claims for breaches of express and implied warranty under state and federal law. Consolidated CCU Complaint ¶ 4. Plaintiffs assert these claims on behalf of two classes: (1) a nationwide class of owners of certain Sears Kenmore washers that contain the "Matador 1" CCU; and (2) a California class of owners of certain Whirlpool washers that contain the "Matador 1" CCU. *Id.* ¶ 55. These two classes include about 450,000 Kenmore washer owners and 86,500 Whirlpool washer owners.

IV. THE SETTLEMENT AGREEMENT

The principal feature of the parties' CCU Settlement Agreement requires defendants to pay full monetary compensation to class members who suffered out-of-pocket expenses related to CCU performance problems. The Settlement Agreement also requires defendants to pay: (1) attorneys' fees to class counsel, (2) class counsels' litigation expenses, (3) incentive awards to the nine named plaintiffs, and (4) costs of settlement administration and class notice. In exchange, class members who do not opt out will release all of their CCU-based claims.[2]

[2] In the CCU Settlement, class members have not released any of their biofilm-based claims leaving them eligible to seek benefits under the MDL Court's biofilm settlement.

A. The Settlement Classes

The Kenmore Settlement Class includes all persons who, while living in the United States, purchased or received as a gift a new Kenmore-brand, front-loading washing machine manufactured by Whirlpool between June 8, 2004, and February 28, 2006, with a Bitron-manufactured Matador 1 CCU. The washers are identifiable by specific model and serial numbers. S.A. at 6.

Similarly, the Whirlpool Settlement Class includes all persons who, while in the State of California, purchased or received as a gift a new Whirlpool-brand, front-loading washing machine manufactured by Whirlpool between May 25, 2004, and February 28, 2006, with a Bitron-manufactured Matador 1 CCU. These washers are also identifiable by specific model and serial numbers. S.A. at 11–12.

B. Compensable Performance Problems

The Settlement Agreement provides monetary compensation for class members whose washers suffered certain "Performance Problems," and who suffered out-of-pocket losses to pay for "Qualifying Repairs."

The definition of a CCU-related Performance Problem is broad—it includes, *but is not limited to*, "(a) failure of the Washer to complete a cycle or interruption of the cycle; (b) failure of the door to lock at the start of the wash cycle or display of an FDL error code on the control console, or both; (c) failure of the door to unlock at the end of the wash cycle or display of an FDU error code on the control console, or both; (d) display of an F11 error code; and (e) service calls to repair or replace the CCU, the door lock assembly, the wire harness between the CCU and the MCU [Motor

Control Unit], the wire harness between the CCU and the door lock, or the MCU." S.A. at 7.

Compensation is available for "Qualifying Repairs," which essentially tracks the definition of Performance Problems. Thus, a "Qualifying Repair" means that "*within three years after the Purchase Date*: (1) a Service Technician repaired or replaced the Washer's CCU, or (2) a Settlement Class Member otherwise incurred documented out of pocket costs to repair the Washer due to the Washer's Performance Problem . . . , or (3) a Settlement Class Member replaced the Washer or otherwise took it out of service after contacting Whirlpool, Sears, an authorized Whirlpool or Sears retailer, or a Service Technician about a Performance Problem." S.A. at 8 (emphasis added). The three-year period exceeds the original manufacturer's warranty of one year for labor and two years for parts. Thus, the Settlement Agreement provides benefits in excess of defendants' written warranties.

C. Amount of Compensation

Class members are entitled to compensation depending on the amount of repair costs they incurred and the proofs they submit. As a general matter, however, class members will receive a minimum of $150 for a valid claim. The Settlement Agreement contains no cap on the total amount that defendants may ultimately be required to pay for valid claims; nor is there a cap on how much an individual class member may receive. In other words, this is *not* a "common fund" or "limited fund" settlement. The compensation scheme is summarized below:

> ***Reimbursement for Paid Qualifying Repairs***: Class Members will receive the full amount of any documented costs for their First Paid

> Repair for any Performance Problems within 3 years of purchase. If a Class Member can provide documentary proof for their First Paid Repair but the proof does not show the amount paid for that repair, that Class Members will receive $150. Class Members can also get additional compensation (on the same terms) for a Second Paid Repair if the repair took place less than 54 months after purchase.
>
> ***Reimbursement for Replacement***: Class Members who chose to replace, rather than repair, the Washer after contacting Whirlpool, Sears, or an Authorized Service Technician about a Performance Problem, will be reimbursed for the amount that the Class Member actually paid for the replacement (with sufficient documentary proof) up to $300.
>
> ***Compensation for Qualifying Service Contracts***: Class Members who purchased a warranty service contract will be reimbursed $100 to partially offset the cost of the service contract.
>
> ***Compensation for Excessive Repairs***: Class Members who had the CCU replaced by a Service Technician on three occasions within four years of purchase will receive the greater of (i) the purchase price of the Washer or (ii) the aggregate cost for the three repairs.
>
> ***Offsets***: The above compensation is subject to an offset if Whirlpool or Sears previously provided compensation to the Class Member such as a policy-adjust cash payment, a partial refund, a discount off the regular price of a new washer, a coupon applicable to the purchase of a new clothes washer that was redeemed, etc.

S.A. §§ IV.C–D.

At the time of the final approval hearing, the Claims Administrator reported that the average amount paid per valid claim was about $275. Dkt. 587 (Feb. 17, 2016 Hr'g Tr.) at 68.

D. Notice and the Claims Process

When a consumer purchases a Sears washer, Sears usually collects point-of-purchase data, including the contact information for the consumer and the serial and model numbers of the purchased washer. To a lesser extent, Whirlpool collects similar information (mostly through warranty registration card returns). As a re-

sult, defendants know the specific identify of the vast majority of purchasers of the Kenmore washers at issue, and many of the Whirlpool washers at issue. Further, defendants often know whether class members complained about CCU-related problems because Sears' database indicates whether a purchaser of a Kenmore washer called with a complaint or to request a service call. This information allowed class notice to be more precise and allowed the claim submission process to be more streamlined.

The claims administrator used defendants' databases to send postcard notice to 486,387 individuals known to have purchased the washers at issue; he was also able to send 41,072 emails directly to class members. Dkt. 523-1 at 5. Whenever possible, class members were sent postcard notices that contained an individualized code; when the class member entered this code in the online claim form, many fields "auto-populated," making claim submission easier. And if a class member could "be identified in Whirlpool's or Sears's databases as having paid for a Qualifying Repair or as having paid for a Qualifying Service Contract," then he or she was deemed a "Prequalified Class Member." S.A. at 7. Prequalified Class Members were not required to submit *any* documentation to support their claims; to receive reimbursement for the amounts that Sears already knows the Prequalified Class Members paid, these class members need only confirm their current name and address, check the eligibility boxes on the online claim form, and submit their electronic signature. *Id.* at 20.

If a non-Prequalified Class Member did not provide necessary documentation of an out-of-pocket expense for a Qualifying Repair, the claims administrator would search defendants' databases for proof of a claimed Qualifying Repair, so that the claim might be cured and the class member would receive full reimbursement. S.A. at 21.

The Settlement Agreement makes clear that all costs of notice and claims administration are paid by defendants and do not reduce the amounts available to class members. S.A. § VI.

E. Attorney Fees and Expenses

Defendants agreed to pay "reasonable attorneys' fees and costs," without reducing the amount of money available to pay benefits to class members, or fees to the settlement administrator, or incentive awards to the named plaintiffs. S.A. at 29, 35.[3] While the Settlement Agreement sets no minimum or maximum amounts within which a fee award must fall, class counsel agreed not to request more than $6 million.

V. METHOD FOR DETERMINING REASONABLE ATTORNEYS' FEES

A. State Law Versus Federal Law

The Settlement Agreement, resolving plaintiffs' warranty claims under the Magnuson Moss Act, 15 U.S.C. § 2301 et. seq, as well as state law warranty claims,

[3] The Settlement Agreement obligates defendants to pay incentive awards of $4,000 to each of the nine named plaintiffs. S.A. at 29. The Court approved these payments at the final approval hearing. Dkt. 589, 590.

provides that it "shall be construed and governed in accordance with federal procedural law and the substantive laws of the State of Illinois." S.A. at 43. While class counsel devote the majority of their brief addressing federal jurisprudence regarding fee requests, they also contend that the Court should apply Illinois law to the fee issue based on this provision in the Settlement Agreement. Dkt. 531 at 12–13. They then go on to assert that Illinois and federal courts essentially agree on how to determine a reasonable fee and the result will be the same regardless which law the court applies. *Id.* at 13–15.

In the Seventh Circuit, the "method of quantifying a reasonable fee is a procedural issue governed by federal law." *Oldenburg Group Inc. v. Frontier–Kemper Constructors, Inc.*, 597 F. Supp. 2d 842, 847 (E.D. Wis. 2009); *see Taco Bell Corp. v. Cont'l Cas. Co.*, 388 F.3d 1069, 1077 (7th Cir. 2004) (the procedure used to determine whether the amount sought is reasonable falls on the procedural side of the substantive-procedural divide created by *Erie* and subsequent decisions). Thus, the Court looks to federal precedent to determine the appropriate fees in this case. Given that the parties agree that plaintiffs are entitled to "reasonable" fees and the method of quantifying what is "reasonable" is a procedural issue, the Court will confine its analysis to federal law.

B. Lodestar Versus Ratio Approach

The district court plays a significant role in reviewing class action settlements and determining appropriate fee awards to class counsel. In non-class action cases, the trial court trusts that the parties "have negotiated to a just result as an alterna-

tive to bearing the risks and costs of litigation." *Redman v. RadioShack Corp.*, 768 F.3d 622, 629 (7th Cir. 2014). But when reviewing a class action settlement, "the law quite rightly requires more than a judicial rubber stamp" because of "the built-in conflict of interest in class action suits." *Id.*; *In re Southwest Airlines Voucher Litig.*, 799 F.3d 701, 711 (7th Cir. 2015) ("conflicts of interest are inherent in class action suits"). Naturally, the defendant "is interested only in . . . how much the settlement will cost him." *Redman*, 768 F.3d at 629. According to the appellate court, "class counsel, as 'economic man' . . . is interested primarily in the size of the attorneys' fees." *Id.* Assuming both counsel are self-interested, "the optimal settlement . . . is therefore a sum of money moderate in amount but weighted in favor of attorneys' fees for class counsel." *Id.*; *see Southwest Airlines*, 799 F.3d at 711 (review of fee requests must be "based on the assumption that class counsel [will] behave as economically rational actors who seek to serve their own interests first and foremost")

In order to address this inherit conflict of interest, the *Redman* court set forth a ratio to assess the reasonableness of a fee request, namely, "the ratio of (1) the fee to (2) the fee plus what the class members received." 768 F.3d at 630. Two months later, *Pearson v. NBTY, Inc.*, 772 F.3d 778, 782 (7th Cir. 2014), emphasized the *presumption* "that attorneys' fees awarded to class counsel should not exceed a third or at most a half of the total amount of money going to class members and their counsel." Both *Redman* and *Pearson* addressed several factors that the district court should consider in calculating this ratio to determine the *actual* value of the settle-

ment to class members. Thus in *Redman*, the court held that the settlement value to the class could not include the $2.2 million in administrative costs as those costs did not represent a value received by the members of the class. 768 F.3d at 630. Similarly in *Pearson*, the settlement value to the class members could not include the $1.5 million for the cost of notice to the class or the $1.13 million *cy pres* award. 772 F.3d at 781, 784. Also, the settlement value was limited to the $865,284 actually paid to the class members, not the potential $14.2 million if every one of the 4 million class members had filed a claim. *Id.* at 780–81.

Relying on *Pearson* and *Redman*, defendants argue that the Court *must* confine its award to "the ratio of (1) the fee to (2) the fee plus what the class members received." *Redman*, 768 F.3d at 630; *accord Pearson*, 772 F.3d at 781; *see* Dkt. 564 at 11–13. In light of the claims pending at the time of the final fairness hearing, strictly applying this ratio would limit the fee award to approximately $900,000. Hr'g Tr. at 64. This is over $2 million less than the value of the time plaintiffs' counsel actually expended over the nine years this case was in litigation.

This Court believes defendants read *Pearson* and *Redman* too broadly. The objectors in *Southwest Airlines*, a coupon settlement, relying on the *Pearson* presumption argued that the fee "had to be based on the value of the coupons actually redeemed by class members." 799 F.3d at 705. The Seventh Circuit rejected this argument, ruling that "a district court [has] discretion to use the lodestar method to calculate attorney fees even when those fees are intended to compensate class counsel for the coupon relief he or she obtained for the class." *Id.* at 707. Indeed, whether

attorneys' fees in class action cases are based on statutory fee-shifting or the common fund doctrine, the district court can use the lodestar method to calculate the fees.[4] *See City of Burlington v. Dague*, 505 U.S. 557, 562 (1992) ("The 'lodestar' figure has . . . become the guiding light of our fee-shifting jurisprudence. We have established a 'strong presumption' that the lodestar represents the 'reasonable' fee . . . ."); *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 566 (7th Cir. 1994) ("in common fund cases, the decision whether to use a percentage method or a lodestar method remains in the discretion of the district court"); *Kolinek v. Walgreen Co.*, No. 2015 WL 7450759, at *15 (N.D. Ill. Nov. 23, 2015) ("In the Seventh Circuit, district courts may exercise discretion in choosing either the lodestar or percentage-of-the-fund approach to calculating attorney's fees in common-fund cases. The Seventh Circuit is agnostic regarding which approach district courts should choose . . . .") (citation omitted); *Reid v. Unilever United States, Inc.*, No. 12 C 6058, 2015 WL 3653318, at *5 (N.D. Ill. June 10, 2015), *aff'd sub nom. Martin v. Reid*, 818 F.3d 302 (7th Cir. 2016) ("In a statutory fee-shifting case, the court determines a reasonable amount of attorneys' fees by applying the lodestar method."). The *Southwest Airlines* court cautioned the court applying the lodestar method to "bear in mind the potential for abuse" but was persuaded that this was "an exceptional settlement that actually makes the class whole." 799 F.3d at 710–12.

[4] Here, plaintiffs brought a class action against defendants under both the Magnuson-Moss Warranty Act, which contains a fee-shifting provision, and various state-law warranty statutes, which do not. The parties do not discuss whether the common fund doctrine or statutory fee-shifting applies to their dispute. Under either scenario, however, the Court can apply a lodestar analysis.

The present case was hard-fought over nearly ten years—including two appearances before the Seventh Circuit on class certification. Furthermore, qualified members of the class are receiving on average $275, nearly all the money they spent repairing or replacing their faulty washer. In light of the *Southwest Airlines* holding, the Court rejects the notion that it is precluded from awarding the lodestar. The *Pearson* presumption is exactly that—a presumption that may be overcome. *See Pearson*, 772 F.3d at 782 ("the *presumption* should we suggest be that attorneys' fees awarded to class counsel should not exceed a third or at most a half of the total amount of money going to class members and their counsel") (emphasis added).

Although the Court finds that it is not bound by the *Pearson* ratio presumption, there is no doubt the Court is obligated to carefully review the settlement for indications of class counsel being compensated at the expense of the class members. The Seventh Circuit has identified a number of factors for the district court to consider when evaluating whether attorney fees for class counsel are being sought at class expense. Not a single one of them is present in this case.

First, the district court should be wary if the settlement agreement includes a "clear-sailing clause"—"a clause in which the defendant agrees not to contest class counsel's request for attorneys' fees." *Redman*, 768 F.3d at 637. The concern is that a defendant likely would not agree to a clear-sailing clause without some concession by class counsel—"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." *Id.* While clear-sailing clauses are not unlawful per se, "such a clause should be sub-

jected to intense critical scrutiny by the district court." *Id.* As evidenced by the volume of pleadings filed in this case regarding the attorneys' fees, the parties have no "clear sailing" agreement.

The district court should also be suspicious of a "kicker clause," which "provides that if the judge reduces the amount of fees that the proposed settlement awards to class counsel, the savings shall inure not to the class but to the defendant." *Pearson*, 772 F.3d at 786. Describing the kicker clause as a "gimmick for defeating objectors," the circuit court observed that the obvious benefit of a kicker clause to the *defendant* is matched by a hidden benefit to *class counsel*—counsel are more likely to get the agreed-upon fee award, because no class member has "standing to object." *Id.*; *see Southwest Airlines*, 799 F.3d at 705 ("'kicker' clauses [are] designed to shield the fee award from challenge"). Again, there is no "kicker" clause here.

Finally, the *Pearson* court was concerned that the claims process actually discouraged claims from being filed. As the *Pearson* court observed, the ratio presumption "gives class counsel an incentive to design the claims process in such a way as will maximize the settlement benefits actually received by the class." 772 F.3d at 781. Troubling to the court in *Pearson* was the fact that, for a modest award of $3 or $5 per bottle purchased, a class member had to wade through five documents on a website, provide proof of purchase ("likely to have been discarded"), and certify under penalty of perjury the veracity of his claim. *Id.* at 783. To the contrary, in the present case, the claims process was designed to maximize claims. Whenever possible, class members were sent postcard notices that contained an individualized

code; when the class member entered this code in the online claim form, many fields "auto-populated," making claim submission easier. And if a class member was "identified in Whirlpool's or Sears's databases as having paid for a Qualifying Repair or . . . a Qualifying Service Contract," then he or she was deemed a "Prequalified Class Member." S.A. at 7. Prequalified Class Members were not required to submit *any* documentation to support their claims. These class members need only confirm their current name and address, check the eligibility boxes on the online claim form, and submit their electronic signature. *Id.* at 20. Finally, defendants also agreed that if a non-Prequalified Class Member did not provide necessary documentation of an out-of-pocket expense for a Qualifying Repair, the claims administrator would search defendants' databases for proof of a claimed Qualifying Repair, so that the claim might be cured and the class member would receive full reimbursement. *Id.* at 21. As a result, the claim submission rate in this case is high. Although "the percentage of class members who file claims is often quite low" in consumer class actions, *Pearson*, 772 F.3d at 782 (noting it was "one quarter of one percent" in that case), the claim submission rate for prequalified claimants in this case is about 16%. Dkt. 574 (Schwartz Decl. in Support of Reply) at ¶ 1.

In this case, there is no evidence of collusion between defendants and class counsel. The Settlement Agreement contains no kicker or clear-sailing clauses. Further, the parties agreed on the class members' settlement without discussing attorney fees. Dkt. 574 at ¶ 7 (class counsel attesting that the parties agreed on class relief without any agreement on fees). "There was not a single cent of relief that [the]

class traded off for fees." Hr'g Tr. at 42; *see* S.A. §§ X.A (agreeing to pay fees "without reducing the amount [of] money available to pay Valid Claims submitted by Settlement Class Members"), X.D (same), X.B ("The amount of attorneys' fees and expenses to be paid to Class Counsel shall be determined by the Court."). And defendants are vigorously contesting class counsel's fees request. *Cf. Redman*, 768 F.3d at 629 (rejecting class settlement partly out of concern that defendant agreed to not contest $1 million in fees in exchange for smaller award to class).

Second and most significantly, qualified class members are receiving a full recovery.[5] Hr'g Tr. at 39; *see Southwest Airlines*, 799 F.3d at 711 (emphasizing that "complete relief for the class is the model of an adequate settlement"). Both parties attest that the Settlement Agreement provides class members with a "full, make-whole relief for repairs (and significant compensation for washer replacements) related to CCU Performance Problems that first manifested within 3 years of purchase."[6] Dkt. 502 at ¶ 12 (joint declaration by defendants and class counsel). The parties agree that class members are enjoying a "substantial recovery," "since the original manufacturer's warranty was limited to one year for labor and 2 years for parts." *Id.*

[5] It is worth noting that there were no objections filed to the fees requested despite the fact that class counsel filed their motion for fees, Dkt. 530, a month before objections were due. *Cf. Redman*, 768 F.3d at 637 (criticizing settlement because class counsel filed fees motion *after* the deadline set for objections had expired). The only objections to the Settlement Agreement were to the three-year limitations period. Dkt. 522, 561, 562. The Court overruled these objections. Dkt. 590 at 25 ("[T]he three-year period is one year *longer* than the written warranties. It is highly likely this relief is far better than what any Class Member could have recovered at trial.").

[6] Discovery in this case confirmed that "a significant percentage of CCU Performance Problems manifested within the first 3 years of service." *Id.*

Third, the lawyers did not rush this case to settlement in order to maximize class counsel's fees. In *Redman*, the parties settled less than two years after the case was filed and before any substantive motions had been decided, yet agreed to award class counsel $1 million in fees. 768 F.3d at 627–28. There was no "genuine adverseness between the parties rather than the conflict of interest recognized and discussed in many previous class action cases, and present in this case." *Id.* at 629. Similarly, in *Pearson*, the parties settled eight months after filing and agreed that defendants would not oppose plaintiffs' counsel's fee request of $4.5 million. 772 F.3d at 779–81. Here, to the contrary, settlement was achieved after *nine years* of litigation. Thus, the fees sought here are not the result of a quick settlement to maximize an economic windfall but instead are the result of intense advocacy on both sides. In sum, there are no factors suggesting "collusion . . . between class counsel and the defendant, to the detriment of the class members." *Redman*, 768 F.3d at 637.

Having concluded that Class Counsel's fee should be determined based on the lodestar, the Court now turns to determinate what their compensation should be.

VI. LODESTAR ANALYSIS

As the party seeking the award of attorneys' fees, plaintiffs "bear[] the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *accord Reid*, 2015 WL 3653318, at *6 ("As the party seeking the award of attorneys' fees, Plaintiffs bear the burden of establishing the reasonableness of the time expended

and hourly rates charged by their attorneys."). The lodestar method results from "multiplying a reasonable hourly rate by the number of hours reasonably expended on the litigation." *Small v. Richard Wolf Med. Instruments Corp.*, 264 F.3d 702, 707 (7th Cir. 2001); *accord Reid*, 2015 WL 3653318, at *6.

Counsel asserts that they spent 6,133.85 hours litigating the CCU claims through February 4, 2016, the date they filed their Reply, with a resulting lodestar of $3,249,640.[7] In addition, class counsel argues that the Court should award a 1.85 multiplier, for a total fees award of $6 million.[8] Dkt. 531 at 22; Dkt. 573 at 51 & n.35.

[7] The CCU related lodestars for each of the plaintiffs' firms breaks down as follows:

Firm	Hours	Lodestar
Carey, Danis & Lowe	2428.6	$1,210,490
Chimicles & Tiklellis LLP	3037.9	$1,635,139
Lieff Cabraser Heimann & Bernstein, LLP	253.95	$156,592
Quantum Legal LLC	302.1	$178,809
Seeger Weiss LLP	56.3	$29,617
Shepherd, Finkleman, Miller & Shaw, LLP	55.0	$38,993
Total	**6133.85**	**$3,249,640**

Dkt. 531, Ex. 1. In their Reply, class counsel (1) subtracted seven hours that were actually biofilm time; (2) shifted $30,310 that Leiff Cabraser paid for appellate legal specialists from expenses to their lodestar; (3) increased Carey Danis' lodestar by $20,000 for time spent by co-lead counsel James Rosemergy with claims administration and final approval issues; and (4) increased Chimicles & Tiklellis' lodestar by $44,000 for time spent by co-lead counsel Steven Schwartz with claims administration and final approval issues. Dkt. 573 at 51 n.35, 53; Dkt. 574 at ¶¶ 17–18; Dkt. 575 at ¶¶ 8, 12 & Ex. 1. All these changes are reflected in the above chart. Defendants have not objected to any of these changes. Dkt. 584.

[8] Class counsel originally requested a 1.9 multiplier. Dkt. 531 at 22. However, in their Reply, they reduced their request to 1.85 because their lodestar had increased by almost $100,000, and they agreed not to seek more than $6 million in fees. Dkt. 573 at 51 & n.35.

A. Class Counsel's Hours

The Supreme Court has directed that "[c]ounsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." *Hensley*, 461 U.S. at 434. It is well-settled that "if the prevailing party fails to exercise the proper billing judgment, the court should exclude from the fee calculation hours that were not 'reasonably expended.'" *Reid*, 2015 WL 3653318, at *7 (citing *Hensley*, 461 U.S. at 434).

Defendants "do not challenge Class Counsel's lodestar on the basis of the total number of hours Class Counsel claim to have spent on the litigation as a whole or on particular tasks." Dkt. 564 at 40. However, defendants argue that the Court should: (1) reduce the base lodestar for any biofilm-related work; (2) disallow the single, non-contemporaneous, cumulative billing entry of 1,047 hours totaling $314,100; and (3) disallow Shepherd Finkelman's time because its records are so heavily redacted. Dkt. 564 at 26–41. The Court addresses each of defendants' arguments in turn.

1. Biofilm-Related Work

Defendants argue that work "on the biofilm claims should [not] be compensated as part of this CCU settlement, especially because Class Counsel intend to request reimbursement of fees and costs in the separate biofilm class settlement." Dkt. 564 at 36. The Court agrees that work performed on the biofilm litigation should not be

compensated here. Defendants' concern arises because prior to April 2014, the CCU claims were litigated together with the related biofilm claims. Dkt. 347 (severing CCU claims for trial purposes). "Documents were produced into a common database, legal issues were tried together in single briefs, and several depositions applied to all claims." Dkt. 531 at 25. Nevertheless, class counsel asserts that "[o]nly CCU-centric time is included in the lodestar" presented in their motion. *Id.* Co-lead counsel, James Rosemergy, personally reviewed "both his firm's entries and the time entries of other firms" and compared them against "the case file and docket to ensure that the time being submitted was, in fact, related to CCU in particular." Dkt. 573 at 41; Dkt. 575 at ¶¶ 4–5. Further, class counsel assured the Court that regardless of the Court's ruling here, none of the fees submitted in this case were submitted in the biofilm fees request.[9] Dkt. 587 at 45–47. The Court agrees with defendants position, but believe class counsel has generally been diligent in only seeking compensation for CCU related hours.

a. Lieff Cabraser Appellate Time

Defendants specifically challenge Lieff Cabreser's request for $109,507.75 in fees for work that its attorneys performed on the class certification appeals. Dkt. 564 at 27–28; *see* Dkt. 531-12 at ¶ 7. Lieff Cabraser, the primary appellate counsel, represented plaintiffs in the Seventh Circuit in the *Kenmore* litigation *and* in the Sixth Circuit in the *Whirlpool* litigation. Dkt. 531-12 at ¶ 5. It was also primary counsel during the two rounds of certiorari briefing in the United States Supreme Court in

[9] It is worth noting that the CCU lodestar is less than 10% of the biofilm lodestar. Dkt. 573 at 35; Dkt. 574 at ¶ 5; Dkt. 586 at 5 (sealed term sheet).

both cases. *Id.* It also handled the appellate work after a biofilm matter was tried in the Ohio district court. The total time spent on this combined appellate work was 887.8 hours with a total lodestar of $438,031. *Id.* at ¶¶ 5–7. Because it was "not possible to precisely attribute the time expended on the appellate work across the *Kenmore* and *Whirlpool* cases in the Courts of Appeal and Supreme Court as between those cases," Lieff Cabraser determined that "approximately 25% of LCHB's hours and lodestar are reasonably and appropriately apportioned to the CCU litigation." *Id.* at ¶ 5(b). That resulted in 221.95 hours and $109,507.75 apportioned to this litigation. *Id.* at ¶¶ 5(b), 7.

After reviewing Lieff Cabraser's time entries, the Court is concerned with the large number of time entries in 2014 and 2015, Dkt. 564-5 at 91–94, which occurred after the appellate work concluded in this case and the parallel appellate work concluded in the *Whirlpool* cases. *See Whirlpool Corp. v. Glazer*, 2013 WL 6493514 (U.S.) (filing joint brief in opposition to certiorari in both the *Kenmore* and *Whirlpool* cases); *Sears, Roebuck & Co. v. Butler*, 134 S. Ct. 1277 (Feb. 24, 2014) (denying certiorari); *Whirlpool Corp. v. Glazer*, 134 S. Ct. 1277 (2014) (same). The 2014–2015 hours, on the other hand, were devoted to only biofilm work. The Court therefore disallows this time—568.3 hours with a lodestar of $263,081.50—from Lieff Cabreser's combined CCU/biofilm time.[10] The allowable time is decreased to 319.5 billable hours with a lodestar of $174,949.50.

[10] This deletes all time for billers Richard Anthony, Elizabeth Cabreser, Todd Carnam, Jordan Elias, Spencer Griffith, Jerome Mayer-Cantu, Kathryn Murray, and Jennifer Rud-

However, because the Court has discounted all 2014–2015 time, the Court finds that 50% of the remaining time is reasonably allocated to Lieff Cabraser's contribution to the CCU settlement. Accordingly, the adjusted lodestar for Lieff Cabreser's appellate work is $117,785—50% of the combined CCU/biofilm lodestar ($87,475) plus the amount paid to appellate legal specialists ($30,310), which the parties agreed to transfer from expenses to the lodestar.[11] Dkt. 573 at 53; *accord* Dkt. 584 at 24.

This finding is amply supported by the amount of time defendants spent on CCU appellate work. Mayer Brown handled the appellate litigation for defendants. After conceding that it is difficult and time-consuming to separate appellate counsel's CCU and biofilm time, defendants assert "[o]nly a small percentage of its work was CCU-related." Defendants went on to stipulate, in the interest of compromise, "that $200,000 of Mayer Brown's work charged . . . was CCU-related, but that is an overstatement of MB's time that could be reasonably attributed to the CCU claims." Dkt. 574, Ex. B. This might be an over-estimate, but it is nearly twice what Lieff Cabreser is awarded for its appellate work.

b. Carey Danis

Defendants also challenge the law firm Carey Danis' claim for $7,962.50 worth of time spent on witness Chowanec's 2015 deposition, which covered both biofilm and

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nick, and 59.3 hours from biller Jason Lichtman and 24.8 hours from biller Jonathan Selbin. Dkt. 564-5 at 91–94.

[11] In addition to Leiff Cabraser's appellate work, the firm devoted 32 hours to work specifically on the CCU district court litigation. Dkt. 531-12 at ¶¶ 6–7. The Court's consideration of these hours is discussed below.

CCU issues. Dkt. 564 at 23 n.10. Plaintiffs agree that the deposition did cover both issues, but assert "the time submitted for this fee petition reflects a proper allocation between the two claims." Dkt. 573 at 39. Mark Chalos of Lieff Cabraser questioned Chowanec on the biofilm issue, and Lieff Cabreser's Chowanec-related time is not being submitted in this fee application. *Id.*; Dkt. 575 at ¶ 6. On the other hand, Mr. Rosemergy of Carey Danis handled the CCU portion of the Chowanec deposition, and his time is properly compensable. *Id.* Defendants' objections to the time spent by Carey Danis on the Chowanec deposition are overruled.

2. Carey Danis Document Review Entry

Class Counsel's fee request included a single time entry for 1,047 hours of document review during the period of April 2014 through March 2015 for a lodestar amount of $314,100. Dkt. 564, Ex. 5 at 82. Defendants rightly object because "no client paying by the hour would pay $314,100 based on a single, vague entry covering 11 months of work." Dkt. 564 at 29; *see Hensley*, 461 U.S. at 434 ("Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* . . . .") (citation omitted) (emphasis in original); *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 722 (7th Cir. 2001) (party seeking fees must provide "the level of detail that paying clients find satisfactory"); *Gibson v. City of Chicago*, 873 F. Supp. 2d 975, 986 (N.D. Ill. 2012) ("The relevant inquiry is thus whether the time entries are sufficiently detailed to permit the Court to determine whether the hours expended were reasonable and necessary to the conduct of the litigation.") (citation omitted). Defendants also assert that "the entry violates the Supreme Court's requirement

that time entries be accurately kept." Dkt. 564 at 30; *see Hensley*, 461 U.S. at 433 & 438 n.13 ("The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly."); *Hardrick v. Airway Freight Sys., Inc.*, No. 98 C 1609, 2000 WL 263687, at *3 (N.D. Ill. Feb. 28, 2000) ("The 'primary concern' of the *Hensley* decision is 'that the entries made were *accurate*,' and based on 'contemporaneous records.'") (quoting *Dutchak v. Central States Pension Fund,* 932 F.2d 591, 597 (7th Cir. 1991)) (emphasis in original).

Class counsel replied that while the work was memorialized "in distinct entries that are identified by date and amount of time worked," they produced a block entry so as not to "unnecessarily burden" the process. Dkt. 573 at 40. Class counsel then provided "out of an abundance of caution" a complete set of daily time entries. Dkt. 575 at ¶ 10; Dkt. 580-3. According to co-lead counsel Rosemergy, the $314,100 charge was for a second-level document review done on CCU documents only *after* the documents had been segregated between CCU and biofilm. Dkt. 573 at 41; Dkt. 575 at ¶ 10. Defendants maintain that the newly produced time entries are still insufficient because they merely describe the work as "document review." Dkt. 584 at 15.

Assured that the documents are CCU related, the Court is not troubled that the Carey Danis' "document review" entries are too vague. Clients and the Court are well aware of what "document review" entails without further edification. Defendants question the timing of performing document review in 2014 and 2015 for doc-

uments produced in 2010–2011. Dkt. 564 at 29–30; *see* Dkt. 584 at 15. But the second-level document review was performed only after the case had been remanded to the district court, and class counsel was certain they had a viable class. *See* Dkt. 573 at 40; Dkt. 575 at ¶ 3. This strikes the Court as efficient rather than objectionable time management.

However, defendants also assert that the bulk of this 1,047 hours of document review (six months, full-time work) was spent in the months leading up to the October 2014 biofilm trial in Ohio when no deposition activity was taking place in CCU. Dkt. 584 at 15. Further, all of this document review was done in preparation for two CCU depositions and to prepare for the CCU trial. The Court finds this time excessive and decreases the allowable time to 800 billable hours.

3. Shepherd Finkelman's and Quantum Legal's Time Entries

In their motion, class counsel admits that Shepherd Finkelman "did not segregate time spent . . . between activities devoted to the portion of the case pertaining to control board issues [CCU] as opposed to biofilm issues" and was able to identify only ".80 hours that clearly was related to control board issues." Dkt. 531, Ex. 13 at ¶ 6. In their reply brief they identified another .80 hours that was "clearly related" to CCU issues. *Id*. Nevertheless, Shepherd Finkelman claims $38,993 in fees. *Id.* at ¶ 5. Defendants contend that this request is "improper" and further complain that the time records tendered by Shepherd Finkelman are "so heavily redacted that it is impossible to determine which, if any, entries pertain to the CCU claims." Dkt. 564 at 30; *see Reid*, 2015 WL 3653318, at *8 ("Where attorneys' time entries are so re-

dacted that it is difficult if not impossible for a court to sufficiently evaluate the services rendered and fees charged, and results in the exclusion of basic material information which undermines the integrity of the entire petition, the court may disallow those entries.") (citation omitted); *see also Harper v. City of Chicago Heights*, 223 F.3d 593, 605 (7th Cir. 2000) ("when a fee petition is vague or inadequately documented, a district court may either strike the problematic entries or (in recognition of the impracticalities of requiring courts to do an item-by-item accounting) reduce the proposed fee by a reasonable percentage").

In reply, class counsel contend that (1) detailed time records were provided to defendants and (2) almost all of Shepherd Finkelman's time was spent in connection with "litigating the related Whirlpool-*Poulsen* matter, which relates solely to issues pertaining to CCU (rather than mold)." Dkt. 573 at 42. At the hearing on February 17, 2016, plaintiffs suggested submitting unredacted billing records to the Special Master. Without objection from defendants, the Court ordered those records to be submitted by February 24, 2016. Dkt. 585. The Court has reviewed the unredacted time entries and finds that they are sufficiently detailed for the Court to evaluate the services rendered. The bulk of the time was spent preparing a response to the motion to dismiss in the *Poulsen* case, a CCU-only matter. The Court therefore finds that the hours spent on the tasks identified were reasonably spent. Defendants' objections to the hours claimed by Shepherd Finkelman are overruled.[12]

[12] Although it was without objection, the Court likely erred in allowing Shepherd Finkelman to submit time records for *in camera* review. *See Reynolds v. Beneficial Nat. Bank,* 288 F.3d 277, 286 (7th Cir. 2002) ("[W]e disapprove the practice . . . of . . . permitting

Defendants also questioned 13 of Quantum Legal's time entries, totaling $6,543.50, because they provided no description whatsoever. Dkt. 564 at 31 & Ex. 5 at 84, 87–88. Plaintiffs acknowledged this oversight and provided corrected versions of these time entries, which now include descriptions. Dkt. 573 at 42. The Court has reviewed these entries and finds them reasonable.[13]

B. Class Counsel's Hourly Rates

A "reasonable hourly rate" is "one that is derived from the market rate for the services rendered." *Pickett v. Sheridan Health Care Ctr.*, 664 F.3d 632, 640 (7th Cir. 2011) (citation omitted). Thus, "an attorney's actual billing rate for similar litigation is appropriate to use as the market rate." *Id.* If an attorney has no fee-paying clients because he uses contingent-fee arrangements, the "next best evidence" of the attorney's market rate is "evidence of rates similarly experienced attorneys in the community charge paying clients for similar work and evidence of fee awards the attorney has received in similar cases." *Spegon v. Catholic Bishop of Chicago*, 175 F.3d 544, 555 (7th Cir. 1999). Of these two alternatives, the Seventh Circuit prefers "third party affidavits that attest to the billing rates of comparable attorneys."

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the submission of fee applications *in camera*. In the unlikely event that some confidential information is contained in the applications, that information can be whited out. To conceal the applications and in particular their bottom line paralyzes objectors . . . ."). Having reviewed the records, there was no basis to have them reviewed *in camera*. However, this is moot since counsel at Shepherd Finkelman—Betsy Ferling-Hitriz, James C. Shah and Natalie F. Bennett—provided *no* information justifying their requested hourly rates, so the Court disallows them recovery on that basis. *See infra* § VI.B.1.

[13] This is moot since counsel who performed these tasks at Quantum Legal—Paul Cho, George Lang, Michael Lotus, Julie Miller, and Paul Weiss—provided *no* information justifying their requested hourly rates, so the Court disallows them recovery on that basis. *See infra* § VI.B.1.

Pickett, 664 F.3d at 640. "The fee applicant bears the burden of producing satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community." *Id.* (citation and alteration omitted). Once that burden is satisfied, the burden shifts to the other party "to present evidence establishing a good reason why a lower rate is essential." *People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205*, 90 F.3d 1307, 1313 (7th Cir. 1996). "If the party seeking fees fails to carry its burden, the Court may properly 'make its own determination of a reasonable rate.'" *Reid*, 2015 WL 3653318, at *14 (quoting *Pickett,* 664 F.3d at 640).

1. Unsupported Hourly Rates

In their sur-reply, defendants argue that class counsel has failed to provide any biographical information for several billing attorneys from Lieff Cabraser, Seeger Weiss, Shepherd Finkelman, and Quantum Legal.[14] Dkt. 584 at 16. Defendants argue that "the Court should disallow any time claimed by attorneys for whom Class Counsel have not provided any information." Dkt. 584 at 17. The Court generally agrees, especially since class counsel had the opportunity in their reply to remedy any oversight and failed to do so. *See Montanez v. Chicago Police Officers Fico (Star No. 6284), Simon (Star No. 16497)*, 931 F. Supp. 2d 869, 879 (N.D. Ill. 2013), *aff'd sub nom. Montanez v. Simon*, 755 F.3d 547 (7th Cir. 2014) (disallowing attorney time in the "absence of any information" on skill or experience); *see also O'Sullivan v. City of Chicago,* 484 F. Supp. 2d 829, 839–40 (N.D. Ill. 2007) (disallowing time for

[14] This is even after class counsel provided biographical data on seven billers in their *reply* brief. Dkt. 575-5; Dkt. 575-7; Dkt. 576-2; *accord* Dkt. 584 at 16, 20–21.

attorney who provided little information other than his hourly rate). However, where the Court can determine that the biller is a paralegal, legal assistant or other support staff, the Court will, as described below, "make its own determination of a reasonable rate." *Pickett,* 664 F.3d at 640. Thus, the Court disallows all time claimed for Natalie Bennett, Paul Cho, Kimberly Evans, Betsy Ferling-Hitriz, George Lang, Michael Lotus, Julie Miller, Kathryn Murray, Stephanie Saunders, Miriam Schimmel, James Shah, Darsana Srinivasan, and Paul Weiss.[15]

2. Supported Hourly Rates[16]

a. Jason Lichtman and Jonathan Selbin

As discussed above, Lieff Cabraser submitted 32 hours for work specifically performed on the CCU litigation alone. Dkt. 531-12 at ¶¶ 6–7. Class counsel seeks a $800 rate for Selbin and a $515 hourly rate for Lichtman, partners with Lieff Cabraser with 9 and 23 years of experience, respectively. Dkt. 531-12 at ¶ 7; Dkt. 575-5 at 101–02, 114. Defendants argue that Selbin's rate should be reduced to $540 and Lichtman's to $346. Dkt. 564 at 37.

Selbin and Lichtman have practiced in numerous federal courts and authored multiple articles. Dkt. 575-5 at 101-02, 114. In support of their hourly rates, Licht-

[15] While class counsel also failed to provide any biographical information for Leiff Cabraser appellate billers Richard Anthony, Todd Carnam, Jordan Elias, Spencer Griffith, Jerome Mayer-Cantu, Jennifer Rudnick, Jle Tarpeh, Gregory Waskiewicz, and Allen Wong, the Court has determined the appropriate CCU appellate lodestar for Leiff Cabraser in the aggregate. *See supra* § VI.A.1.a.

[16] The Court notes that the hourly rates it finds supported are all less than those approved recently in *Abbott v. Lockheed Martin Corp.*, No. 06 CV 701, 2015 WL 4398475, at *3 (S.D. Ill. July 17, 2015).

man asserts that these specific rates have been "expressly approved" by multiple courts throughout the United States, including the Northern District of Illinois. Dkt. 531-12 at ¶ 9. Lichtman supports his declaration with citations to over 20 cases where courts had approved the standard billing rates submitted in this case. *Id.* a ¶ 9(a)–(u). The Court finds that Lichtman and Selbin have met their burden to establish that their rates are in line with those prevailing in the community.

b. Stephen Weiss, Jonathan Shub, and Scott George

Class counsel seeks an $850 hourly rate for Weiss and a $750 hourly rate for Shub, partners with Seeger Weiss with 24 and 27 years of experience, respectively. Dkt. 576-1; Dkt. 576-2 at 28, 30. Class counsel seeks a $650 rate for George, who is of counsel with Seeger Weiss and has 17 years of experience. Dkt. 576-2 at 32. Defendants express no opinion on Weiss's rate but argue that Shub's rate should be reduced to $528 and George's to $458. Dkt. 564 at 37.

Weiss and Shub have practiced in numerous federal courts and authored multiple articles; George's practice focuses on class action litigation. Dkt. 576-2 at 28, 30, 32. In support of their hourly rates, Weiss asserts that these "usual and customary hourly rates . . . have been reviewed and deemed reasonable" by multiple federal courts. Dkt. 576 at ¶¶ 2, 5–6; *see* Dkt. 531-14 at ¶ 5. For example, the Central District of California has recently approved a $750 hourly rate for Seeger Weiss partners and a $595 rate for Seeger Weiss counsel.[17] Dkt. 576 at ¶ 6 (citing *Aarons v.*

[17] According to the Consumer Law Report, which defendants submitted in support of their proposed rates, billing rates for Los Angeles attorneys are generally comparable to rates for Chicago attorneys. *Compare* Dkt. 564-11 at 80, *with id.* at 91.

BMW of N. Am., LLC, No. CV 11-7667, 2014 WL 4090564, at *16 (C.D. Cal. Apr. 29, 2014), *objections overruled*, No. CV 11-7667, 2014 WL 4090512 (C.D. Cal. June 20, 2014)). The Court finds that Shub has met his burden to establish that his rate is in line with those prevailing in the community. However, Weiss and George have not provided any reasons why their rates should be higher than the rates approved by the *Aarons* court. The Court concludes that $750 is a reasonable rate for Weiss and Shub and that $595 is a reasonable rate for George.[18]

3. Other Requested Hourly Rates

Defendants assert that the fee request includes only "self-serving declarations" and class counsel has failed to establish that any court has "approved the *particular* rates claimed by the particular lawyers billing in this case for comparable work." Dkt. 564 at 33–37 (emphasis in original). Plaintiffs counter that they provided (1) cases in which courts have approved their requested rates as reasonable; and (2) evidence that "hourly fee-paying clients have actually paid the hourly rates claimed." Dkt. 573 at 44. While there are a few exceptions, as discussed above, the Court generally agrees with defendants that class counsel's submissions "cannot satisfy the plaintiff's burden of establishing the market rate for that attorney's services." *Spegon*, 175 F.3d at 556. For example, while Steven Schwartz attests that Chimicles & Tikellis' rates "have been approved by state and federal courts throughout the coun-

[18] Weiss also asserts that because the *Aarons* court award $595 per hour for Seeger Weiss's associates, this Court should approve Miriam Schimmel's requested $410 per hour rate. Dkt. 576 at ¶ 6. But the Court has no biographical information for Schimmel or for the associates approved by the *Aaron* court. Therefore, as discussed *supra* § VI.B.1, the Court disallows all time claimed for Schimmel.

try, including successful consumer class cases where [the] firm served as lead class counsel," Dkt. 531-2 at ¶ 25, counsel provides no proof that each of the specific rates requested for each of the Chimicles lawyers *in this case* have been approved by another court. So even if a court approved Mr. Schwartz's requested rate of $750 at some point, the general statement in Mr. Schwartz's declaration does not establish that the billing rates of the other five attorneys from Chimicles & Tikellis were approved. Furthermore, although counsel provided an impressive description of the firm's litigation successes, including case captions, there is nothing indicating the approval of rates or what those rates were. Dkt. 531-3 at 31-48. Even if this Court were to search the dockets of these various courts for orders approving the requested rates, class counsel provides no basis for the court to conclude that these out-of-district billing rates are comparable to those in the Chicago area. *See Reid*, 2015 WL 3653318, at *15 ("Plaintiffs have offered no evidence to prove that the billing rates in each district are comparable."). This is also true for the general, unsupported statements submitted by counsel from the other firms. Dkt. 531-8 at ¶¶ 12–13 (James Rosemergy attesting that Carey Danis' rates "have been approved by state and federal courts throughout the country, including successful consumer class cases where [the firm] has served in a lead or prominent role."); Dkt. 531-11 at ¶ 5 (Richard Burke attesting that Quantum Legal's rates "for [the] firms partners, attorneys and professional support staff included in the schedule were the usual and customary hourly rates charged for their services in similar complex litigation."); Dkt. 531-13 at ¶ 8 (James Shah attesting that Shepherd Finkelman's rates "have

been approved by courts throughout the United States."). Because the Court concludes that class counsel have not met their burden of producing satisfactory evidence establishing many of their requested rates, the Court therefore may properly "make its own determination of a reasonable rate." *See Pickett*, 644 F.3d at 640.

Defendants urge the Court to rely on averaging the *Laffey* Matrix[19] and the Chicago-specific portions of the Consumer Law Report[20] to set the appropriate rates. Because these two surveys "provide substantially similar rate data based on a lawyer's years of experience, . . . [s]plitting the minimal differences between these two reliable sources yields" the appropriate market rates. Dkt. 564 at 36. The Seventh Circuit has never formally adopted the Matrix and has stated only that it "can assist the district court with the challenging task of determining a reasonable hourly rate." *Pickett*, 664 F.3d at 648. Thus, courts in this district have relied on the Matrix as one factor in determining a reasonable rate. *See Sandra T.-E. v. Sperlik*, No. 05 C 473, 2012 WL 1107845, at *1 (N.D. Ill. Apr. 1, 2012) (collecting cases). Courts in this district have also considered the Consumer Law Report in analyzing the reasonableness of proposed hourly billing rates. *Reid*, 2015 WL 3653318, at *15 (collecting cases).

[19] The *Laffey* Matrix is a chart of hourly rates for attorneys and paralegals in the Washington, D.C. area that was prepared by the United States Attorney's Office for the District of Columbia to be used in fee-shifting cases. *Montanez v. Simon*, 755 F.3d 547, 554 (7th Cir. 2014); *see* Dkt. 564-10 (2014–2015 *Laffey* Matrix).

[20] The United States Consumer Law Attorney Fee Survey Report publishes the survey results relating to attorney's fees for attorneys specializing in consumer law for the ten largest U.S. cities, including Chicago, IL. *Reid,* 2015 WL 3653318, at *14 n.9; *see* Dkt. 564-11 at 91 (2013–2014 Consumer Law Report for Chicago).

Plaintiffs encourage the Court to use the National Law Journal survey of hourly billing rates to cross-check their rates. Dkt. 573 at 47 (citing *Fleisher v. Phoenix Life Ins. Co.*, No. 11-CV-8405, 2015 WL 10847814, at *18 n.15 (S.D.N.Y. Sept. 9, 2015); *Zest IP Holdings, LLC v. Implant Direct Mfg., LLC*, No. 10-CV-0541, 2014 WL 6851612, at *6 (S.D. Cal. Dec. 3, 2014); *Blue Growth Holdings Ltd. v. Mainstreet LimitedVentures, LLC*, No. CV 13-1452, 2014 WL 3518885, at *3 (N.D. Cal. July 16, 2014); *In re Schering-Plough Corp. Enhance Sec. Litig.*, No. 08-2177, 2013 WL 5505744, at *33 n.27 (D.N.J. Oct. 1, 2013)). Plaintiffs submitted the National Law Journal's Annual Billing Survey for 2015 (NLJ Survey) to suggest that the hourly rates they seek are "well within the range of market rates charged by attorneys of equivalent experience, skill, and expertise" for Chicago-based firms. However, courts have expressed skepticism at applying hourly rates for large international firms with corporate clients to consumer class action attorneys. *See In re Southwest Airlines Voucher Litig.*, No. 11 C 8176, 2013 WL 5497275, at *9 (N.D. Ill. Oct. 3, 2013), *amended*, No. 11 C 8176, 2014 WL 2809016 (N.D. Ill. June 20, 2014), *aff'd*, 799 F.3d 701 (7th Cir. 2015) (rejecting request by plaintiffs to rely on the NLJ's annual billing survey because "it would be difficult to reach a reasonable conclusion that the hourly rate charged by a 1,000-lawyer firm representing primarily large corporate clients who voluntarily choose to pay its rates is a fair point of comparison for the reasonable hourly rates for attorneys at a seven-lawyer firm that handles primarily class action and other consumer-related litigation on a contingent-fee ba-

sis"). Similarly, this Court declines to find that the NLJ Survey is binding, but will consider it as one of many factors.

a. Nicholas Chimicles, Steven Schwartz, James Rosemergy, and Richard Burke

Class counsel seek a $950 hourly rate for Nicholas Chimicles, the named partner of Chimicles & Tikellis, who has 42 years of experience. Dkt. 531-3 at 4–5; Dkt. 531-4. Chimicles has been lead counsel and lead trial counsel in major complex litigation suits for over 30 years, including several in the Northern District of Illinois. Dkt. 531-4 at 4–5. Defendants argue that Chimicles' hourly rate should be reduced to $481. Dkt. 564 at 37.

Class counsel seeks a $750 hourly rate for Steven Schwartz, a partner with Chimicles & Tikellis, who has 28 years of experience. Dkt. 531-3 at 9–10; Dkt. 531-4. Schwartz has prosecuted a large number of consumer class actions, including multi-district and multi-state class actions in both state and federal courts. Dkt. 531-4 at 9–10; Dkt. 531-2 at ¶ 4. Mr. Schwartz, unlike some of his colleagues, affirms that he has been paid his "full billing rate for hourly work . . . in connection with class cases they brought as class representative against . . . insurers." Dkt. 531-2 at ¶ 26. Defendants argue that Schwartz's hourly rate should be reduced to $528. Dkt. 564 at 37.

Class counsel seeks a $650 hourly rate for James Rosemergy, a partner with Carey Danis, who has 17 years of experience. Dkt. 531-9 at 9; Dkt. 531-10. Rosemergy concentrates his practice in consumer and antitrust class action litigation.

Dkt. 531-9 at 9. He is also on the Board of Governors for the Missouri Association of Trial Attorneys, an organization dedicated to protecting the rights of consumers and the injured. Dkt. 531-8 at ¶ 5. Other than the first two years of his legal career, his practice "has been dedicated entirely to Plaintiff's class action and mass tort litigation." *Id.* He has served in leadership roles in numerous successful class actions. *Id.* ¶ 6. Defendants argue that Rosemergy's hourly rate should be reduced to $458. Dkt. 564 at 37.

Class counsel seeks a $720 hourly rate for Richard Burke, a partner with Quantum Legal, who has 30 years of experience. Dkt. 531-11 at 5; Dkt. 575-6 at 5. Dkt. 564 at 37. In support of Burke's rate, counsel states that he has worked on over 150 class action cases throughout the country, including complex consumer class actions and numerous high profile class action lawsuits. Dkt. 575-6 at 5–6. Defendants argue that Burke's hourly rate should be reduced to $528.

The Court finds Chimicles's, Schwartz's, Rosemergy's, and Burke's extensive class action experience persuasive and that experience places them near the 95% median rate for consumer law attorneys in the Chicago area ($630). Dkt. 564-11 at 91. Further, this rate is near the median rate for Chicago partners according to the NLJ Survey. Dkt. 573 at 46–47. Accordingly, the Court concludes that $630 is a reasonable market rate for Chimcles's, Schwartz's, Rosemergy's, and Burke's services in this case.

b. Timothy Mathews and Mathew Schelkopf

Class counsel seeks a $600 hourly rate for Mathews and Schelkopf, Chimicles & Tikellis partners, with 12 and 13 years of experience, respectively.[21] Dkt. 531-3 at 13–14, 16–17; Dkt. 531-4. Mathews has litigated a broad array of subject matters in both federal and state courts. Dkt. 531-3 at 13–14. Schelkopf has extensive trial experience, with an emphasis on consumer class actions. Dkt. 531-3 at 16–17. Defendants argue that Mathews's hourly rate should be reduced to $446 and Schelkopf's to $346. Dkt. 564 at 37. The Court finds Mathews's and Schelkopf's litigation experience persuasive, and that experience should place them near the 75% median rate for consumer law attorneys in the Chicago area ($510). Dkt. 564-11 at 91. Further, this rate is within the range for Chicago partners according to the NLJ Survey. Dkt. 573 at 46–47. Accordingly, the Court concludes that $510 is a reasonable market rate for Mathews's and Schelkopf's services in this case.

c. Andrew Cross

Class counsel seeks a $650 hourly rate for Cross, a partner with Carey Danis, who has 22 years of experience. Dkt. 531-9 at 8–9; Dkt. 531-10. Cross's practice focuses on consumer and mass tort litigation. Dkt. 531-9 at 9. Defendants argue that Cross's rate should be reduced to $540. Dkt. 564 at 37. The Court finds that defendant's proposed rate is appropriate in light of the information provided. This rate is near the 75% median for all consumer law attorneys in Chicago. Dkt. 564-11 at 91. Further, this rate is within the range for Chicago partners according to the NLJ

[21] Defendants erroneously state that Schelkopf has only seven years of experience. *Compare* Dkt. 564 at 37, *with* Dkt. 531-3 at 16.

Survey. Dkt. 573 at 46–47. Accordingly, the Court concludes that $540 is a reasonable market rate for Cross's services in this case.

d. Anthony Geyelin and Alison Gushue

Class counsel request fees for two Chimicles & Tikellis lawyers, Anthony Geyelin and Alison Gushue, who spent a combined 1,300 hours on document review work at hourly rates of $460 and $450 per hour, respectively. Dkt. 531-3 at 18–19; Dkt. 531-4; Dkt. 564-5 at 1–17, 38–48. Geyelin is of counsel, with 10 years of experience; Gushue is an associate, with 9 years of experience. Dkt. 531-2 at ¶ 9; Dkt. 531-3 at 3, 21, 29. Defendants object, arguing that the Court "should not approve partner rates for work that could have been accomplished by contract attorneys or first-year associates at a much lower rate," and propose a $346 rate. Dkt. 564 at 37–38.

Geyelin has significant private and public sector corporate and regulatory experience, and Gushue has experience litigating consumer fraud cases. Dkt. 531-3 at 21, 29. In addition, Gushue's "familiarity with key documents, the Whirlpool and Sears record-keeping practices and document databases, and the state of the law concerning defects in front-loading washing machines translated into efficiencies for the work she performed in the CCU actions, which she has worked on from the outset." Dkt. 531-2 at ¶ 8. Geyelin is "a highly experienced document review attorney with significant experience in managing large-scale complex document review production." *Id.* at ¶ 9. Gushue and Geyelin "took responsibility for identifying from all the documents produced in the CCU/biofilm cases those that were relevant to the CCU claims case and organizing those relevant documents into detailed digests or-

ganized [by] topics for sue [*sic*] at depositions and at trial and to assist [the expert]." *Id.*

The Court finds that Gushue and Geyelin were not performing routine document review that could have been performed by first-year associates or contract attorneys, as defendants contend. To the contrary, they were performing a high-level analysis of the documents already reviewed in order to prepare for depositions and trial. Further, the Court finds that their extensive knowledge of this case, along with their prior experiences and skill level, translated into significant efficiencies.

The Court finds Geyelin's and Gushue's extensive experience and skills highly persuasive, and that experience should place them well above the average for consumer law attorneys in the Chicago area with 6–10 years' experience. The rate for the average consumer law attorney with 6–10 years' experience is $322, while the average for 11–15 years is $432. Dkt. 564-11 at 91. Further, the average attorney rate for all attorneys is $420. Under these circumstances, the Court concludes that $425 is a reasonable market rate for Geyelin's and Gushue's services in this case. This rate is also within the range of attorneys with 8–10 years' experience ($370) and those with 11–19 years' experience ($460), according to the *Laffey* Matrix. Dkt. 564-10. And, this rate is near the median rate for Chicago associates according to the NLJ Survey. Dkt. 573 at 46–47.

e. Benjamin Johns, Zachary Jacobs, Grant Lee, and Tiffany Yiatris

Class counsel seeks a $550 hourly rate for Benjamin Johns, a partner with Chimicles & Tikellis, who has 10 years of experience; a $550 hourly rate for Tiffany

Yiatras, a partner with Carey Danis, who has 10 years of experience; a $680 hourly rate for Grant Lee, a partner with Quantum Legal, who has 9 years of experience; and a $550 hourly rate for Zachary Jacobs, an associate with Quantum Legal, who has 8 years of experience. Dkt. 531-3 at 18–19; Dkt. 531-4; Dkt. 531-9 at 9; Dkt. 531-10; Dkt. 531-11 at 5; Dkt. 575-6 at 7; Dkt. 531-11 at 5; Dkt. 575-6 at 6–7; Dkt. 531-12 at 3. In support of these rates, counsel submitted sparse biographical information, which indicates only that each of these attorneys have some litigation experience. Dkt. 531-3 at 18–19; Dkt. 531-9 at 9; Dkt. 576 at 6–7. Defendants argue that Jacobs's, Lee's, and Yiatris's rates should be reduced to $346. Dkt. 564 at 37. Defendants express no opinion on Johns's rate.

The Court finds that Defendant's proposed rate is appropriate for these attorneys with 8–10 years' experience. Accordingly, the Court concludes that $346 is a reasonable market rate for Johns's, Jacobs's, Lee's, and Yiatras's services in this case.

f. Christina Saler

Class counsel seeks a $500 hourly rate for Saler, a senior counsel with Chimicles & Tikellis, who has 12 years of experience focused on prosecuting class actions. Dkt. 531-3 at 24; Dkt. 531-4. Defendants argue that Saler's hourly rate should be reduced to $446. Dkt. 564 at 37. The Court finds that defendants' proposed rate is appropriate for someone of Saler's experience. This rate is near the average for all consumer law attorneys in Chicago. Dkt. 564-11 at 91. Further, this rate is within the range for Chicago associates according to the NLJ Survey. Dkt. 573 at 46–47.

Accordingly, the Court concludes that $446 is a reasonable market rate for Saler's services in this case.

g. Aaron Morgan

Class counsel seeks a $300 hourly rate for Morgan, an associate with Carey Danis, who has 8 years of experience. Dkt. Dkt. 531-10; Dkt. 575 at ¶ 9. Defendants have not objected to this proposed rate, and the Court approves it. Morgan oversees a staff of document review attorneys, focusing on complex, mass tort and class action litigation. Dkt. 575 at ¶ 9. His work in this case occurred after the documents had been previously reviewed and was designed to gather the critical documents for trial and discovery. *Id.* at ¶ 10.

h. Thomas Flowers

Class counsel seeks a $350 hourly rate for Flowers, an associate with Quantum Legal, who has 3 years of experience. Dkt. 531-11 at 5; Dkt. 575-6 at 6. In support of Flower's rate, counsel has submitted sparse biographical information, which indicates only that he has some experience in both federal and state court. Dkt. 575-6 at 6. Defendants express no opinion on Flowers's proposed rate.

The Court finds Flowers's experience should place him within the range for attorneys with 3–5 years of experience. Therefore, the Court will average the results of *Laffey* Matrix and the Consumer Law Report surveys. Dkt. 564-10 at 2; Dkt. 564-11 at 91. Accordingly, the Court concludes that $313 is a reasonable market rate for Flowers's services in this case.

i. Support Staff Rate

Class counsel seeks hourly rates ranging from $60 to $250 for support staff personnel, including paralegals and legal assistants.[22] Dkt. 531-4; Dkt. 576-1. Defendants do not propose any alternate rates; instead, they generally argue that the hours should be disallowed because no biographical information was submitted. Dkt. 584 at 17.

Courts in the Northern District of Illinois consistently award a $95–125 hourly rate to law clerks and paralegals. *Reid*, 2015 WL 3653318, at *19 (collecting cases). Further, the Consumer Law Report found that the average rate for all paralegals in Chicago is $127, and the median rate is $133. Dkt. 564-11 at 91. The *Laffey* Matrix found that the average rate for paralegals and law clerks is $150. Dkt. 564-10. Thus, taking into consideration the case law and the current rates in the Consumer Law Report and the Matrix, the Court concludes that $125 is a reasonable rate for the support staff personnel.

4. Summary

After considering class counsel's requested rates and defendants' objections, the lodestar in this case stands at $2,726,190 based on the following breakdown of reasonable hourly rates and hours expended:

[22] Specifically, the support staff personnel are Shelby Cain, Blair Epstein, Lauren Griffith, Bonnie Johnson, Corneliu Mastraghin, Phuong Ngo, and Jesse Royer, Andro Torres, and Kristin Wickline. Dkt. 531-4; Dkt. 576-1.

Biller	Yrs[23]	Hours	Pl. Rate	Lodestar	Df. Rate	Adj. Hours	Adj. Rate	Adjusted Lodestar
Bennett		18.0	$700	$12,600		0		$0
Burke	30	12.5	$720	$9,000	$528	12.5	$630	$7,875
Cain	PL	4.0	$175	$700		4.0	$125	$500
Chimicles	42	2.25	$950	$2,137	$481	2.25	$630	$1,417
Cho	A	50.7	$555	$28,138		0		$0
Cross	22	17.0	$650	$11,050	$540	17.0	$540	$9,180
Epstein	LA	11.75	$60	$705		11.75	$125	$1,469
Evans	A	12.0	$300	$3,600		0		$0
Ferling		0.8	$185	$148		0		$0
Flowers	3	7.6	$350	$2,660		7.6	$313	$2,379
George	17	23.4	$650	$15,210	$458	23.4	$595	$13,923
Geyelin	10	1140.75	$460	$524,745		1140.75	$425	$484,819
Griffith, L.	PL	3.0	$215	$645		3.0	$125	$375
Gushue	9	872.5	$450	$392,625	$346	872.5	$425	$370,812
Jacobs	8	3.8	$550	$2,090	$346	3.8	$346	$1,315
Johns	10	1.5	$550	$825		1.5	$346	$519
Johnson	LA	13.25	$60	$795		13.25	$125	$1,656
Lang	A	122.3	$635	$77,660		0		$0
Lee	9	10.2	$680	$6,936	$346	10.2	$346	$3,529
Lichtman	9	11.4	$515	$5,871	$346	11.4	$515	$5871
Lotus	A	15.0	$625	$9,375		0		$0
Mastraghin	LA	1.75	$250	$437		1.75	$125	$219
Mathews	12	31.75	$600	$19,050	$446	31.75	$510	$16,192
Miller	A	63.7	$490	$31,213		0		$0
Morgan	8	1047.0	$300	$314,100		800.0	$300	$240,000
Murray		0.6	$280	$168		0		$0
Ngo	LA	5.0	$100	$500		5.0	$125	$625
Rosemergy	17	1348.3	$650	$876,395	$458	1348.3	$630	$849,429
Royer	LA	5.0	$150	$750		5.0	$125	$625
Saler	12	37.75	$500	$18,875	$446	37.75	$446	$16,836
Saunders	A	4.25	$275	$1,169		0		$0
Schelkopf	7	17.0	$600	$10,200	$346	17.0	$510	$8,670
Schimmel	A	19.6	$410	$8,036		0		$0
Schwartz	28	877.4	$750	$658,050	$528	878.7	$630	$553,581
Selbin	23	7.0	$800	$5,600	$540	7.0	$800	$5,600
Shah		36.2	$725	$26,245		0		$0
Shub	27	6.0	$750	$4,500	$528	6.0	$750	$4,500
Srinivasan		13.0	$395	$5,135		0		$0
Torres	PL	0.6	$215	$129		0.6	$125	$75
Weiss, P.	OC	16.3	$720	$11,736		0		$0

[23] PL=paralegal; LA=legal assistant; A=associate; OC=of counsel

Biller	Yrs[23]	Hours	Pl. Rate	Lodestar	Df. Rate	Adj. Hours	Adj. Rate	Adjusted Lodestar
Weiss, S.	24	0.5	$850	$425		0.5	$750	$375
Wickline	PL	3.2	$210	$672		3.2	$125	$400
Yiatras	10	16.3	$550	$8,965	$346	16.3	$346	$5,640
Lieff Appeal		221.95		$139,885		159.75		$117,785
Total		**6133.85**		**$3,249,750**				**$2,726,191**

C. Adjustment of the Lodestar Under *Hensley*

"After calculating the lodestar, the Court may, in its discretion, increase or reduce the lodestar amount by considering a variety of factors, including: the time and labor required; whether the attorney's fee is fixed or contingent; the amount involved and the results obtained; and the experience, reputation, and ability of the attorneys." *Reid*, 2015 WL 3653318, at *24 (citing *Hensley,* 461 U.S. at 430 n.3). "The standard is whether the fees are reasonable in relation to the difficulty, stakes, and outcome of the case." *Gastineau v. Wright*, 592 F.3d 747, 748 (7th Cir. 2010) (citation omitted). However, the presumption is that "the lodestar includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee." *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 553 (2010) (citation omitted); *see Hensley*, 461 U.S. at 434 n.9 ("many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate"). Thus, "factors subsumed in the lodestar calculation cannot be used as a ground for increasing an award above the lodestar." *Perdue*, 559 U.S. at 546. In that respect, the party seeking fees "has the burden of identifying a factor that the lodestar does not adequately take into account and proving with specificity that an enhanced fee is justified." *Id.* Although the Supreme Court "has never sustained an enhancement of a lodestar

amount for performance," it has "repeatedly said that an enhancement may be awarded in 'rare' and 'exceptional' circumstances." *Id.* at 552 (citation omitted).

Class counsel acknowledges that many of the *Hensley* factors are subsumed in the base lodestar calculation but argues that the base lodestar calculation does not include "the novelty/complexity of the legal issues involved, the degree of success obtained, the public interest advanced by the litigation, the fact that fees were contingent on the outcome of the case, and to a lesser extent the preclusion of certain Class Counsel from working on other cases." Dkt. 531 at 11. Thus, they argue that they should receive a positive multiplier of 1.85. Dkt. 575 at 51.

Defendants, on the other hand, contend that "[g]iven Class Counsel's relative lack of success on behalf of the class compared to their goals, the Court should make a substantial *downward* adjustment to the base lodestar." Dkt. 564 at 41 (emphasis in original). Defendants argue that if "all purchasers of the class washers were injured when they purchased a washing machine with a poorly designed CCU," as class counsel assert in their reply, Dkt. 573 at 3, "why did Class Counsel agree to a settlement that does not provide *any* recovery to the overwhelming majority of those allegedly injured Settlement Class Members?" Dkt. 584 at 1 (emphasis in original). Defendants contend that the Court should reject the $6 million fee request—which will be 6.75 to 11 times the amount that the Settlement Class will receive, Dkt. 584 at 3, and instead "award Class Counsel no more than 50% of the aggregate settlement value in fees, or up to approximately $890,000 depending on the final claims data," *id.* at 4.

1. Degree of Success

Class counsel argues that they achieved "a significant degree of success on behalf of the class" because class members "are entitled to claim full *cash* reimbursements for out-of-pocket losses." Dkt. 531 at 31–32 (emphasis added). Defendants contend that class counsel achieved "meager" results because "only a tiny percentage" of all washer buyers received any compensation under the settlement. Dkt. 564 at 42–43. Defendants assert that plaintiffs originally claimed that *all* washer buyers "were injured because they would not have bought, or would have paid less for, the Washers if [they had] known about the alleged CCU defect." *Id.* at 42. Instead, the settlement "pays benefits *only* to those class members who potentially had a colorable warranty claim" as *defendants* had long argued. *Id.* at 43. Thus, defendants argue that because class counsel "achieved only the *opportunity* to obtain relief for less than 5% of the CCU class . . . , Class Counsel's proposed 1.9 multiplier is overreaching, at best." *Id.* (emphasis in original).

Defendants are conflating the concepts of injury and damages. While plaintiffs have alleged that all buyers were injured when they purchased a washing machine with a poorly designed CCU, plaintiffs have also emphasized for some time that they were seeking damages only for those buyers where the washer defect manifested itself. *See Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009) (observing that "a class will often include persons who have not been injured by the defendant's conduct"). The Consolidated Class Action Complaint, filed in February 2009, sought only replacement, recall or repair costs "attributable to the defects."

Dkt. 137 at ¶ 5. Similarly, the Amended Consolidated Class Action Complaint, filed in August 2009, alleged that "Sears is obligated under the terms of its written warranty to repair and/or replace the *defective* Washing Machines sold to Plaintiffs and members of the Classes." Dkt. 162 at ¶ 112 (emphasis added). In plaintiffs' brief opposing defendants' request in October 2011 to an interlocutory appeal of the district court's order certifying a CCU class, plaintiffs reiterated that they had "defined an objectively identifiable class containing only those people who own washers that were manufactured using a defective process, and Plaintiffs seek relief *for only those whose CCUs have failed*, for breach of warranty." *Butler v. Sears, Roebuck and Co.*, No. 11-8029 (7th Cir. Oct. 24, 2011) (Plaintiffs-Respondents' Brief in Opposition To Sears' Petition for Permission To Appeal Pursuant To Federal Rule of Civil Procedure 23(f)) (emphasis added). Plaintiffs made similar assertions in their April and December 2013 briefs in opposition to defendants' petitions for writs of certiorari:

> The issues raised in connection with the CCU class are straightforward: either the CCU manufacturing process at the particular subpart vendor was or was not defective for a short period of time and, if it was, Sears' warranty either does or does not obligate it to fix Kenmores that fail as a result. Perhaps most importantly for present purposes, the CCU class will provide relief, if at all, *only to individuals whose machines have manifested the defect*.

Sears, Roebuck and Co. v. Butler, 2013 WL 1836534 (U.S.), 8 (emphasis added).

> [I]n a design defect case, it is the allegedly defective design that establishes the breach of warranty and injury-in-fact at the point of sale, which is the reason that the class is properly defined to include . . . only those purchasers who own the machines manufactured with the substandard process and part (identifiable by serial numbers on the machines). The CCU class seeks to have Petitioners *cover the costs or repair or replacement for those units that have failed*.

Whirlpool Corp. v. Glazer, 2013 WL 6493514 (U.S.), 25 (emphasis added).

Consistent with these allegations, the settlement provides that *all* persons who own washers that were manufactured with the defective process will receive notice and *all* persons with CCU units that have failed will be fully compensated. Under these circumstances, the Court finds that class counsel achieved a high degree of success.

2. Novelty/Complexity

Class counsel contends that the case involved "complex issues of multi-state class certification, liability standards, electrical engineering, and uncertainty how to prove damages except on some individual basis." Dkt. 531 at 30. They argue that the legal complexity is demonstrated by the multiple rounds of briefing in the Seventh Circuit and Supreme Court "to beat back repeated attempts to dismiss the complaint in its entirety and strike plaintiffs' class allegations." *Id.* Further, class counsel asserts that the case was complicated from a factual perspective because of "questions regarding electronic defects, acceptable defect rates, and the digestion of highly technical information regarding the use of CEM-1 versus CEM-3 or FR-4 circuit boards." *Id.* at 30–31. Defendants contend, on the other hand, that this case is "a run-of-the-mill warranty case pled as an overbroad class action." Dkt. 564 at 44.

The Court concludes this factor weighs in favor of a multiplier. While this case may have involved some complex legal and factual issues, most were not "rare or exceptional," justifying a lodestar increase. For example, the need for expert opinion in a consumer class action is not unusual. *See Perdue*, 559 U.S. at 553 ("the novelty and complexity of a case generally may not be used as a ground for an enhance-

ment because these factors presumably are fully reflected in the number of billable hours recorded by counsel") (citation omitted); *Reid*, 2015 WL 3653318, at *25 (finding no significant complexities in a case brought under the Magnuson-Moss Warranty Act that would justify a lodestar enhancement). On the other hand, the Seventh Circuit issued two opinions in this case addressing difficult questions regarding standards for class certification. The second of these opinions, which has already been cited in over 150 other cases around the country, opined that even post the Supreme Court's ruling in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), individual questions with respect to damages do not defeat class certification. *See Butler*, 727 F.3d at 801 ("It would drive a stake through the heart of the class action device, in cases in which damages were sought rather than an injunction or a declaratory judgment, to require that every member of the class have identical damages. If the issues of liability are genuinely common issues, and the damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification. Otherwise defendants would be able to escape liability for tortious harms of enormous aggregate magnitude but so widely distributed as not to be remediable in individual suits."). This statistic reveals class counsel did have to address novel and complex legal issues. *Cf. Reid*, 2015 WL 3653318, at *25 (declining to award any multiplier where case settled after only 18 months and did not present any novel or complex issues).

3. Public Interest Advanced

Class counsel asserts that the case "advanced existing law and created new law in the area of multi-state class certification and consumer claims where the defect does not manifest itself in each and every product," and will therefore benefit consumers in other cases. Dkt. 531 at 33. Defendants contend "public interest" applies only where "Congress or a state legislature has encouraged litigation," which is not present here. Dkt. 564 at 45.

The Court finds otherwise. Congress has determined that it is in the public interest to "encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms." 15 U.S.C. § 2310(a)(1). Thus, this settlement encourages manufacturers to expeditiously identify and cure defects in their products, regardless of whether the defect manifests itself in every item sold.

4. Contingent Fees

Class counsel contends that the Court "*must* award a multiplier when attorneys' fees are contingent upon the outcome of the case." Dkt. 573 at 50. In common fund cases, "a risk multiplier is not merely available . . . but mandated." *Florin*, 34 F.3d at 565. But when granting attorney's fees under a fee-shifting statute, "courts may not enhance a fee award above the lodestar amount to reflect risk of loss or contingency." *Id.* at 564. Here, given that the Magnuson-Moss Warranty Act contains a fee-shifting provision, the Court declines to increase plaintiffs' lodestar on the basis of the risk of nonpayment involved in the case.

5. Preclusion of Class Counsel from Working on Other Cases

Class counsel argues that the case required "significant work" from all attorneys, especially for Alison Gushue and Tony Geylelin, who worked "virtually full time" on the case for a 5-month period, and co-lead counsel Steve Schwartz and James Rosemergy, who devoted "large swaths of time" to this case. Dkt. 531 at 33. Defendants contend that the fact that two attorneys worked full time for five months—out of the eight years this case has been pending—does not merit a lodestar enhancement. Dkt. 564 at 45. The Court agrees. There is nothing "rare or exceptional" about two senior associates working full time for five months or lead counsel devoting "large swaths of time" to a multi-state class action.

6. Summary

Taking all these circumstances into consideration—the high degree of success, the vindication of a public interest, the presence of novel and complex legal issues—the Court finds that a multiplier is appropriate here. Given that the most important factor is the "results obtained," *Hensley*, 461 U.S. at 434, class counsel is entitled to a significant lodestar enhancement. The Seventh Circuit has suggested "that a doubling of the lodestar would provide a sensible ceiling." *Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 258 (7th Cir. 1988); *see Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998) ("We also have speculated that a multiplier of 2 may be a sensible ceiling."); *accord Southwest. Airlines*, 2013 WL 5497275, at *12. *Abbott v. Lockheed Martin Corp.*, No. 06 CV 701, 2015 WL 4398475, at *3 (S.D. Ill. July 17, 2015) ("Between 1993 and 2008, the mean multiplier in class actions in the Seventh Circuit was

1.85.") (citing Theodore Eisenberg & Geoffrey Miller, *Attorneys' Fees and Expenses in Class Action Settlement: 1993–2008*, 7 J. Empirical Legal Stud. 248, 272 (Table 14) (2010)).

The Court will award a multiplier of 1.75. When applied to the lodestar figure of $2,726,191, this yields attorney's fees totaling $4,770,834.

VII. COSTS

The parties have largely agreed on the amount of costs that class counsel may claim. Dkt. 573 at 53; Dkt. 584 at 24 (agreed-upon expenses related to prosecuting the CCU claims is $167,717). They disagree, however, as to whether defendants should reimburse class counsel for plaintiffs' portion of the CCU-related bills submitted by the Special Master. *Id.* Class counsel contends that the Special Master's CCU-related fees are "reasonable bills incurred as part of the litigation," for which they should be reimbursed. Dkt. 573 at 53; Dkt. 587 at 51. But class counsel did not include the Special Master's fees in their Motion—they sought fees paid to their experts, deposition expenses, travel costs, computer research, investigation, and photocopying costs. Dkt. 531 at 34–35 & Ex. 8. Nor did class counsel raise the issue of the Special Master's fees in their negotiations with defendants in an effort to agree on class counsel's requested costs. Dkt. 584 at 24; Dkt. 584-2 at ¶ 22. Indeed, "[a]t no time during . . . negotiations in late January and early February [2016] did Class Counsel request that they be reimbursed for Special Master Cohen's fees, nor did they produce . . . copies of any of Mr. Cohen's invoices for which Class Counsel seek

reimbursement." Williams Decl. ¶ 22. Thus, defendants argue that class counsel's request should be denied as untimely. Dkt. 584 at 24.

The Court agrees. It is well settled that parties waive arguments raised for the first time in a reply. *See*, *e.g.*, *Argyropoulos v. City of Alton*, 539 F.3d 724, 740 (7th Cir. 2008); *Rives v. Whiteside Sch. Dist. No. 115*, 575 F. App'x 678, 680 (7th Cir. 2014); *Empire Elecs., Inc. v. D&D Tooling & Mfg., Inc.*, No. 13 C 376, 2014 WL 5819728, at *6 (N.D. Ill. Nov. 10, 2014); *Burks v. U.S. Postal Serv.*, No. 08 C 5869, 2009 WL 1097508, at *3 (N.D. Ill. Apr. 17, 2009). By not raising the issue of the Special Master's fees until three months after filing their motion for fees and costs, the Court finds that class counsel have waived the request.

The Court awards class counsel costs in the amount of $167,717, plus any reasonable expenses incurred in connection with the final approval hearing and class counsel's duties in connection with the ongoing notice and claims process, subject to the agreed-upon $200,000 cap.

E N T E R:

Dated: September 13, 2016

MARY M. ROWLAND
United States Magistrate Judge