19-1921

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALESSANDRO BERNI, GIUSEPPE SANTOCHIRICO, MASSIMO SIMIOLI, DOMENICO SALVATI,

Plaintiffs - Appellees,

v.

BARILLA S.P.A., BARILLA AMERICA, INC., BARILLA USA,

Defendants - Appellees,

v.

ADAM EZRA SCHULMAN,

Objector - Appellant.

On Appeal from the United States District Court
for the Eastern District of New York, No. 16-cv-4196

Reply Brief of Appellant Adam Ezra Schulman

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I. The settlement certification violates Rule 23(b)(2).

The settling parties devote little attention to the propriety of class certification under Rule 23(b)(2). Neither appellee discusses or even cites *Hecht v. United Collection Bureau*, 691 F.2d 218 (2d Cir. 2012), this Circuit's leading case on (b)(2) settlement certifications after *Walmart v. Dukes*. Neither appellee attempts to reconcile Rule 23(b)(2) with the release of individual monetary claims or even disputes that monetary relief is the natural and ordinary remedy for plaintiffs' consumer claims.

Instead, plaintiffs rely on the supposed "Catch-22" dilemma past-purchasing consumer plaintiffs face without injunctive-relief classes. PB39-40.[1] Far from "ignor[ing] this analysis" (PB39), Schulman already explained why there is no actual dilemma at all. "[I]njunctions (assuming the operative substantive law permits them) can be obtained without certifying a (b)(2) class, either as a remedy in a (b)(3) class action or in individual litigation." OB24. Many of the objections Schulman was compelled to catalog for the settling parties involved (b)(3) settlements with injunctive elements. A166-68. Schulman never objected "that a court does not have the power to issue an injunction [as part of a settlement] when a party has no legal right to relief" and he doesn't imply that in his opening brief. *Contra* DB32. The question is not whether

[1] "A" indicates the joint appendix for this appeal. "Dkt." indicates docket numbers in the underlying district-court case, No. 16-cv-4196 (E.D.N.Y.). "OB" indicates Schulman's opening brief, "PB" indicates the plaintiffs' brief, and "DB" indicates the defendants' (collectively "Barilla") brief.

an injunction can be included in the settlement package, it's whether (b)(2) certification is proper. And the answer is clear: no, "the proponents of the settlement" may not "rewrite Rule 23" "by treating the settlement agreement as dispositive" of the certification question. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 858-59, 864 (2000).

Citing *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70 (2d Cir. 2015), plaintiffs note that this Court has interpreted *Wal-Mart* only to require (b)(2) injunctive relief to be beneficial to each class member (not identical). PB38. But because the relief here would not be beneficial to each class member (OB22-25), *Sykes*'s standard affirmatively supports Schulman's argument for reversal. Specifically, it is worth contrasting the prospective class definition in *Sykes* with retrospective definitions here and in *Hecht*. *Compare Sykes*, 780 F.3d at 79 *with* OB 10 *and Hecht*, 691 F.3d at 223. The *Sykes* class consisted of "all persons who have been or will be sued" by the defendants. 780 F.3d at 75. Absent class members would either benefit from the defendant's change in debt-collection practices (if they had not yet been sued) or from the notification that they had the right to reopen their adverse default judgments (if they had already been sued). *Id.* at 97-98. Here, Class members who will not purchase the product again obtain no putative benefit.[2] Plaintiffs suggest this is acceptable because those class members could have opted out. PB40. But it is not. OB32-35.

Barilla too declines to address *Wal-Mart* or *Hecht*. Instead, it makes a mountain out of *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982). DB31-32. However, Schulman

[2] Unlike the named plaintiffs in *Sykes* (whose default judgments were vacated but ran the risk of further action by defendants), class members here who do not intend to again purchase Barilla pasta suffer no risk of future harm.

merely cites (OB29) that case for one discrete point relating to traditional use of equitable remedies: that injunctions "will not issue" "to restrain an act the injurious consequences of which are trifling." *Consolidated Canal Co. v. Mesa Canal Co.*, 177 U.S. 296, 302 (1900) (quoted by *Weinberger*, 456 U.S. at 311-12). Barilla thinks this restatement of black letter law irrelevant because *Weinberger* does not involve a class action settlement. But again, (b)(2) certifications depend upon whether the underlying law allows for injunctive relief. OB29-30. On this score *Weinberger* undermines the rationale upon which the lower court justified certification: that a monetary remedy is inadequate—and an injunction is more suitable—because the class's damages would be too small to apportion. A236-237.

Barilla cites an out-of-circuit case, *Berry v. Schulman*,[3] holding that a (b)(2) settlement certification can be justified by the relief obtained at settlement, notwithstanding the underlying nature of the class claims. 807 F.3d 600, 610 (4th Cir. 2015). But *Berry* conflicts with *Hecht* by allowing the provision of injunctive relief in the settlement to dictate the propriety of a (b)(2) certification, without regard to the class's claims. *Contrast Berry*, 807 F.3d at 609-10 *with Hecht*, 691 F.3d at 223-24 & n.1 (evaluating the class definition, class allegations, and class claims in determining whether (b)(2) certification was appropriate); OB29-30 (citing cases from the Seventh and Fifth Circuits). Moreover, *Berry* is also distinguishable from this case. All *Berry* (b)(2) class members necessarily had an ongoing relationship with the defendant LexisNexis because their personal information was housed within Lexis's databases. As such, at

[3] 807 F.3d 600 (4th Cir. 2015).

least the *Berry* class did not suffer from the infirmity of a "retrospective class definition" without "any forward-looking requirement." *Hecht*, 691 F.3d at 223.

This settlement class cannot be certified under (b)(2).

II. Worthless relief is still worthless even when it corresponds to the allegations of the complaint.

As a factual matter, the settling parties insist that Schulman has not challenged the proposition that the labeling relief remedies the complained-of wrong. PB34-36; DB24. As a legal matter, they believe obtaining relief relating to the complaint is sufficient to approve the class representation as adequate and the class settlement as fair. PB36, 54; DB18-30. They are mistaken on both facts and law.

Factually, Schulman has described why the fill line is "irrelevant" even for those unreasonable consumers who care only about the volume of pasta they are purchasing. Simply put, the fill line does not even purport to assure consumers that the pasta in the box *actually* reaches the line at the time of purchase. OB 41 & n.17. The settlement disclaimers themselves directly undercut any ability to rely on the fill-line, alerting consumers the "product may settle," that the product is "sold by weight not volume," and that "the amount of product in this box may differ from the amount contained in similarly-sized boxes." A41, A152-53.

Schulman also observed that the fill line did not correspond to the only specific injunctive remedy sought in the complaint: having Barilla repackage the pastas without non-functional slack fill. OB26 n.12 (citing A33). Plaintiffs now proclaim that a fill line in small print on the back or side of the pasta box "cures any misrepresentation." OB36 n.17. Yet the theory of their complaint is that "a reasonable consumer need not

manipulate a package physically to determine the volume of pasta inside, nor review the statements on the box regarding the weight or servings in the box." DB4 (citing A28 ¶ 36).

Legally, Rule 23 doesn't work the way the appellees suggest. Courts cannot simply presume that the theory of the complaint is valid and thus approve any settlement that addresses the complaint's allegations; they must exercise independent economic and commonsense judgment to see whether, in fact, the injunctive relief confers a class benefit. *See, e.g. In re Subway Footlong Sandwich Mkt'g and Sales Practices Litig.,* 869 F.3d 551 (7th Cir. 2017) ("*Subway*"); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013) ("*Pampers*").

If a reviewing court simply defers to the fact that the plaintiff obtained what he sought on behalf of the class, that would neglect its fiduciary duty to absent class members. Rather, it must assure itself that in economic reality the allocation of the settlement proceeds between the class and class counsel is fair and that the class's representation has been adequate. That means assessing the real-world benefit of the injunctive relief to absent class members.

Take a concrete example: merger litigation. Several years ago, a number of plaintiffs' lawyers recognized that they could extract a portion of corporate merger transactions by filing frivolous strike suits alleging inadequate proxy disclosures to the shareholders. *See* Matthew D. Cain, et al., *The Shifting Tides of Merger Litigation*, 71 VAND L. REV. 603 (2018). Leveraging the threat of enjoining the merger and the expense of litigating the preliminary injunction motion, these settlements would inevitably settle for supplemental disclosures for the shareholder class and a hefty fee for class counsel.

For example, a certain suit might complain that the initial proxy only disclosed that "dozens" of analysts reviewed the proposed merger, without disclosing the precise number. Then the settlement might provide an amended proxy that tells shareholders exactly thirty-eight analysts performed the review. Such settlements demonstrate exactly why a connection between the complaint's allegations and the relief obtained is insufficient to confer class value. When the underlying proxy is not deficient, amending that proxy is no benefit in economic reality. So too here with Barilla's labeling. Without a showing that the alleged proxy misrepresentations/omissions were "plainly material," $0 settlements that provide only trivial injunctive relief in exchange for fees cannot be approved. *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 725 (7th Cir. 2016); *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, 898 (Del. Ch. Ct. 2016).

Subway acknowledged the principles of *Walgreen* and imported them to the consumer context. But rather than adopt the tack of the district court (A230) and candidly acknowledge that affirmance requires creating a circuit split with *Subway*, appellees posit that *Subway* and *Pampers* can be distinguished because there the settlement relief did not match the complaint. PB54; DB23.[4] Not so, the disclaimer relief in those cases mitigated the alleged harms in the same way that the labeling relief here does.

[4] Barilla also declares that *Kaplan v. Rand*, 192 F.3d 60 (2d Cir. 1999) can be distinguished because its relief was "completely divorced from the claims at issue." DB30. Yet, in both this case and in *Kaplan*, the relief "sought by the plaintiffs…never was achieved." *Id.* at 71. And that relief that was achieved "fails to serve as a remedy for past misconduct" *Id.* at 72.

Plaintiffs in *Subway* alleged consumer fraud claims regarding the length of Subway's "Footlong" sandwich and settled for supposedly valuable additional disclosures and enhanced oversight procedures. 869 F.3d at 552. But ultimately the settlement disclaimer itself acknowledged that "natural variations in the bread baking process" means that bread shape and size "may vary." *Id.* at 557. Analogously, the settlement disclaimer here acknowledges that the "product may settle" and thus that the volume of pasta in the box at the time of purchase cannot be guaranteed. It is equally "circular" (PB55); it acknowledges the purported issue but does not remedy it.

Nor was the disclaimer in *Pampers* "wholly unrelated" or "totally divorced" from the allegations of the *Pampers* complaint (at least in the sense of relatedness used by the parties in defending this settlement). *Contra* PB54, DB24. The *Pampers* complaint alleged that a defect in Pampers "dry max" technology caused severe diaper rash and the parties proclaimed that their settlement providing valuable instructions in the event that diaper rash occurred. 724 F.3d at 715-16. The deficiency pinpointed by the Sixth Circuit wasn't that this relief was untethered to the complaint; it was that the relief was both non-compensatory for a class of past purchasers and so obvious as to denigrate the intelligence of consumers. 724 F.3d at 719-20. The same is true here.

Creating a circuit split "is inadvisable" "in the absence of compelling reasons to the contrary." *Janese v. Fay*, 692 F.3d 221, 227 (2d Cir. 2012). The settling parties provide none. *Subway* and *Pampers* dictate reversal here.

Barilla erroneously attributes to Schulman the categorical notion that "injunctive-only relief does not provide value to a class." DB19. Such relief obviously befits classes that have a continuing relationship within the defendant. *See* OB24 (offering example

of a desegregation injunction). Even in a past-purchaser consumer class action, injunctive-only relief can confer benefit if it serves as compensation for the injury that the class is alleged to have received. *See, e.g., Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998) (class members received "a redesigned improved replacement latch to be installed free of charge."). But the injunctive relief in this case is entirely forward-looking, whilst the class members' alleged injuries occurred discretely in the past. "The fairness of the settlement must be evaluated primarily based on how it *compensates class members*." *Pampers*, 724 F.3d at 720 (internal quotation omitted; emphasis in original).

Even if one were to consider potential benefits to all future purchasers of Barilla, there is no material incremental benefit generated by the labeling changes. OB40-42. Barilla argues certain relief can confer a class benefit even though there is no actual violation of law to be remedied. DB20-22. In the abstract, yes it can. For example, if Barilla had agreed to provide class members a free spaghetti dinner, or alternatively, continuous medical monitoring for diabetes, the value of such injunctive relief would not depend on the merits of plaintiffs' case; it would have real independent economic value. Similarly, had the settlement provided a monetary remedy, its value would not be contingent on the merit of the underlying claims. But here the value *vel non* of the injunctive relief depends upon it being an actual remedy to a consumer deception problem, just as the value of supplemental disclosures in merger litigation depends upon there being a material misrepresentation in the initial proxy. When the settlement relief targets a non-existent problem, the settlement injunction acts a "dam holding back" a flood that does not exist. *Grok Lines v. Paschall Truck Lines*, 2015 WL 5544504, 2015 U.S. Dist. LEXIS 124812 (N.D. Ill. Sept. 18, 2015). It is not "something more than technical

in its consequence" or something "that accomplishes a result which corrects or prevents an abuse which would be prejudicial to the rights and interests" of the class. *Kaplan*, 192 F.3d at 69 (quoting *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 396 (1970)). It is a solution in search of a problem.

For the very same reason, plaintiffs are misguided to suggest that the fill line has value simply because it constitutes a safe harbor under California law. PB28-29. Complying with a safe harbor is only be useful as a remedy to otherwise deceptive labeling. For the reasons detailed in the numerous slack-fill dismissals (DB 13-18), no reasonable consumer could be misled by packaging that discloses the correct weight of a product and states its accurate serving size by weight, even if it could be unreasonably misunderstood by an insignificant, unrepresentative segment of the purchasing public. Here, the fill line is superfluous and non-remedial; it "adds nothing of value." *Kaplan*, 192 F.3d at 71. This is firmly *Subway* territory, where "a simple comparison of the state of affairs before and after the settlement exposes the cynicism" in arguing that the settlement provides meaningful benefits. 869 F.3d at 556.

Barilla offers one alternative framing of the benefit of the minimum fill line: providing "easier and simpler information about a package's contents." DB20. But conveying information about the volume of the product (to the extent the fill line does that (*see* page 4 above)) is by Barilla's own admission an "irrelevancy" to reasonable consumers. DB22. If consumers care at all about the volume of uncooked pasta, it would be "only as it relates to the amount or quantity of food." *Daniel v. Mondelez Int'l, Inc.*, 287 F. Supp. 3d 177, 193 (E.D.N.Y. 2018). But for this purpose, volume information is redundant, given the conspicuous labeling of net weight on the front of

the box and the store shelf tags mandated by state law. *Id.* at 194; *Stewart v. Riviana Foods Inc.*, 2017 WL 4045952, 2017 U.S. Dist. LEXIS 146665, *26 (S.D.N.Y. Sept. 11, 2017) ("the weight and price of the dry good are clearly the most material aspect of this type of product"). Moreover, there is nothing in the record supporting plaintiffs' assertion that a small fill line on the side or back of the box (that the average consumer wouldn't even know to look for) is simpler or easier. Common sense suggests that consumers comparing different pasta brands would incorrectly estimate volume if relying on fill lines on different shaped boxes.

Plaintiffs admonish Schulman for not distinguishing between "very weak" and "illusory" relief. PB36. But Rule 23(e) settlement approval requires more than mere "relief that is not illusory." Otherwise, a settlement could merely enjoin a defendant's CEO to write 100 times on a chalkboard "I will not defraud the class," and escape appellate scrutiny. A rearranging of deck chairs is not illusory but it also isn't beneficial. Anyway, the *value* of the relief here *is* illusory.

Next, the settling parties carry forward the lower court's rationale that the settlement was fair and the representation was adequate in light of the weakness of the class's claims. PB34-35; DB9-18. Indeed, Barilla protests that "Schulman's overriding argument is that no injunctive-only relief settlement should ever occur when the claims at issue are meritless" and that if defendants want to settle they'll have to "pony up substantial monetary relief." Bosh! Again, Schulman is not and has never argued that the proposed $450,000 settlement fund is inadequate. Instead, he has argued that the $450,000 constructive common fund cannot be allocated entirely to class counsel and the class representatives at the expense of the class. OB16, 44-48. Rule 23(e)(2) requires

both a "fair" distribution and an "adequate" recovery. A complete analysis necessitates considering, among other things, the class's relief relative to "the terms of any proposed award of attorney's fees." Rule 23(e)(2)(C)(iii).

The utter feebleness of the plaintiffs' claim also undercuts the adequate representation required by Rules 23(a)(4) and (g)(4). OB40-41. The very theory of plaintiffs' lawsuit insults the intelligence of Schulman and other reasonable consumer class members. And the fact that the named plaintiffs allege that they were deceived by Barilla's packaging reveals just how unsuitable they are to represent the interests of a class of reasonable consumers. A19-20. Perhaps a derogatory theory could be overlooked if class counsel had ultimately achieved a meaningful economic benefit for the class, but they have not.

Barilla interprets *Gallego v. Northland Group*, 814 F.3d 123 (2d Cir. 2016) to turn on the fact that the FDCPA caps damages when claims are brought on a class basis and would permit $1,000 in statutory damages if claims were pursued individually. DB27-28. If this was the central impetus for *Gallego*'s suggestion of inadequate representation, one might expect the Court to at least advert to the idea that plaintiffs were sacrificing valuable non-class claims of absentees. Yet *Gallego* expressly explains why it questioned the adequacy of plaintiffs' representation, without once mentioning the value of the legal claims. It mentioned only the facts that the class was providing defendant a plenary release in exchange for meaningless economic recovery. *Id.* at 129-30. Both facts are true here too.[5]

[5] Further, here, class members in certain states are releasing individual consumer law statutory damages claims with maximum value of $1,000 or more. *See, e.g.,* D.C.

Because the settlement does not provide "effectual relief to the class and its principal effect is to induce the defendants to pay the class's lawyers enough to make them go away," the class representation fails to satisfy 23(a)(4). *Subway*, 869 F.3d at 556.

III. The attorneys' fees provisions reveal that the class representatives have pursued class counsel's interest at the expense of the class.

Plaintiffs have used a "clear-sailing" clause and a segregated fee structure to insulate their counsel's disproportionate fee request. OB44-41. Naturally unconcerned with the allocation of the settlement fund (OB18), Barilla offers no defense of this structure. Plaintiffs' defense is that clear-sailing clauses are preferred, that their attorneys' fee did not affect the class benefit, and that their fee can be justified based upon counsel's lodestar. PB43-53. All wrong.

Plaintiffs respond that *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), encourages settlement of fee disputes. PB43-44. But that fundamentally misunderstands the difference in procedural posture between *Hensley* and a class-action settlement. *Hensley* was a fully-litigated case, and the parties then sought to resolve the collateral 42 U.S.C. § 1988 litigation on fee-shifting after judgment. A class is not potentially prejudiced when that happens, because their relief has already been set in stone by an Article III court. In contrast, when plaintiffs settle a class action, there are two major differences. First, class counsel is not just compromising their fee request, but also compromising the relief available to their putative clients, and this leads to an inherent conflict of interest that could lead to self-dealing. "[C]lass action settlements are often quite

Code § 28-3905(k)(2)(A) ($1,500); Utah Code Ann. § 13-11-19(2) ($2,000); Va. Code. Ann. § 59.1-204(A) ($1,000). Schulman is a citizen of Virginia.

different from settlements of other types of cases, which indeed are bargained exchanges between the opposing litigants." *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014); *accord Pampers*, 724 F.3d at 715. Second, *Hensley* involved a bilateral negotiation between one set of class counsel and one set of defendants. In contrast, a class action settlement fee request is a multilateral issue where absent class members were never at the table and never had the opportunity to consent to the fee. A fee agreement between two of the parties does not end collateral litigation, because absent class members continue to have the right to object under Rules 23(e) and (h). The only effect of a side agreement is to prejudice the class's rights without the benefit of preventing collateral litigation. *See generally Pearson*, 772 F.3d at 787 (noting conflicts of interest in class litigation, citing cases, and noting benefit of objectors).

This Court's unpublished *Blessing* decision certainly never suggests that negotiated clear-sailing fees and a segregated fee fund are preferable, simply that "without more, [they] do not provide grounds for vacating the fee." 507 Fed. Appx. 1, 4 (2d Cir. 2012). Schulman agrees that where the negotiated fee is proportional to the class recovery, the fact that the fee is unopposed and paid separately is not objectionable. But if the fee is outsized vis-à-vis the value of the class's recovery, that is the "more" that calls for rejecting the settlement. *See, e.g., In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011).

Plaintiffs' citation to *Continental Illinois Securities Litigation*, is even further off base. *Continental* simply describes the "market mimicking" approach to fee awards under which the district judge approximates what fee agreement would be reached if the class had hypothetically negotiated a fee with class counsel at the outset of the litigation. 962

F.2d 566, 568-70 (7th Cir. 1992). In no way, shape, or form does it—or the Seventh Circuit—endorse clear sailing. Quite the opposite: the Seventh Circuit, like the Ninth, holds that a clear-sailing clause is a "questionable feature" that "at least in a case…involving a non-cash settlement award to the class…should be subjected to intense critical scrutiny." *Redman v. RadioShack Corp.*, 768 F.3d 622, 637 (7th Cir. 2014).

Plaintiffs' assert that if fees are paid separately, "the Court's fiduciary role in overseeing the [fee] award is greatly reduced, because there is not [sic] conflict of interest between attorneys and class members." PB44 (quoting a district court decision). This formalist view is inconsistent with the broad consensus recognition that the inherent conflict of interest cannot be avoided merely by stipulating that class counsel will be paid "independently" of the class fund. OB44 (citing cases from Sixth, Ninth, and Second Circuits). In other words, "private agreements to structure artificially separate fee and settlement arrangements cannot transform what is in economic reality a [constructive] common fund situation into a statutory fee shifting case." *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. 1995). Plaintiffs' claim is simply "not realistic"; the inherent conflict cannot be allayed by merely cordoning off negotiation of the fee award and paying it from a segregated pot of money. *Pearson*, 772 F.3d at 787. It's a "package deal." *Johnson v. Comerica*, 83 F.3d 241, 246 (8th Cir. 1996). The only effect of the segregation is to make the class worse off, because any reduction returns to the defendant, rather than the class. "If the defendant is willing to pay a certain sum in attorneys' fees as part of the settlement package, but the full fee award would be unreasonable, there is no apparent reason the class should

not benefit from the excess allotted for fees," and plaintiffs provide no such reason here. *Bluetooth*, 654 F.3d at 959.

In *Pearson*, the Seventh Circuit rejected class counsel's argument that negotiating class benefits separately from attorneys' fees actually benefits the class.

> [A]n economically rational defendant will be indifferent to the allocation of dollars between class members and class counsel. Caring only about his total liability, the defendant will not agree to class benefits so generous that when added to a reasonable attorneys' fee award for class counsel they will render the total cost of settlement unacceptable to the defendant.

772 F.3d at 786. After *Pearson* reversed settlement approval, the parties renegotiated so that instead of $865,000, class members received more than $5 million in cash, and any reduction in attorneys' fees flowed to class members rather than back to the defendants. Settlement Agreement, No. 11-cv-07972, Dkt. 213-1, ¶¶7-8 (N.D. Ill. May 14, 2015). In short, if you make class lawyers get money to class members in order to get paid, that is exactly what happens.

Allen v. Similasan Corp. also demonstrates the point well. There, the district court denied approval of a settlement that allocated $545,000 to the class attorneys, $2500 to each class representative, and left the class members with only prospective labeling changes. 318 F.R.D. 423 (S.D. Cal. 2016). "[T]he fee was negotiated separately, only after the parties had reached agreement on injunctive relief." Plaintiffs' memorandum in support of fees, No. 12-cv-00376, Dkt. 209 at 14 (S.D. Cal. Jun. 17, 2016). Yet, after settlement denial the parties renegotiated a revised settlement under which the class would be allowed to claim cash from a $312,000 net settlement fund while class

counsel's award was limited to $277,000. Order Granting Plaintiffs' Motion for Attorneys' Fees, No. 12-cv-00376, Dkt. 267 (S.D. Cal. Aug. 7, 2017). That several district courts in this Circuit have endorsed the fiction that segregated fee funds are beneficial (PB44-45) merely demonstrates the need for clear precedent from this Court recognizing the same economic reality that other circuits do.

Although clear-sailing clauses and segregated fee funds may be "common and regularly approved" (PB53), it is less common to see such provisions safeguard a disproportionate fee. Schulman does not claim to defend the decisions of every district court around the country; he concedes that, while some have agreed with him, many others have made similar errors of law. "Without the adversarial process, there is a natural temptation to approve a settlement, bless a fee award, and be done with the litigation." *Marshall v. Deutsche Post DHL*, 2015 WL 5560541, 2015 U.S. Dist. LEXIS 125869, at *2 (E.D.N.Y. Sept. 21, 2015); *see also* Howard Erichson, *Aggregation as Disempowerment*, 92 NOTRE DAME L. REV. 859, 869 (2016) ("district judges, predisposed to favor settlement and unaccustomed to inquisitorial judging, have been too willing to approve problematic settlements"); Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 829 (1997) ("No matter how virtuous the judge, the fact remains that courts are overworked, they have limited access to quality information, and they have an overwhelming incentive to clear their docket. They cannot reliably police the day-to-day interests of absent class members."); Hillary A. Sale, *Judges Who Settle*, 89 WASH. U. L. REV. 377, 411 (2011) ("Busy judges will then face their own personal and professional conflicts with resisting and scrutinizing settlements"). Here, because the magistrate judge had himself shepherded the parties to settlement through months of

mediation, he was at an even greater disadvantage than usual in assessing the settlement with the necessary skepticism and scrutiny. When lower courts approve unworthy settlements, correction is imperative. *Crawford v. Equifax Payment Servs.*, 201 F.3d 877, 881 (7th Cir. 2000) ("appellate correction of a district court's errors is a benefit to the class").

Plaintiffs proclaim that there is "no question that the so-called *Bluetooth* standards were met." PB53 n.24. But *Bluetooth* instructs courts to "assure [themselves] that the amount awarded was not unreasonably excessive in light of the results achieved." 654 F.3d at 943. Instead, the lower court declined to even consider the size of the fee in relation to the class settlement value, holding that the inquiry "can largely be avoided" because of counsel's lodestar. A256.

Similarly, plaintiffs maintain that the fees can be justified by their counsel's lodestar alone. PB45-52. But again, lodestar doesn't excuse a lopsided allocation of settlement proceeds. OB46-48. Divorced from any consideration of the result, lodestar doesn't even make for a reasonable fee. "Plaintiffs attorneys don't get paid simply for working; they get paid for obtaining results." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1187 (9th Cir. 2013).

The confluence of fee provisions indicates that the representatives did not rigorously pursue the class's interest, and renders the settlement unfair under Rule 23(e)(2).

IV. Public policy supports reversal.

Barilla invokes "the extraordinarily strong public policy in favor of settlements in the class action context." DB33. To the contrary, public policy should abhor a settlement arrangement in which plaintiffs' counsel are permitted to capture the entire value of the settlement, especially when the claims they have pursued are without merit. "There is a fundamental public interest in ending such abuse of the judicial system." *McGirr v. Rehme*, 891 F.3d 603 (6th Cir. 2018) (detailing the corrupt scheme perpetrated by certain plaintiffs' attorneys to abscond with 63% of one class settlement's proceeds).

Because class actions amplify the best and worst uses of litigation, weeding out abuses is especially critical. "If class actions are typically seen as shakedowns by plaintiffs' lawyers trying to make a buck, class action filing or settlement will send a different message than if class actions are seen as compensatory." Russell M. Gold, *Compensation's Role in Deterrence*, 91 NOTRE DAME L. REV. 1997, 2001 (2016). "[P]ublic confidence in the fairness of attorney compensation in class actions is vital to the proper enforcement of substantive law." *Laffitte v. Robert Half Int'l*, 376 P.3d 672, 692 (Cal. 2016) (Liu, J., concurring). Recent empirical surveys reveal that the public generally believes that while class actions should be compensatory, they are currently dysfunctional. Gold, *Compensation's Role*, 91 NOTRE DAME L. REV. at 2029. And unfortunately, the problem has long tenure. Third Circuit Task Force Report, Selection of Class Counsel, 208 F.R.D. 340, 343-44 (2002) ("[T]here is a perception among a significant part of the non-lawyer population . . . that class action plaintiffs' lawyers are overcompensated for the work that they do."); OB 45 (citing cases recognizing the issue from more than forty years ago). Courts ought to police these unhealthy arrangements "[f]or the sake of their

own integrity, the integrity of the legal profession, and the integrity of Rule 23." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974).

Barilla counters that the settlement "was a good result" "from an overall resource perspective" and "Barilla is entitled to make that decision and control its destiny." DB34. Barilla can certainly pursue its own litigation strategy, but it has no authority to override class members' right to a fair settlement under 23(e) and a proper class certification under 23(b). Those requirements "are intended to protect absent class members;' they "are not the defendant's to waive[.]" Alexandra D. Lahav, *Symmetry and Class Action Litigation*, 60 UCLA L. REV. 1494, 1506 (2013). There are problems enough with "the misalignment of interests between class counsel and class members in the settlement context. A practice of allowing the defendant to waive Rule 23 requirements only when its settlement terms are met will likely exacerbate these problems." *Id.* (footnotes omitted).

Defendants cannot and should not be relied on to assert the rights of absent class members. Indeed, there are strategic reasons a defendant would prefer an inadequate representative. As one example, it is easier to negotiate cheap settlements if the class representative is solely pursuing counsel's best interest. *See, e.g., Gallego*. As another, a defendant can leverage a named plaintiff's special vulnerability into a settlement of general effect. Jessica Erickson, *The New Professional Plaintiffs in Shareholder Litigation*, 65 FLA. L. REV. 1089, 1126 (2013). Hence the rule that neither of the "proponents of the settlement" may "rewrite Rule 23." *Ortiz*, 527 U.S. at 858-59.

Plaintiffs take refuge in what they characterize as a presumption in favor of settlement fairness. PB30. But because of the conflicts inherent in class proceedings

(OB17-21), any presumption should at most "extend[] only to the amount the defendant will pay, not the manner in which that amount is *allocated* between the class representatives, class counsel and unnamed class members." *Pampers*, 724 F.3d at 717 (emphasis in original). Similarly, because the incentives of plaintiffs and defendants align to encourage overestimating the true value of injunctive settlement relief, courts should place the burden of proving value squarely on the settlement proponents. *Id.* at 719 (citing authorities); *Koby v. ARS Nat'l Servs.*, 846 F.3d 1071, 1079 (9th Cir. 2017).

While public policy favors the settlement of disputes, it does not favor *this* type of settlement.

V. As a class member bound by the settlement and its release, Schulman has standing to challenge settlement approval.

Plaintiffs alone reprise their argument that Schulman lacks standing to appeal the class settlement approval to which he is bound. PB20-26.[6] They are mistaken. Schulman objects to approval and certification of a class action settlement that waived all of his claims while paying him and every other absent class member nothing. This occurred because class counsel structured the settlement to protect their excessive fee request from scrutiny and ensure they could obtain the entire settlement value. "Class members suffer injury in fact if a faulty settlement is approved, and that injury may be redressed if the court of appeals reverses. What more is needed for standing?" *In re Navigant Consulting, Inc., Sec. Litig.*, 275 F.3d 616, 620 (7th Cir. 2001), *vacated on other grounds* 536

[6] Plaintiffs violate Fed. R. App. P. 28(b) by failing to include a jurisdictional statement in their response brief even though they dispute Schulman's account of jurisdiction.

U.S. 920 (2002). As the court below correctly concluded, as a *bona fide* objecting class member, Schulman has standing to challenge arrangements of this sort. A226-228. *Accord Subway Footlong*, 869 F.3d at 555.

The ability of objecting class members to appeal settlement approval "does not implicate the jurisdiction of the courts under Article III of the Constitution." *Devlin v. Scardelletti*, 536 U.S. 1, 6-7 (2002). Here, because Schulman "is a member of the class bound by the judgment, there is no question that he satisfies [the three requirements for Article III standing]." *Id.* at 7.[7] Class members have standing to challenge unwanted settlements regardless of the underlying merit of the plaintiffs' claims and regardless of whether the settlement supposedly "fully compensates" the objector. *Subway*, 869 F.3d at 555; *Rawa v. Monsanto Co.*, 934 F.3d 862, 867 (8th Cir. 2019).

While plaintiffs protest that "Mr. Schulman has given up nothing in the settlement" (PB2), he and all other absent class members have been deprived of their rights under Rule 23 to an equitable allocation of the settlement proceeds that have been generated by the waiver of their claims. Any notion that the settling parties can structure a settlement to freeze out the class and then deprive those class members of

[7] Plaintiffs distinguish *Devlin* as involving a mandatory class. PB 24. But every federal court of appeals to consider this supposed distinction has held that it is not material for purposes of objector standing. *Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund*, 582 F.3d 30, 39-40 (1st Cir. 2009); *Fidel v. Farley*, 534 F.3d 508, 512-13 (6th Cir. 2008); *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 572-73 (9th Cir. 2004); *In re Integra Realty Res., Inc.*, 354 F.3d 1246, 1257 (10th Cir. 2004); *Muransky v. Godiva Chocolatier, Inc.*, 922 F.3d 1175, 1184 (11th Cir. 2019).

standing to contest that unfairness is "patently meritless." *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 820 (3d Cir. 1995).

Moreover, as the lower court reasoned (A227 n.3), plaintiffs err by assuming that Schulman's views on the value of his and other class members' claims dictate whether he would have standing to bring those claims. "[O]ne must not confuse weakness on the merits with absence of Article III standing." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015). As a matter of standing, like all class members, Schulman paid money to purchase Barilla products and would be entitled to some portion of that payment in restitution if Barilla was unjustly enriched as the Complaint claims. A32-33.

Neither case that plaintiffs cite (PB24-25) supports the contention that Schulman lacks standing. Contrary to plaintiffs' representation (PB25), *Blessing v. Sirius XM Radio Inc.*, did not even hold that objecting class members lacked "standing to appeal" settlement approval. 507 Fed. Appx. 1 (2d Cir. 2012) (unpublished). Rather, *Blessing* held only that class members had no standing to assert one particular equal-protection challenge to the district court's counsel appointment order. *Id.* at 5. The unpublished district-court opinion *City of Livonia Employees Ret. Sys. v. Wyeth*,[8] is both wrongly decided and distinguishable. It is wrongly decided because standing to object to settlement approval is not conditioned upon submitting a claim for a share of the settlement. *Stetson v. Grissom*, 821 F.3d 1157, 1163 (9th Cir. 2016); *Union Asset Mgmt. Holding A.G. v. Dell,*

[8] 2013 WL 4399015 (S.D.N.Y. Aug. 7, 2013).

Inc., 669 F.3d 632, 638-39 (5th Cir. 2012). But even if *Wyeth* were correct, it is distinguishable because class members had no option of filing a claim here.

Notwithstanding plaintiffs' view (PB23), "objectors have a valuable and important role to perform in preventing collusive or otherwise unfavorable settlements." *White v. Auerbach*, 500 F.2d 822, 828 (2d Cir. 1974); *see also* Advisory Committee Notes to 2018 Amendments to Rule 23 ("Good-faith objections can assist the court in evaluating a proposal under Rule 23(e)(2)"). Schulman's appeal follows in this tradition and he possesses standing to pursue it.[9]

[9] Schulman has resisted the label "professional objector" only to distinguish himself from "professional objectors" who "primarily seek to obstruct or delay settlement proceedings so as to extract attorneys' fees in exchange for the withdrawal of the objection." *Garber v. Office of the Comm'r of Baseball*, 2017 WL 752183, 2017 U.S. Dist. LEXIS 27394, at *35 n.9 (S.D.N.Y. Feb. 27, 2017).

Conclusion

For the foregoing reasons, the Court should reverse the class certification and accompanying settlement approval.

Dated: December 5, 2019

Respectfully submitted,

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I hereby certify that on December 5, 2019, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Second Circuit using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

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