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

Opening Brief of Appellant Adam Ezra Schulman

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Corporate Disclosure Statement (FRAP 26.1)

Pursuant to the disclosure requirements of Federal Rule of Appellate Procedure 26.1, Adam Ezra Schulman, declares that he is an individual and, as such, is not a subsidiary or affiliate of a publicly owned corporation and there is no publicly held corporation that owns ten percent or more of any stock issued by him.

Table of Contents

Table of Authorities

Cases

Other Authorities

Statement of Subject Matter and Appellate Jurisdiction

The district court had jurisdiction under 28 U.S.C. § 1332(d), because plaintiffs' class action complaint alleges claims that exceed $5,000,000 exclusive of interest and costs, there are thousands (or perhaps millions) of class members, most of which are citizens of states other than defendants' states of citizenship. For example, named plaintiff Alessandro Berni is a citizen of the State of New York, while remaining defendant Barilla America, Inc. ("Barilla")[1] is an Illinois corporation with its principal place of business in Illinois. A19-20.[2] Having received a referral upon consent of the settling parties under 28 U.S.C. § 636(c),[3] the magistrate judge granted final approval of the settlement on June 3, 2019 ("Final Approval Order"). A221-258.

That said, it is unclear that the plaintiffs, as past purchasers, have Article III standing to seek prospective injunctive relief. *See generally Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 239 (2d Cir. 2016) ("past injuries…do not confer standing to seek injunctive relief unless the plaintiff can demonstrate she is likely to be harmed again in the future in a similar way.").

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[1] Although plaintiffs initially also brought claims against Italian parent company Barilla G.e.R. Fratelli S.p.A., pursuant to the settlement, it was dismissed from the action for lack of personal jurisdiction when the court granted preliminary approval. A47, A221; Dkt. 57 at 2.

[2] "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.).

[3] *See* Dkt. 51.

This Court has appellate jurisdiction under 28 U.S.C. § 1291. Objecting class member Adam Ezra Schulman, the appellant in this case, filed a notice of appeal on July 1, 2019, appealing the Final Approval Order dated June 3, 2019. A259. (Although the lower court did not enter final judgment on a separate document as required by Fed. R. Civ. P. 58(a), this does not preclude appellate jurisdiction over final orders; an appellant "need not wait for entry of a Rule 58 judgment." *In re Litas Int'l, Inc.*, 316 F.3d 113, 118 (2d Cir. 2003)). Schulman's notice of appeal is timely under Fed. R. App. P. 4(a)(1)(A). Schulman, as a class member who objected to settlement approval below, has standing to appeal a final approval of a class action settlement without the need to intervene formally in the case. *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

Statement of the Issues

1. Fed. R. Civ. P. 23(b)(2) class certification is limited to situations where "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." When putative class members are "victims of a completed harm with no reference to ongoing injury or risk of future injury," Rule 23(b)(2) class certification is improper. *Hecht v. United Collection Bureau,* 691 F.3d 218, 223 (2d Cir. 2012). And, when the litigation involves "individualized monetary damages claims," Rule 23(b)(2) certification is improper. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011). Did the magistrate judge err by certifying a Rule 23(b)(2) class of past purchasers of Barilla pasta for the purpose of approving a settlement that would extinguish their monetary claims?

Standard of Review: "Certification of a class is reviewed for abuse of discretion." *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 827 F.3d 223, 231 (2d Cir. 2016) ("*Payment Card*"). A court abuses its discretion if its decision "rests on a legal error or clearly erroneous factual finding, or falls outside the range of permissible decisions." *Id.* "Abuse of discretion can be found far more readily on appeals from the denial or grant of class action status than where the issue is, for example, the curtailment of cross-examination or the grant or denial of a continuance." *Abrams v. Interco Inc.* 719 F.2d 23, 28 (2d Cir. 1983) (Friendly, J.). "Except to the extent that the ruling is based on determinations of fact…or where the trial judge's experience in the instant case or in similar cases has given him a degree of knowledge superior to that of appellate judges, as often occurs, review of class action determinations for 'abuse of discretion' does not differ greatly from review for error." *Id.*

2. This Court and others hold that named plaintiffs are inadequate class representatives when the economic reality of the proposed settlement provides worthless injunctive relief in exchange for release of the class members' claims. *E.g. In re Subway Footlong Sandwich Mkt'g and Sales Practices Litig.,* 869 F.3d 551 (7th Cir. 2017) ("*Subway*"); *Gallego v. Northland Group*, 814 F.3d 123, 129 (2d Cir. 2016); *cf. also Kaplan v. Rand*, 192 F.3d 60, 70-72 (2d Cir. 1999). Nonetheless, the court explicitly declined to consider the economic reality of this settlement. A230-233. Did the magistrate judge err by finding the named plaintiffs adequate and approving the settlement where class members released all claims in exchange for worthless injunctive relief?

Standard of Review: "Certification of a class is reviewed for abuse of discretion." *Payment Card*, 827 F.3d at 231. A court abuses its discretion if its decision

"rests on a legal error or clearly erroneous factual finding, or falls outside the range of permissible decisions." *Id.* Failure to consider an essential factor qualifies as an abuse of discretion. *E.g.*, *Brecher v. Republic of Arg.*, 806 F.3d 22, 24 (2d Cir. 2015).

3. To better review class settlements, this Court has long instructed district courts to ferret out "those situations short of actual abuse, in which the client's interests are somewhat encroached by the attorney's interests." *In re Agent Orange Prods. Liab. Litig.*, 818 F.2d 216, 224 (2d Cir. 1987). Similarly, the 2018 amendments to Rule 23 direct courts to consider, *inter alia*, whether the settlement relief is adequate in relation to "the terms of any proposed award of attorney's fees." Fed. R. Civ. P. 23(e)(2)(C)(iii). If the negotiated fees are outsized in relation to the value of the class benefit, the settlement should be rejected as unfairly affording "preferential treatment" to class counsel. *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013) ("*Pampers*"); *accord Subway*, 869 F.3d at 556-57; *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011) ("*Bluetooth*"). Did the magistrate judge err by approving a settlement that allowed class counsel to obtain a disproportionate fee relative to the value of the class relief?

Standard of Review: Settlement approval is reviewed for abuse of discretion. *Cent. States Southeast & Southwest Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 246 (2d Cir. 2007). A court abuses its discretion if its decision "rests on a legal error or clearly erroneous factual finding, or falls outside the range of permissible decisions." *Payment Card*, 827 F.3d at 231. "This Court reviews *de novo* questions of statutory interpretation, including a district court's interpretation of

the Federal Rules of Civil Procedure." *L-3 Commc'ns. Corp. v. OSI Sys.*, 607 F.3d 24, 27 (2d Cir. 2010).

Statutes and Rules

Federal Rule of Civil Procedure 23. Class Actions.

(a) Prerequisites.

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

…

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions.

A class action may be maintained if Rule 23(a) is satisfied and if:

…

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

…

…

(e) Settlement, Voluntary Dismissal, or Compromise.

The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal or compromise:

…

(2) *Approval of the Proposal.*

If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

…

(C) the relief provided for the class is adequate, taking into account:

…

(iii) the terms of any proposed award of attorney's fees, including timing of payment…

…

…

…

(5) *Class-Member Objections.*

(A). *In General.*

Any class member may object to the proposal if it requires court approval under this subdivision (e)…

…

…

(g) Class Counsel.

…

(4) *Duty of Class Counsel.*

Class counsel must fairly and adequately represent the interests of the class.

Statement of the Case

This is an appeal from a final order of Magistrate Judge Steven L. Tiscione, granting, over the objection of class member appellant Adam Ezra Schulman, plaintiffs' motion for class certification and final approval of a proposed class settlement. A221. The decision is only reported electronically, by LexisNexis at 2019 U.S. Dist. LEXIS 92440 and by Westlaw at 2019 WL 2341991 (E.D.N.Y. Jun. 3, 2019).

A. Plaintiffs bring a "slack-fill" lawsuit alleging that Barilla pasta boxes contain excess empty space.

Four New York citizens filed a putative consumer class action against Barilla S.p.A and its domestic subsidiary Barilla America, Inc. d/b/a Barilla USA (collectively "Barilla"). Dkt. 1; A16, A221-222. Notwithstanding the fact that Barilla's packaging conspicuously and accurately designated the net weight of each product, Plaintiffs alleged that Barilla was perpetrating a consumer fraud by deceptively selling certain specialty pastas in unnecessarily spacious boxes. *Id.*

Increasing in popularity, this genus of consumer claim has been dubbed a "slack-fill" claim. Jonah M. Knobler & Julie A. Simeone, *"Slack-Fill" Cases Coming Up Empty*, MISBRANDED: THE FOOD/DRUG/COSMETIC FALSE ADVERTISING BLOG (Mar. 21, 2019), https://www.pbwt.com/misbranded/slack-fill-cases-coming-up-empty (last visited Oct. 6, 2019). "Despite the volume of slack-fill litigation, all of which has been filed as putative class actions, very few have reached the stage of class certification." *In re McCormick & Co.*, 2019 WL 3021245, 2019 U.S. Dist. LEXIS 114583, at *10-*11 (D.D.C. Jul. 10, 2019) (cataloging only three actions (including this case), of dozens, that have attained certification). By simultaneously overestimating what the law

demands and underestimating the capability of a reasonable consumer, most slack-fill actions fall short of a stating a viable claim. *Id.* at *10 n.21; *see e.g., Stewart v. Riviana Foods Inc.*, 2017 WL 4045952, 2017 U.S. Dist. LEXIS 14665 (S.D.N.Y. Sept. 11, 2017) (dismissing New York consumer protection law slack-fill claims involving Ronzoni pasta).

Here, plaintiffs asserted that Barilla's alleged slack-fill packaging violated New York's consumer protection statute and the common law right against unjust enrichment. A31-32. As relief for Barilla's alleged fraud, plaintiffs sought, *inter alia*, compensatory and punitive damages, restitution, and an injunctive order requiring Barilla "to repackage the pastas without non-functional slack-fill." A33.

B. The parties settle.

The action was assigned to District Judge Vitaliano and Magistrate Judge Tiscione. A6. At the initial case conference, Judge Tiscione scheduled an in-person settlement conference in effort to mediate an agreement between the parties. Dkt. 32. "[W]ith the assistance of Magistrate Tiscione" over the course of three settlement conferences, the parties negotiated and ultimately reached a settlement in principle. Dkt. 43; A74-76.[4] Before filing the preliminary approval order, both parties then filed their consent under 28 U.S.C § 636(c) for referral to Magistrate Judge Tiscione to adjudicate the fairness of the settlement that he had mediated at the earlier settlement conferences.

[4] Between the initial case conference and the settlement conferences, the parties submitted briefing on Barilla's motion to dismiss. Dkts. 33, 34, 35. This motion was later denied without prejudice to renewal in the event that the settlement was not approved. A11.

Dkt. 51. District Judge Vitaliano issued the referral order. Dkt. 52. Shortly thereafter, plaintiffs moved unopposed for preliminary approval of the settlement and the court granted the motion. Dkts. 53, 57.

The fundamental terms of the settlement are as follows:

- Barilla agrees that, no later than 18 months after the settlement's effective date, it will alter its specialty pasta boxes to add (1) a minimum fill line and (2) a disclaimer that reads "Product sold by weight not volume. Product may settle. The amount of product in this box may differ from the amount contained in similarly-sized boxes." A41, A152. (A reproduction of the new labeling appears at A63-64 and A77-78.)
- Class members agree to fully release Barilla from all claims, monetary or otherwise, through the date of final approval, "that were asserted or could have been asserted in the Action relating to the amount of pasta contained in a package of pasta and the packaging of the Products." A40, A48-49.
- Class counsel and the named representatives obtained the right to seek, unopposed by Barilla, fees, case contribution awards and reimbursement of expenses totaling up to $450,000. A54. If the court awarded less than the negotiated $450,000, that amount would be retained by Barilla.

The putative Rule 23(b)(2) settlement class includes "All consumers in the United States…who purchased one or more of the [less than one pound boxes of Barilla specialty pasta] from July 28, 2010 until [June 12, 2018]" who do not timely and properly exclude themselves from the class. A49-50, A40. Upon preliminary approval, the settlement administrator issued class notice through a web-based and social media

advertising campaign and a settlement website. A78, A174-175. There was no individualized notice and no one opted out of the class.

Class counsel filed a motion for final approval requesting the full $450,000 in fees, expenses and case contribution awards. Dkts. 59, 61.

C. Schulman objects.

On November 16, 2018, class member Adam Ezra Schulman objected *in propria persona*. A125-173. Schulman objected to (b)(2) class certification of the settlement on the grounds that "final injunctive relief" was not appropriate with respect to a class of past Barilla purchasers asserting and releasing consumer claims for damages. A142-149. He further objected to class certification on the ground that the plaintiffs had not demonstrated that the adequate stewardship of the named representatives and class counsel. A138-142. Finally, he objected that even if the class could be certified, the settlement unfairly afforded preferential treatment to class counsel and the named representatives at the expense of absent class members. A149-158. As his objection explained, as a matter of economic reality, the negligible value of the labeling changes paled in comparison to the $450,000 in attorneys' fee and case contribution awards that the representatives had secured for themselves. A151-156. Compounding the unfairness, the plaintiffs negotiated "clear sailing" and "kicker" clauses that insulated their $450,000 from full review, and ensured that the lower court did not have the power to fix the inequitable allocation. A156-158.

Schulman documented his class membership through an accompanying declaration that attached as an exhibit photographic evidence of his purchases. A161-

173. Under protest, he complied with the settlement's burdensome and improper demand that objectors list all other objections that they have submitted to any court in the previous five years. A166-169.

D. After a fairness hearing, the court approves the class certification, settlement and negotiated attorneys' fees.

On December 17, 2018, the magistrate judge held a fairness hearing, at which Schulman and the settling parties appeared. A177. After the hearing, the court issued an order requesting additional lodestar billing information. A217. Plaintiffs filed supplemental documentation under seal. Dkts. 74-75.

On June 3, 2019, the court issued a memorandum opinion overruling Schulman's objection, certifying the class, approving the settlement, and awarding attorneys' fees in full. A221-258.

First, the Court rejected plaintiffs' argument that Schulman lacked standing to pursue his objection. A226-228. As a bona fide class member who demonstrated that he fell within the class definition, Schulman possessed standing to assert objections to an undesired and binding settlement. A226-227 (citing, *e.g., Devlin v. Scardelletti*, 536 U.S. 1, 6-7 (2002)). Standing turns on the objective fact of Schulman's class membership, not on his "personal feelings" about the underlying purchase, nor on his "subjective experience of the harm [he] alleges." A227 (quoting in part *E.M. v. New York Dep't of Educ.*, 758 F.3d 442, 450 (2d Cir. 2014)).

Addressing the merits of Schulman's objections, the court explicitly declined to follow the reasoning in Seventh Circuit's *Subway* decision. A230. The court held that it did not need to determine "whether the relief is 'worthless' or 'meaningless' in the

abstract," A230. Instead, it held that it need only determine whether the labeling changes provided a sufficient benefit "in light of the nature and the strength of Plaintiffs' claims." *Id.* Under this rubric, the court found that "the injunctive relief here is not in fact 'worthless' *as compensation for Plaintiffs' claims*." A231 (emphasis in original). "In the [c]ourt's view, the weakness of the Plaintiffs' claims—the unlikelihood that the class would be able to establish a right to damages—reinforces rather than dilutes the adequacy of the injunctive-only relief provided for in the settlement." A232. As a result of the court's approach, it did not assess the real value to class members of the labeling relief. It did, however, express "its doubts about whether the injunctive relief is necessary to accurately advertise the pasta." A233. Nor did the court determine whether pursuing such demeaning claims from the outset satisfied class counsel's and the named representatives' parallel duties to adequately represent the putative class.

Further, the court failed to address Schulman's objection to the preferential treatment afforded class counsel through the settlement's fee provisions. Rather, the court believed that "[t]he inherent difficulty in monetary valuation of the injunctive relief can be largely avoided…because the fee award contemplated under the settlement only represents class counsel's lodestar, rather than a multiplier of it." A256. To address amended Rule 23(e)(2)(C)(iii), which explicitly requires consideration of the attorneys' fee terms in evaluating settlement fairness, the court simply incorporated its subsequent discussion of the *Goldberger*[5] factors. A250. The court did not mention the settlement's

[5] *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000).

"clear sailing" clause nor the fact that the settlement would revert unawarded fees to the defendant.

Lastly, the court overruled Schulman's objection to Rule 23(b)(2) certification. A233-239. On the question of whether it is appropriate to certify a class of past purchasers under (b)(2), it found a divergence of authority. A234. Nonetheless, it thought the practical public need for injunctive relief in consumer cases means that (b)(2) certification must be permitted. A235. Moreover, it found that money damages did not constitute an adequate remedy because such damages were not easily ascertainable and would be minimal in amount. A236. Finally, it determined that individual monetary claims could be released in a (b)(2) action as long as a settlement allows class members' the right to opt out if they wish. A237-238.

Schulman timely appealed the decision. A259.

Preliminary Statement

Schulman, a practicing attorney, brings his objection through his employer, the non-profit Hamilton Lincoln Law Institute ("HLLI"). The Center for Class Action Fairness ("CCAF"), a program housed within HLLI, litigates on behalf of class members against unfair class-action procedures and settlements, and it has won hundreds of millions of dollars for class members. Andrea Estes, *Critics hit law firms' bills after class-action lawsuits,* BOSTON GLOBE (Dec. 17, 2016); *see also, e.g.*, Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES (Aug. 13, 2013) (calling CCAF attorney Theodore H. Frank "the leading critic of abusive class action settlements"); Editorial Board, *The Class-Action Con*, WALL ST. J. (Feb. 11, 2018). As commentators

recognize, CCAF has "develop[ed] the expertise to spot problematic settlement provisions and attorneys' fees." Elizabeth Chamblee Burch, *Publicly Funded Objectors*, 19 THEORETICAL INQUIRIES IN LAW 47, 55-57 & n.37 (2018); *see also Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (praising CCAF's work); *Pampers*, 724 F.3d at 716-17 (same); *Richardson v. L'Oreal USA, Inc.*, 991 F. Supp. 2d 181, 205 (D.D.C. 2013) (same); A166-69 (documenting dozens of successful objections as required by preliminary approval order). This appeal is brought in good faith to protect class members in this and future class actions against unfair class certifications and settlements.

Summary of Argument

Plaintiffs sued Barilla on behalf of a putative class of pasta purchasers alleging a consumer fraud worthy of punitive damages. Not long later, they settled for payments of $1500 a piece, more than $400,000 to their counsel, and $0 to the absent class members. Class members will release all claims—including monetary claims for damages—in exchange for Barilla's agreement to add a "minimum fill line" and a 25-word common sense disclaimer to its retail packaging.

Explicitly splitting from the Seventh Circuit's *Subway* decision, the court below declined to evaluate whether this injunctive "relief" constituted a real demonstrable class benefit. This was error; *Subway* is not only correct that a close inspection is necessary under Rule 23, but existing precedents of this Court already direct lower courts to assess the economic reality of settlement relief. *See, e.g.*, *Kaplan*, 192 F.3d 60.

Without any realistic assessment of the class's settlement relief, the lower court was also unequipped to compare the attorney's fee provisions with the class recovery,

another requirement of Rule 23 and Second Circuit jurisprudence. *See, e.g.*, *Gallego*, 814 F.3d 123. Had the court undertaken the necessary searching review, it would have reached the ineluctable conclusion that class counsel, the named representatives, and Barilla are the only concrete beneficiaries of the proposed settlement. The class's relief amounts to window-dressing a non-existent problem.

Perhaps, as the court below suggested, the underlying claims are worthless, and even a peppercorn in relief to the class would overcompensate them. No matter: Rule 23(e) requires that a settlement be *fair*, as well as adequate, before approval, and if class counsel generates a $450,000 windfall, that windfall needs to be proportionately shared between the class and the attorneys. The lower court's argument that the weakness of the case made it fair for the attorneys to walk away with 100% of the settlement relief creates the perverse incentive for attorneys to bring weak claims, rather than strong claims with the potential to benefit injured consumers.

To make matters worse, the court erred by allowing the settling parties to certify the settlement class under Rule 23(b)(2), without several of the protections afforded to monetary claims-holders under Rule 23(b)(3). Given the retrospective class definition, the monetary claims and economic injuries asserted, and the settlement's plenary release of monetary claims, it was unlawful to certify the class under (b)(2). *E.g., Hecht*, 691 F.3d 218.

In recent years, the Sixth, Seventh and Ninth Circuits have all refused to tolerate abusive arrangements of this sort. *Pampers*, 724 F.3d 713; *Subway*, 869 F.3d 551; *Koby v. ARS Nat'l Servs.,* 846 F.3d 1071, 1079 (9th Cir. 2017). This Court ought not open its

door as a haven for class litigation that makes no actual effort to benefit those on whose behalf the suit is brought.

Argument

I. Class actions are predisposed to agency problems.

Unlike settlements in ordinary civil litigation, class-action settlements require court approval pursuant to Federal Rule of Civil Procedure 23(e). Even merely proceeding in court on behalf of a class demands a "rigorous analysis" of the Rule 23(a) and (b) prerequisites. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011). The need for these additional layers of review, during which the court acts as a fiduciary of the class, arises from the self-interested incentives inherent in class actions: "class-action settlements affect not only the interests of the parties and counsel who negotiate them, but also the interests of the unnamed class members who by definition are not present during the negotiations. And thus there is always the danger that the parties and counsel will bargain away the interests of the unnamed class members in order to maximize their own." *Pampers*, 724 F.3d at 715. To forestall this danger, "district judges presiding over such actions are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole." *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 175 (3d Cir. 2013). Judges must not "assume the passive role that is appropriate when there is genuine adverseness between the parties." *Redman v. RadioShack Corp.*, 768 F.3d 622, 629 (7th Cir. 2014); *see also Plummer v. Chemical Bank*, 668 F.2d 654, 658 (2d Cir. 1982).

The potential for conflict in class-action settlements is structural and acute because every dollar reserved to the class is a dollar defendants cannot pay class counsel. As this Court has recently observed, "in negotiating a settlement, a defendant is interested only in disposing of the total claim asserted against it;" "the allocation between the class payment and the attorneys' fees is of little or no interest to the defense." *Fresno Cty. Emples. Ret. Ass'n v. Isaacson*, 925 F.3d 63, 69-70 (2d Cir. 2019) (cleaned up). Thus, while class counsel and defendants have proper incentives to bargain effectively over the *size* of a settlement, similar incentives do not govern their critical decisions about how to *allocate* it—either between the payments to class members and the fees for class counsel or amongst the different class members themselves. *Pampers*, 724 F.3d at 717; *Payment Card*, 827 F.3d at 232-36.

The dysfunction that can result from these incentives is problematic because class actions often are the only way plaintiffs can be compensated and defendants held to account for serious misdeeds with diffuse harm. Our adversary system—and the value of class actions within it—depends upon unconflicted counsel's zealous advocacy for their clients, especially where those clients are absent class members who do not get to choose their counsel for themselves and may not even know their legal rights are at stake. *See, e.g., Payment Card*, 827 F.3d at 235. As a result, rigorous adherence to the safeguards of Rule 23 is necessary to ensure that counsel is not self-dealing at the class's expense. "The concern is not necessarily in isolating instances of major abuse, but rather is for those situations short of actual abuse, in which the client's interests are somewhat encroached upon by the attorney's interests." *In re Agent Orange Prods. Liab. Litig.*, 818 F.2d 216, 224 (2d Cir. 1987) (internal quotation omitted). Where, as here, class counsel

favor themselves while providing no meaningful benefit to their clients, a court should reject the settlement and the accompanying settlement-class certification. *Pampers*, 724 F.3d at 718-21; *Subway*, 869 F.3d 551, 555-57; *see also Gallego*, 814 F.3d at 129.

Various tools enable class counsel to obscure settlement misallocations. These tools function primarily by artificially inflating the settlement's apparent relief. The illusion of a large settlement benefits both settling parties: "The more valuable the settlement appears to the judge, the more likely the judge will approve it. And the bigger the settlement, the bigger the fee for class counsel." *See* Howard M. Erichson, *How to Exaggerate the Size of Your Class Action Settlement*, DAILY JOURNAL (Nov. 8, 2017).[6] Without judicial oversight to weed out such practices, class members are left with disproportionate settlements in which class counsel recovers far more than a reasonable share of the recovery. *See* Howard Erichson, *Aggregation as Disempowerment*, 92 NOTRE DAME L. REV. 859 (2016).

One such inflationary tool is spurious injunctive relief. *Id.* at 874-78; *see also* Erin L. Sheley & Theodore H. Frank, *Prospective Injunctive Relief and Class Settlements*, 39 HARV. J. L. & PUB. POL'Y 769, 778-80 (2016). As Judge Vaughn Walker once described it, an injunctive-relief settlement coupled with "arrangements to pay plaintiffs' lawyers their fees" is the "classic manifestation of the class-action agency problem." *In re Oracle Secs. Litig.*, 132 F.R.D. 538, 544 (N.D. Cal. 1990). "The defendants thus get off cheaply, the plaintiffs' (and defendants') lawyers get the only real money that changes hands and the court, which approves the settlement, clears its docket of troublesome litigation." *Id.* at

[6] *Available at* https://www.dailyjournal.com/articles/344700-how-to-exaggerate-the-size-of-your-class-action-settlement.

544-45. Defendants benefit from *res judicata* following judicial approval of the settlement and the minimal cost of such relief, while class counsel hopes for approval of a higher fee request. The critical question for a reviewing court is whether the change achieved by the settlement actually benefits class members or whether it is "illusory,"[7] "substantively empty,"[8] "premised upon a fictive world,"[9] "worthless,"[10] or like here, "denigrate[s] the intelligence of ordinary consumers."[11]

Although there exists a "strong judicial policy in favor of settlements" (A224), "[t]he public interest in having rules of procedure obeyed is at least as important as the public interest in encouraging settlement of disputes." *Keller v. Mobil Corp.*, 55 F.3d 94, 98 (2d Cir. 1995). "[T]he pressure to close cases must not overshadow the federal courts' paramount role of being a forum where dispute are efficiently ***and*** fairly resolved." *Catzin v. Thank You & Good Luck Corp.*, 899 F.3d 77, 86 (2d Cir. 2018) (emphasis added).

Where settling parties are not prodded to do better, settlements often look a lot like the one here: spurious injunctive relief with attorneys' fees/incentive awards as the only concrete settlement value, and a broad release for the defendant. Exacerbating the problems, and further demonstrating the self-dealing, this settlement includes a "clear sailing" clause whereby defendant agreed not to challenge the attorneys' fee request and

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7 *Kaplan v. Rand*, 192 F.3d 60, 71 (2d Cir. 1999).

8 *Pearson v. NBTY, Inc.*, 772 F.3d 778, 785 (7th Cir. 2014).

9 *Pampers*, 724 F.3d at 721.

10 *Subway*, 869 F.3d at 557; *Koby*, 846 F.3d at 1079.

11 *Pampers*, 724 F.3d at 720.

a "kicker" stipulating that any reduction in the fee award reverts to defendant rather than the class. A156-158. "The clear sailing provision reveals the defendant's willingness to pay, but the kicker deprives the class of that full potential benefit if class counsel negotiates too much for its fees." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 949 (9th Cir. 2011).

The vitality of the class-action mechanism depends on zealous scrutiny by the judiciary and the application of doctrinal tests that properly align the incentives of class counsel with those of the vulnerable, absent class members whose claims they settle away. The magistrate judge's scrutiny failed to meet this standard and, as a result, overlooked multiple red flags of settlement unfairness.

II. The class cannot be certified under Rule 23(b)(2).

Although a court certifying a class for settlement purposes need not consider the manageability problems that a trial would present, the "other specifications of [Rule 23]—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *accord Payment Card*, 827 F.3d at 235 (2d Cir. 2016) ("added solicitude"); *Pampers*, 724 F.3d at 721 ("These requirements are scrutinized more closely, not less, in cases involving a settlement class"). The settling parties here sought certification of a putative Rule 23(b)(2) settlement class. While a 23(b)(3) class is designed to seek monetary damages, a 23(b)(2) class is limited to situations where plaintiffs seeks a single, "indivisible injunction" against the defendant that will provide relief to all class members equally. *Wal-Mart*, 564 U.S. at 361-63.

Rule 23(b)(2) lacks several procedural protections that are afforded to absent class members in a (b)(3) class—amongst them, the right to the "best notice practicable" and the security of judicial findings that common issues predominate over individual ones and that the use of the class action is superior to other methods of adjudication. *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 934 F.3d 316, 329 (3d Cir. 2019) ("*Google Cookie*"). Given this framework, courts should be even more vigilant to protect absent class members against "unwarranted or overbroad class definitions." *Amchem*, 521 U.S. at 620. The most forceful textual protection for a 23(b)(2) class is the requirement that "final injunctive relief or corresponding declaratory relief [be] appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

The putative class here cannot be certified as a (b)(2) class because the putative class lacks a homogenous interest in the prospective injunctive relief. First, defined as past purchasers of Barilla products, there are many putative class members who will never again purchase the Barilla products and thus, do not have an interest in changes to the product. And second, plaintiffs assert (and release) individual consumer fraud claims for which money damages are an adequate remedy.

A. 23(b)(2) certification is improper because the putative class is defined as past purchasers of Barilla products.

The putative class is not appropriate for (b)(2) certification because it comprises past Barilla purchasers bringing damages claims. A Rule 23(b)(2) class cannot be certified when class members are "victims of a completed harm with no reference to ongoing injury or risk of future injury," when the definition "ensure[s] that every

member would be entitled to damages, but not that every member would have standing to seek injunctive relief." *Hecht v. United Collection Bureau*, 691 F.3d 218, 223-24 (2d Cir. 2012); *accord Wal-Mart*, 564 U.S. at 365 (repudiating (b)(2) certification when "about half of the class" was no longer employed by defendant).

Hecht follows a wide consensus of courts that have rejected attempts at shoehorning former customers, ex-employees, or any individuals who suffered a discrete harm in the past into 23(b)(2) classes that offer prospective injunctive relief. *See e.g., Wal-Mart*, 564 U.S. at 365; *McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 553 (5th Cir. 2003); *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 978 (5th Cir 2000); *Crawford v. Equifax Payment Servs.*, 201 F.3d 877 (7th Cir. 2000). *Wal-Mart* eliminated any doubt that may have remained in the wake of these cases:

> [E]ven though the validity of a (b)(2) class depends on whether "final injunctive relief or corresponding declaratory relief is appropriate respecting the class *as a whole*," about half the members of the class approved by the Ninth Circuit have no claim for injunctive or declaratory relief at all. Of course, the alternative (and logical) solution of excising plaintiffs from the class as they leave their employment may have struck the Court of Appeals as wasteful of the District Court's time.

564 U.S. at 365 (quoting Rule 23(b)(2) and adding emphasis). Though *Wal-Mart* involved a litigation class certification rather than a settlement certification, "that does not make its precedent any less applicable to this case." *Payment Card*, 827 F.3d at 241-42 (2d Cir. 2016) (Leval, J., concurring).

Cohesive classes coalesce behind a common interest that makes appropriate the granting of final injunctive relief. Consumers who purchased a Barilla product

sometime in the last nine years have no such common interest in injunctive relief. A49-50 (emphasis added). There is a discontinuity between the class definition—former buyers—and the prospective injunctive relief obtained in the settlement. All settlement relief has only the potential to benefit future purchasers of Barilla products, but the class comprises past purchasers who have already allegedly suffered injuries.

To be sure, as the magistrate judge observed, there is a split of authority on the issue, with other courts that permitting (b)(2) certification of former purchaser classes. A234. Yet none of these permissive decisions consider *Hecht* or the relevant language from *Wal-Mart*. Like the court below, those courts instead focused on the practical necessity of allowing injunctions to protect the general consumer public against future misleading advertising. But this is a non-sequitur, because injunctions (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. More fundamentally, Rule 23 ought be interpreted "with the interests of absent class members in close view." *Amchem*, 521 U.S. at 629. It is unhealthy—and unethical—if the class' fiduciaries subordinate class member interests to those of the non-class-member public.

Certainly, a (b)(2) class itself could be appropriate when the class comprises individuals with an ongoing relationship with the defendant. The prototypical example is a desegregation injunction in a civil rights case. *See* Advisory Committee Notes, 39 F.R.D. 98, 102 (1966). "While (b)(2) classes are not exclusively reserved for civil rights disputes, this class type is especially suited for those plaintiffs." *Casa Orlando Apts., Ltd. v. Fannie Mae*, 624 F.3d 185, 200-201 (5th Cir. 2010). But when the only shared characteristic amongst class members is that they have purchased a Barilla product some

time in the past nine years, the requisite cohesive interest in injunctive relief is not present. "[A]t some level of abstraction, a degree of cohesion will exist in almost any putative class," but fundamentally "the question is not one of fault but one of remedy." *Blackman v. District of Columbia*, 633 F.3d 1088, 1094 (D.C. Cir. 2011) (Brown, J., concurring). It is not possible to suggest that all class members will again purchase Barilla products in the future. Nor is it possible to suggest that all class members would be benefited by the feeble injunctive relief obtained in settlement. A162. (Indeed, it does not benefit any class members. *See* section III.).

Final injunctive relief is not appropriate respecting the putative class as defined.

B. 23(b)(2) certification does not befit the plaintiffs' consumer claims.

A (b)(2) class is also not suitable for claims alleging economic harm and monetary damages, at least when such claims accrue on an individual basis. *Wal-Mart*, 564 U.S. at 360-61. In determining whether class members allege individual monetary claims that would preclude (b)(2) certification, the court should analyze the claims averred in the complaint. *See, e.g., Hecht*, 691 F.3d at 223 ("The … complaint requested 'the maximum statutory damages' under the FDCPA but failed even to mention injunctive relief."). For example, in *Crawford v. Equifax Payment Servs.*, 201 F.3d 877, 881 (7th Cir. 2000), plaintiffs sought statutory damages under the Fair Debt Collection Practices Act. Although "Crawford's pleadings sought certification under Rule 23(b)(3)," there was a "last-minute change" for certification under 23(b)(2). *Id.* The Seventh Circuit rejected the (b)(2) class because the claims in the complaint sought money damages. *Id.* at 882.

As in *Crawford*, plaintiffs here originally sought a money-damages class action, but the settlement pulls a last-minute switch to seek solely injunctive relief and a (b)(2) certification. Plaintiffs' complaint sought damages under a New York consumer protection statute as well as restitution for unjust enrichment from payment of the purchase price of the pastas. A32-33. The complaint invoked the diversity jurisdiction of the lower court on the allegation that $5 million was in controversy, seeking as remedy a variety of forms of monetary relief. A18, A33.[12] Indeed, the complaint's "class action allegations" averred that the putative class could satisfy the (b)(3) requirements of "superiority" and "predominance," yet did not mention any of the requirements of (b)(2). A30-31. Instinctively, plaintiffs recognized that "individualized monetary claims belong in Rule 23(b)(3)." *Wal-Mart*, 564 U.S. at 362. Plaintiffs' subsequent self-serving attempt to turn their monetary claims into injunctive ones do not suffice to satisfy (b)(2). *E.g., Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 889 (7th Cir. 2011); *Segal v. Bitar*, 2015 WL 3644479, at *15 (S.D.N.Y. May 26, 2015).

Kartman is also instructive. In *Kartman*, the court decertified the 23(b)(2) class, finding that plaintiffs "have only one cognizable injury—underpayment of their insurance claims…—and prospective injunctive relief is not a proper remedy for that kind of injury." 634 F.3d at 888-89.

> The proposed injunction would not be an appropriate remedy for any single plaintiff, let alone for the class as a whole. To begin with, the plaintiffs cannot satisfy the test for a remedy in equity. An

[12] The complaint only sought one specific injunctive remedy: having Barilla "repackage the pastas without non-functional slack-fill." A33. The settlement does not deliver this relief.

> injunction requires a showing that: (1) the plaintiffs have suffered irreparable harm; (2) monetary damages are inadequate to remedy the injury….

Id. at 892; *see also Segal*, 2015 WL 3644479, at *14-*15 (denying (b)(2) settlement certification when money damages were an adequate remedy at law). As in *Kartman*, (b)(2) certification is "necessarily improper." *Kartman*, 634 F.3d at 892. Prospective injunctive relief is not a proper remedy for plaintiffs' alleged injury that they overpaid for pasta because it is not an irreparable harm and because monetary damages—as sought in the complaint—are adequate to remedy the alleged injury. A31-33. While (b)(2) classes are readily suited to remedy civil rights violations, they are ill-fitted for consumer fraud cases.

Despite the allegations of the complaint, the magistrate judge disagreed, declaring that monetary relief was an inadequate remedy because damages would be difficult to ascertain and would result in only nominal payments to class members. A236-237. Neither rationale withstands scrutiny.

First, although there does exist a doctrine that unascertainable damages can justify injunctive relief, it has no application in a case that deals solely with consumer allegations. Indeed, the cases the district court relies on were commercial disputes and not consumer class actions. *See* A236 (citing cases). This Court distilled the "governing principle" in *Tom Doherty Associates v. Saban Entertainment*. 60 F.3d 27, 38 (2d Cir. 1995). "Where the availability of a product is essential to the life of the business or increases business of the plaintiff ***beyond sales of that product***…the damages caused by loss of the product will be far more difficult to quantify than where sales of one of many products is the sole loss." *Id.* (emphasis altered). "Where the loss of a product with a

sales record will not affect other aspects of a business, a plaintiff can generally prove damages on a basis other than speculation." *Id.*; *see also Interphoto Corp. v. Minolta Corp.*, 417 F.2d 621, 622 (2d Cir. 1969) (per curiam) (affirming finding of irreparable harm because plaintiff "would be unable to calculate its damages since it would suffer ***not merely loss of profits with respect to [defendant's] goods*** but loss of good will from the lack of a 'full line'") (emphasis added). Plaintiffs here, as the purchasers of a few discrete Barilla product lines, can "be compensated with money damages determined on the basis of past sales of that product and of current and expected future market conditions." *Tom Doherty Assocs.*, 60 F.3d at 38; *see also Kaczmarek v. Int'l Bus. Machs. Corp.,* 186 F.R.D. 307, 313 (S.D.N.Y. 1999) (money damages adequate remedy for computer purchasers bringing consumer fraud allegations).

Second, ostensibly inventing a second rationale from whole cloth, the lower court held that where damages amounts are low, a monetary remedy is inadequate. A236-237. This rationale is inimical to Rule 23; "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem*, 521 U.S. at 617 (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)). And if class settlement payments would be truly *de minimis*, that is a reason to deny certification, not grant it. *Gallego*, 814 F.3d 123.

Rule 23(b)(2) does not become a proper outlet for class claims merely because damages will be "miniscule" or "negligible" on a per class member basis. *Hecht*, 691 F.3d at 221, 225-26 (disavowing that notion); *see also Carter v. City of Los Angeles*, 224 Cal. App. 4th 808, 824 (Cal. App. 2d Dist. 2014) ("incidental" does not mean of "negligible

value"). Against common sense, the lower court's reasoning entails that monetary damages are never adequate relief in a small-stakes consumer suit for economic harm. That view runs contrary to the experience of courts since the inception of Rule 23. In fact, it is precisely backwards. It is an injunction which is not appropriate "to restrain an act the injurious consequences of which are merely trifling." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12 (1982) (quoting *Consolidated Canal Co. v. Mesa Canal Co.*, 177 U.S. 296, 302 (1900)).

That monetary damages are an adequate remedy for consumer protection claims is underscored by the fact that, while consumer protection statutes vary from state to state, many do not allow private plaintiffs to act as private attorneys general and limit such plaintiffs to monetary relief. *See, e.g., Physicians Comm. for Responsible Med. v. General Mills, Inc.*, 283 Fed. Appx. 139, 142 (4th Cir. 2008) (private parties cannot seek injunctive relief under Virginia consumer protection law).[13] A (b)(2) certification cannot lie where the underlying law allows only for a damages remedy. *Crawford*, 201 F.3d at 882; *Bolin*, 231 F.3d at 977 n.39 ("Of course, the unavailability of injunctive relief under a statute

[13] This state-by-state variation illuminates the lack of intra-class cohesiveness necessary for a (b)(2) certification. While Schulman recognizes that the complaint alleges only New York statutory consumer protection claims (it does also allege nationwide unjust enrichment claims), the release is most certainly not so limited. Nor under a conflict of laws analysis would application of New York law be proper for those class members who purchased their products outside of New York. *Cf. Johnson v. Nextel Comms. Inc.*, 780 F.3d 128, 140-48 (2d Cir. 2015). The fact that all putative class representatives are citizens of New York (A19-20) provides further reason to doubt that any accounting of state law variation has occurred and that non-New York class members' interests have been adequately represented.

would automatically make (b)(2) certification an abuse of discretion."); *Hecht*, 691 F.3d at 223 n.1 (citing both *Crawford* and *Bolin* on this point).

Even if prospective injunctions were permissible remedies for every consumer protection statutory claim, monetary claims under those causes of action are individualized. This is because these claims are "dependent in significant way[s] on the intangible, subjective differences of each class member's circumstances." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998), *cited by Wal-Mart*, 564 U.S. at 365-66. Compensatory damages and restitution amounts vary with the individual purchase price and quantity. Any potential statutory liquidated damages would vary depending upon the geographical location of the individual purchase. Ryan P. O'Quinn & Thomas Watterson, *Fair is Fair: Reshaping Alaska's Unfair Trade Practices and Consumer Protection Act*, 28 ALASKA L. REV. 295, 305-06 (2011) (cataloguing state-by-state variation). Given the lack of available injunctive relief under myriad state consumer protection laws and the individualized nature of the claims, "Rule 23(b)(3) [is] the only conceivable vehicle for [a nationwide consumer fraud] claim." *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 946 (6th Cir. 2011).

Final injunctive relief is not appropriate with respect to the putative class' legal claims nor with respect to plaintiffs' allegation of injury.

C. 23(b)(2) certification does not even befit the settlement.

A (b)(2) settlement certification cannot be justified by the mere fact that the class only obtains injunctive relief. *See Hecht*, 691 F.3d at 221 (describing the settlement that afforded class members no monetary damages, only prospective relief and a *cy pres*

payment to third parties). A thorough analysis also entails examining the preclusive effects that the settling parties intend to foist upon absent class members. "[T]he focus here is…whether the judgment will bind absent class members as to their damages claims." *Richardson v. L'Oreal, USA, Inc.*, 991 F. Supp. 2d 181, 199 (D.D.C. 2013). In a (b)(2) class settlement, the release should confine itself to future claims for injunctive relief, without encroaching on absent class members' rights to bring claims for monetary relief in the future. *See Wal-Mart*, 564 U.S. at 362 ("Given [the structure of Rule 23], we think it clear that individualized monetary damages claims belong in Rule 23(b)(3)"). Settlement ¶ 1.23, however, stipulates that "released claims" include "all causes of action, claims, suits, debts, damages…whatsoever" "for all claims that were asserted or could have been asserted in the Action relating to the amount of pasta contained in a package of pasta and the packaging of the Products." (emphasis added). A40.

A (b)(2) settlement may not release individualized monetary claims, even if those claims share an identical factual predicate with the litigated claims. *Contra* A237-238. The magistrate judge thought that *Wal-Mart* spoke only to "the *award* of non-incidental damages" in a (b)(2) litigation class, not to the release of damages claims in a (b)(2) settlement class. A238 n.7. But there is "no basis for exempting settlements from the rule announced in [*Wal-Mart*]." *West Morgan-East Lawrence Water & Sewer Auth. v. 3M Co.*, 737 Fed. Appx. 457, 468 (11th Cir. 2018) (citing, *inter alia*, *Payment Card*, 827 F.3d at 241-42 (Leval, J., concurring)). As the Eleventh Circuit held, even a settlement that partially preserves class members' individualized claims would not satisfy (b)(2). *Id.* at

469. "Put simply, the parties may not accomplish through class settlement what they otherwise would be unable to accomplish through class litigation." *Id.*

Most recently, the Third Circuit "question[ed]" "whether a defendant can ever obtain a class-wide release of claims for money damages in a Rule 23(b)(2) settlement." *Google Cookie*, 934 F.3d 316, 329-30 (citing, *inter alia*, *Payment Card*). "By seeking certification under Rule 23(b)(2), the defendant and class counsel avoid the additional safeguards that apply to Rule 23(b)(3) actions. One might think this would leave room for class members to pursue damages individually; yet that relief is foreclosed as well, as the settlement contains a nationwide release of claims for money damages." *Id.* at 331.; *cf. also Koby,* 846 F.3d at 1080 (denouncing release of monetary claims in a (b)(2) settlement as a matter of fairness).

Because the settlement release does not confine itself to injunctive claims, (b)(2) certification is further improper.

D. Allowing a right of opt out does not cure the certification defect.

Affording absent class members the right to exclude themselves is not by itself enough to reconcile a (b)(2) certification. *See Google Cookie*, 934 F.3d 316 (mistrusting (b)(2) certification notwithstanding provision of opt-out rights). As "Wal-Mart clarified[,] the structure of Rule 23(b) requires that claims for non-incidental monetary relief be certified for class treatment only if all of the (b)(3) requirements are satisfied—notice and opt-out rights alone are insufficient."[14] *United States v. City of New York*, 276

[14] Moreover, one would be hard-pressed to say that the notice provided to the class here was the "best notice practicable," as would be owed class members under Rule 23(b)(3). *See Hecht*, 691 F.3d at 225. The notice plan consisted in only an internet

F.R.D. 22, 27 (E.D.N.Y. 2011); *see Wal-Mart*, 564 U.S. at 362 (listing "the procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, *and* the right to opt out") (emphasis added).

In part, this is because the right of opt-out is not a panacea. It is rarely exercised. Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1546 (2004). It "does "not relieve the court of its duty to safeguard the interests of the class and to without approval from any settlement that creates conflicts among class members." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 809 (3d Cir. 1995) ("*GM Trucks*"). It does not "diminish the extent to which a class action settlement is an exercise of judicial power." *Epstein v. MCA, Inc.*, 50 F.3d 644, 667 (9th Cir. 1995), *rev'd on other grounds sub. nom. Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996). It "does nothing to protect…claims of those class members who decided not to opt out." *In re MTBE Prods. Liab. Litig.*, 209 F.R.D. 323, 338 n.23 (S.D.N.Y. 2002).

Beyond the limitations of the opt-out right, the (b)(3) prerequisites of predominance and superiority are indispensable safeguards for absent class members. They serve to prevent against "sacrificing procedural fairness or bringing about other undesirable results." *Amchem*, 521 U.S. at 615. "When a class seeks an indivisible injunction…[p]redominance and superiority are self-evident. But with respect to each class member's individualized claim for money, that is not so—which is precisely why (b)(3) requires the judge to make findings about predominance and superiority before

ad campaign, a toll-free helpline, and an informational website, all of which combined cost less than $25,000. A175-176.

allowing the class." *Wal-Mart*, 564 U.S. at 362-63. Allowing (b)(2) certification with opt-out rights is "a way of undermining the (b)(3) requirement [of superiority]." *Parker v. Time Warner Entm't Co., L.P.*, 331 F.3d 13, 24 (2d Cir. 2003) (Newman, J., concurring).

This is not merely an academic exercise. There are serious doubts here about whether (b)(3) superiority could be satisfied here. When a settlement "do[es] little more than turn [defendant's] settlement with [named plaintiffs] into a general release of liability from all similarly situated plaintiffs at minimal extra cost while furthering a cottage industry among enterprising lawyers," class certification is not superior. *Gallego v. Northland Group.*, 102 F. Supp. 3d 506, 511 (S.D.N.Y. 2015), *aff'd in relevant part* 814 F.3d 123 (2d Cir. 2016). "The prospect of mass indifference, a few profiteers, and a quick fee to clever lawyers is hardly the intended outcome for Rule 23 class actions." *Id.* at 510. This Court endorsed that holding, reasoning that certification to effect a settlement of "meaningless" or "trivial" relief is not superior to other methods of adjudication. 814 F.3d at 129.

Nor is the predominance analysis a foregone conclusion either. *See In re McCormick & Co.*, 2019 WL 3021245 (D.D.C. Jul. 10, 2019) (declining to certify multi-state class for slack-fill claims because of interstate variations of law); *In re Grand Theft Auto Video Game Consumer Litig.*, 251 F.R.D. 139, 155 (S.D.N.Y. 2008) (rejecting settlement class certification because individualized issues pertaining to reliance); *Clement v. Am. Honda Fin. Corp.*, 176 F.R.D. 15, 23 (D. Conn. 1997) (rejecting settlement class certification because of variation among state consumer protection laws).

Putative class members are better off with no certification and no settlement, than with a bad certification. *See Amchem*, 521 U.S. at 621 ("The safeguards provided by

the Rule 23(a) and (b) class-qualifying criteria, we emphasize, are not impractical impediments—checks shorn of utility—in the settlement class context."). Ultimately, questions of predominance and superiority cannot be sidestepped by an artful agreement under (b)(2); "[r]ule 23(b)(3) [is] the only conceivable vehicle for [a nationwide consumer fraud] claim." *Pilgrim*, 660 F.3d at 946.

* * *

Neither the class definition, the complaint's allegation, nor the settlement itself is compatible with Rule 23(b)(2). Each of these independent grounds is sufficient to reverse the certification, but together they create an uncommonly noxious brew that laid the groundwork for the attendant malignant settlement.

III. In economic reality, the purported settlement relief demonstrates that the class has not been adequately represented.

Rule 23(a)(4), grounded in the Due Process Clause of the Constitution, conditions class certification upon a demonstration that "the representative parties will fairly and adequately protect the interests of the class." Rule 23(g)(4) imparts an equivalent duty on class counsel, especially weighty "when the class members are consumers, who ordinarily lack both the monetary stake and the sophistication in legal and commercial matters that would motivate and enable them to monitor the efforts of class counsel on their behalf." *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 917 (7th Cir. 2011). Together these provisions demand that the named representatives and class counsel manifest "undivided loyalties to absent class members." *Broussard v. Meineke Discount Muffler Shops*, 155 F.3d 331, 338 (4th Cir. 1998).

Here, the superficial injunctive relief juxtaposed against a sizable $450,000 award to counsel and the named representatives combine to indicate inadequate representation. *See, e.g., Pampers*, 724 F.3d at 721; *Subway*; 869 F.3d at 555-56; *Gallego*, 814 F.3d at 129-30; *see generally In re Razorfish, Inc. Sec. Litig.*, 143 F. Supp. 2d 304, 311 (S.D.N.Y. 2001) (Rakoff, J.) ("an excessive compensation proposal can cast in doubt the ability of proposed lead counsel to adequately represent the class."). When class counsel is "motivated by a desire to grab attorney's fees instead of a desire to secure the best settlement possible for the class, it violate[s] its ethical duty to the class." *Tech. Training Assocs., Inc. v. Buccaneers Ltd. P'ship*, 874 F.3d 692, 694 (11th Cir. 2017).

Subway is directly on point. 869 F.3d 551. Plaintiffs there alleged that the sandwich mega-chain had perpetrated a widespread consumer fraud by selling "Footlong" sandwiches that only measured 10 or 11 inches. *Id.* at 552-53. Abandoning their request for damages, they settled for $1000 incentive awards to the named plaintiffs, $525,000 to class counsel and a potpourri of prospective injunctive relief for class members, including, for example, the requirement that Subway locations keep a measuring tool on the premises. *Id.* at 554-55. The problem was that in reality the relief was "utterly worthless." *Id.* at 557. Due to natural variability in the baking process, both before and after the settlement there was "still the same small chance that Subway will sell a class member a sandwich that is slightly shorter than advertised." *Id.* Requiring Subway to prominently display a disclaimer to this effect added nothing because "customers already know this as a matter of common sense." *Id.* Since the representatives and counsel were extracting the only value from the settlement, the Seventh Circuit reversed the certification under 23(a)(4). *Id.*

Subway announces a general rule: "If the class 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, then the class representatives have failed in their duty under Rule 23 to fairly and adequately protect the interests of the class. And if the class representatives have agreed to a settlement that provides meaningless relief to the putative class, the district court should refuse to certify…the class." *Id.* at 556 (internal quotations omitted).

Likewise, in *Pampers*, class counsel and the named representatives attempted to justify oversized paydays by, *inter alia*, requiring the defendant to add a disclaimer to its diaper packaging and include "some rudimentary information about diaper rash" and two new links on its website. 724 F.3d at 716. The Sixth Circuit concluded that the disclaimers were so commonsensical that attributing any value to them "would denigrate the intelligence of ordinary consumers (and thus of the unnamed class members)." *Id.* at 720. Even if labeling changes impose a cost on the defendant, it is "egocentrism" to believe that that confers a benefit on class members. *Id.* In light of the meagerness of the class's relief, the class's representatives' plentiful self-harvest demonstrated that they had not adequately represented the putative class. *Id.* at 722.

This Court too has confronted examples of faithless class representation. In *Gallego*, a proposed settlement provided $35,000 in attorneys' fees, a $1000 payment to the named representative, and allotted the 100,000 absent class members the right to claim a share of $16,500. 814 F.3d 123, 125-26. The district court rejected the certification as failing to meet the superiority requirement of 23(b)(3). 102 F. Supp. 3d 506, 510-11 (S.D.N.Y. 2015). This Court affirmed, independently remarking that there

was reason to doubt whether the representation was adequate. 814 F.3d at 129. "The conclusion is reasonable that absentee class members' interests would not be best served by a settlement that required them to release any and all claims relating to similar letters from [Defendant] in exchange for as a little as 16.5 cents—or for no money at all, if they succumbed to the mass indifference predicted by [Plaintiff] himself." *Id.* at 129-30. The settlement here fares poorly even by comparison to *Gallego*. If a settlement that purports to release class claims for 16.5 cents of benefit per capita displays inadequate representation, then *a fortiori* so too does this settlement—one that confers 0 cents of benefit per capita.

When the settlement here is reduced to its only concrete component—the $450,000 allocated to the attorneys' fee, incentive awards and expense reimbursement—it is clear that the class counsel have prosecuted the suit "just in their interests as lawyers" and that all representatives have "leverage[d]" "the class device" for their own benefit. *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006). A settlement class cannot be certified where the attorneys are the central beneficiary of that agreement; it should be "dismissed out of hand." *Subway*, 869 F.3d at 553 (internal quotation omitted).

A common thread runs through each of these cases: "cases are better decided on reality than on fiction." *Pampers*, 724 F.3d at 721 (internal quotation omitted). "[I]n cases such as this where the benefit is in non-monetary form, the district court must bring an informed economic judgment to bear in assessing its value." *Merola v. Atlantic Richfield Co.*, 515 F.2d 165, 172 (3d Cir. 1975). Courts may not rely on assertions of a "fanciful, contrived, and mutually inconsistent character." *Schechtman v. Wolfson*, 244 F.2d 537, 540

(2d Cir. 1957). That is, courts certifying a class and approving a settlement must assure themselves that the negotiated relief provides a real benefit to the absent class members by comparing "the state of affairs before and after the settlement." *Subway*, 869 F.3d at 556.

Though the lower court correctly recognized the parallel between this case and *Subway*,[15] it declined to follow it. Rather, it decided that representational adequacy should be analyzed by "consider[ing] the value of the relief *in light of the nature and the strength of Plaintiffs' claims*, rather than whether the relief is 'worthless' or 'meaningless in the abstract.'" A230; *see also* A242. Yes, the consideration pinpointed by the court is one relevant aspect of settlement fairness under this Circuit's *Grinnell*[16] factors. But it is legal error to allow this consideration to circumvent a meaningful inspection into the actual value of the settlement relief.

Two cases of this Court expose the error. First, the plaintiffs in *Gallego* negotiated a settlement fund equivalent to the maximum available damages under the Fair Debt

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[15] It did not discuss *Pampers* or *Gallego*.

[16] *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974). The lower court compounded its misconception of *Grinnell* by reiterating *Grinnell*'s instruction not to "reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute." A225, 251. *Grinnell*, however, merely addresses the appropriate standard for reviewing an objection that the settlement offer "consists of one fractional portion of the possible ultimate recovery rather than another." *Id.* at 457. *Grinnell* says nothing about analyzing an injunctive-relief settlement, a task that requires the district court to "bring an informed economic judgment to bear" by looking at the reality underlying the dispute. *Merola*, 515 F.2d at 172. "Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart*, 564 U.S. at 351.

Collection Practices Act (FDCPA). 814 F.3d at 125-26 & n.1. As such, under the rule espoused below, *Gallego* should have found the plaintiffs perfectly adequate in light of the nature and strength of their claims. But this Court instead looked to the economic reality—the class was asked to surrender a plenary release of claims in exchange for a pitiful 16.5 cents per class member. *Id.* at 129-30.

Second, in *Kaplan v. Rand*, an objecting shareholder appealed the award of attorneys' fees to counsel granted upon the consummation of a derivative settlement providing the corporation certain "therapeutic" benefits. 192 F.3d 60, 71-72 (2d Cir. 1999). Analyzing the economic reality, this Court found that the supposed benefits could "only be characterized as illusory." *Id.* at 71. They "add[ed] nothing of value" to what the company already provided to shareholders and addressed a non-existent problem. *Id.* at 71-72. Echoing the rule below, plaintiffs' counsel argued that the benefit was substantial in light of "the great obstacles they faced in bringing the derivative action to successful conclusion." *Id.* at 72. The Court was unpersuaded: "Rather than providing a reason to allow fees to counsel for their superficial accomplishments in this case, these arguments raise questions about counsel's compliance with Fed. R. Civ. P. 11." *Id.*

Furthermore, to the extent that the merits of the underlying claim are relevant to representational adequacy, *Subway* and *Pampers* correctly imply that bringing frivolous claims on behalf of a putative class cuts **against** adequacy. Both the very theory of this case and the settlement relief itself "denigrate[] the intelligence of ordinary consumers (and thus of the unnamed class members)." *Pampers*, 724 F.3d at 720. The theory of the case does so by supposing that class members are irrational and unreasonable. *See Ebner*

v. Fresh, Inc., 838 F.3d 958, 966 (9th Cir. 2016) (A "rational consumer" would not "simply assume" something about the product that a cursory inspection would show to be false); *Daniel v. Mondelez Int'l, Inc.*, 287 F. Supp. 3d 177, 192 (E.D.N.Y. 2018). The settlement relief does so by spoonfeeding them obvious, and in the case of the minimum fill line, irrelevant, information. *Pampers*, 724 F.3d at 720.

The preexisting labels on Barilla products *already* make crystal clear that the product is sold by weight and not by volume. *See* Dkt. 33 at 8-9 (displaying "NET WT. 12 OZ" on the front label of Gluten Free Penne and a recommended six servings of two ounces each on the side label). To argue that class members or non-class future consumers are benefited by a superfluous disclaimer is to insist that they do not know basic English or basic multiplication tables or both. Increasing the "level of coddling" does not benefit consumers; the court should "decline[] to enshrine into the law an embarrassing level of mathematical illiteracy." *Daniel v. Tootsie Roll Indus., LLC*, 2018 WL 3650015, at *13 (S.D.N.Y. Aug. 1, 2018). To argue that consumers are benefited by the addition of a minimum fill line presumes not only that they care about the size of the cardboard pasta box rather than the mass of the object inside, it also presumes that if they care they are unable to rotate the product 90 or 180 degrees to get a sense of what portion of the box is filled with product.[17] Pure "egocentrism!" *Pampers*, 724 F.3d at 720. Selling pasta by volume is particularly nonsensical as it isn't a product that

[17] Even if consumers did care about the volume of space in the box, and even if they couldn't manipulate the product, the minimum fill line is *still* irrelevant. Because, as the disclaimer notes, the "product may settle," the initial fill line does not convey the desired information.

well-adjusted humans consume raw. Plaintiffs believe that measurements of weight fall beyond the ken of ordinary American consumers and instead we need pictures and lines to understand basic quantitative concepts. However, plaintiffs are wrong about the capability of reasonable consumers. *Daniel*, 2018 WL 3650015, at *11-*14. The consumer public is in better shape than plaintiffs suggest, but the adequacy of their representation is not. Far from "vigorously prosecut[ing] the interests of the class," plaintiffs have provided no value to absent class members, and have proceeded on a theory that insults class members' intelligence. *Pampers*, 724 F.3d at 721.

Even though the lower court announced that it would not examine the realities of the settlement relief, it did remark in passing that it "has its doubts about whether the injunctive relief is necessary to accurately advertise the pasta." A233. If it had explored those doubts, it would have seen that the injunctive relief was not necessary, that it cured no reasonable customer's deception, and therefore conferred no genuine benefit. Class members would be unequivocally better off opting out; yet their fiduciaries intend to bind them to a general release in exchange for no meaningful relief. This Court should reverse the class certification for failing to satisfy either (a)(4) or (g)(4).

IV. Even if the class were certifiable, the settlement unfairly affords class counsel preferential treatment at the expense of class members.

As discussed above, the class certification cannot stand. Certification arguments can bleed into the corollary 23(e)(2) question of whether the settlement is "fair, reasonable and adequate." For instance, if final injunctive relief is not appropriate respecting the class as a whole, any settlement that releases class members' claims in

exchange for solely injunctive relief will be *per se* inadequate. Similarly, when the terms of settlement manifest inadequate representation of absent class members, it often follows that the settlement is itself unfair. *See, e.g., Payment Card*, 827 F.3d at 236 (examining the settlement for "evidence of prejudice" from inadequate representation). Nonetheless, there are independent reasons that this Court should reject the settlement under 23(e) even if it accepts that the class certification itself is viable.

Namely, the conjunction of attorneys' fees, incentive awards, and no meaningful relief for class members signals an unfair, lawyer-driven settlement. The settlement agreement here permits class counsel to seek, unopposed, an award of fees, class representative awards, and costs totaling up to $450,000. A54. If any amount less than the full fee was awarded, it for "no apparent reason" was structured to revert to the defendant. *Bluetooth*, 654 F.3d at 949. Meanwhile, the class was entitled only to cosmetic injunctive relief measures that offer no genuine improvement over the *status quo ante*. *See* section III, *supra*. As in *Pampers*, the signs of an unfair deal that affords preferential treatment to class counsel are "not particularly subtle." 724 F.3d at 718.

Because the settlement here is pre-certification, the lower court should have applied an even higher degree of careful scrutiny. *Payment Card*, 827 F.3d 223, 235-36; *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (citing cases). Approval of a pre-certification settlement will occasion appellate review of "the entire settlement, paying special attention to the terms of the agreement containing convincing indications that the incentives favoring pursuit of self-interest rather than the class's interest in fact influenced the outcome of negotiations." *Dennis v. Kellogg Co.*, 697 F.3d 858, 867 (9th Cir. 2012) (internal quotation omitted).

While satisfaction of the nine *Grinnell* factors is necessary for approval under Rule 23(e), it is not sufficient. Like the multi-factor tests of other circuits, the *Grinnell* factor test is not exhaustive. *Grinnell*'s test simply does not provide an exclusive list of reasons to reject a settlement. *See, e.g.*, *Payment Card*, 827 F.3d 223 (reviewing settlement and remanding to cure intra-class conflict); *Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006) (reversing approval due to a provision that was unfair to a non-settling defendant); *Plummer*, 668 F.2d at 660 (affirming rejection of settlement due to "preferential treatment" afforded the named plaintiffs). The settlement here must be rejected because it unfairly provides class counsel preferential treatment at the expense of class members.

A. Rule 23(e) does not permit a disproportionately excessive fee award.

The most common settlement defects are ones of allocation of the settlement relief between the class members and the class attorneys. Again, this is because the adversarial process cannot safeguard the rights of those absent from the table. Allocational issues cannot be waived away simply by structuring the settlement to provide "separate" attorneys' fees, rather than as a traditional common fund. *See, e.g., Pampers*, 724 F.3d at 717-18; *Bluetooth*, 654 F.3d at 943; *Gallego*, 814 F.3d 123. "That the defendant in form agrees to pay the fees independently of any monetary award or injunctive relief does not detract from the need carefully to scrutinize the fee award." *Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003).

Effective December 1, 2018, Rule 23 now explicitly requires courts to consider defects of allocation as part of their fairness review. Courts must consider, *inter alia*,

"whether the relief provided for the class is adequate, taking into account the terms of any proposed award of attorney's fees." Rule 23(e)(2)(C)(iii). This amendment was intended "to focus the court…on the core concerns" that can get lost amidst the "sheer number of factors" in, for example, the *Grinnell* multi-factor test. Advisory Committee Notes on 2018 Amendments to Rule 23.

But consideration of the attorneys' fee terms of a settlement has decades-old roots. This Circuit has long directed reviewing courts to root out "those situations short of actual abuse, in which the client's interests are somewhat encroached by the attorney's interests." *In re Agent Orange Prods. Liab. Litig*, 818 F.2d 216, 224 (2d Cir. 1987); *cf. also Grinnell*, 495 F.2d at 469 (cautioning courts not to allow class actions to become "fruit tree[s] planted in a lawyer's garden" or "a golden harvest of fees") (internal quotations omitted); *Alpine Pharmacy v. Chas. Pfizer & Co.*, 481 F.2d 1045, 1050 (2d Cir. 1973) (stressing the need to "protect[] the class action device against public apprehensions that it encourages strike suits and excessive attorneys' fees.")

It is unfair for the class to receive a useless perfunctory injunction but class counsel to be "amply rewarded." *Bluetooth*, 654 F.3d at 947; *accord GM Trucks*, 55 F.3d at 803 ("[N]on-cash relief…is recognized as a prime indicator of suspect settlements."); *Subway*, 869 F.3d at 551 (a settlement may not be approved where its "principal effect is to induce the defendant to pay the class's lawyers enough to make them go away").

A proportionate attorney award is roughly 25% of the settlement value. *E.g. Bluetooth*, 654 F.3d at 943. Conversely, an award that vastly exceeds this ratio is disproportionate and renders the settlement unfair. *See, e.g., Pampers*, 724 F.3d 713 (vacating settlement where fees cannibalized $2.7 million of the $3.1 million

constructive common fund value); *Bluetooth*, 654 F.3d at 945 (vacating approval where fees amounted to more than 83% of the constructive common fund); *Pearson*, 772 F.3d at 781 (69% fee is "outlandish"); *In re Excess Value Ins. Coverage Litig.*, 598 F. Supp. 2d 380, 390 (S.D.N.Y. 2005) (it's "anomalous and unacceptable for counsel to fare better than the Class."). Here, to reach the appropriate ratio, the class benefit would have to be valued at nearly $1.5 million. And the burden of proving that quantum of benefit resided with the proponents of the settlement. *Pampers*, 724 F.3d at 719; *Koby*, 846 F.3d at 1079.

Yet, the settling parties made little effort to demonstrate that the settlement relief had any value to the class. Any such demonstration would need to show the value to the class, not merely the value to the general public. "The fairness of the settlement must be evaluated primarily based on how it *compensates class members*—not on whether it provides relief to other people, much less on whether it interferes with the defendant's marketing plans." *Pampers*, 724 F.3d at 720 (internal quotation omitted; emphasis in original). "Future purchasers are not members of the class, defined as it is as consumers who have purchased [the product]." *Pearson*, 772 F.3d at 786.

The magistrate judge let the settling parties off the hook, rationalizing that "[t]he inherent difficult in monetary valuation of the injunctive relief can largely be avoided…because the fee award contemplated under the settlement only represents class counsel's lodestar rather than a multiplier of it." A256, A250 (cross-referencing A256). By allowing class counsel's lodestar to short-circuit any inquiry into the value of the settlement relief vis-à-vis the negotiated fees, the lower court erred. Several cases

demonstrate that limiting a fee award to lodestar, or less than lodestar, cannot justify a failure to weigh the class recovery against the fee.

First, take *Bluetooth*. That case involved a settlement that provided injunctive relief only to the class and sub-lodestar attorneys' fees to class counsel. Even after the district court's scrutiny of class counsel's billing records showed that counsel's lodestar "substantially exceed[ed]" the negotiated fee, the court had not done enough to "assure itself—and [the Ninth Circuit]—that the amount awarded was not unreasonably excessive in light of the results achieved." 654 F.3d at 943. The district court still needed to compare the fee award with both the value of the benefit to the class and a "reasonable percentage award." *Id.*

Also take *Pampers* and *Subway*. In *Pampers*, the district court's unchallenged conclusion that a $2.73 million fee was "less than what the lodestar calculation would reflect, and [would] properly compensate[] class counsel for extraordinary work" could not justify a settlement where the fee was not "commensurate" with class relief. *Compare* Transcript of Fairness Hearing, No. 10-cv-301 (S.D. Ohio.), Dkt. 76, at 35, *with Pampers*, 724 F.3d at 720-21. Similarly, in *Subway*, the defendant agreed to provide $520,000 in attorneys' fees—which was well below plaintiffs' $1.125 million lodestar. *See In re Subway Footlong Sandwich Mktg. and Sales Practices Litig.*, 316 F.R.D. 240, 253 (E.D. Wis. 2016).

Fundamentally, "hours can't be given controlling weight in determining what share of the class settlement pot should go to class counsel"; "the reasonableness of a fee cannot be assessed in isolation from what it buys." *Redman*, 768 F.3d at 633, 635. It is wrong for class counsel to ask the class to settle, yet "appl[y] for fees as if it had won the case outright." *Sobel v. Hertz Corp.*, 2011 WL 2559565, at *14 (D. Nev. Jun. 27, 2011).

If a fee award were justified because it is no more than lodestar, no matter how little the class received, it would be reasonable for class counsel to negotiate a settlement where the class receives a single peppercorn—much like the minimum fill line and vacuous disclaimer here—as consideration for the class's release. Such a rule creates a counterproductive incentive to bring low-merit cases. The risk of litigation will make it easy to justify a settlement that does not pay the class much while class counsel gets millions of dollars. Recognizing this reality, numerous courts, "aim to tether the value of an attorneys' fees award to the value of class recovery." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1179 (9th Cir. 2013); *see e.g. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 121 (2d Cir. 2005) (commending the percentage-of-recovery fee approach because it "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation"). As such, a sub-lodestar fee award cannot make a lopsided settlement fair. *HP Inkjet*, 716 F.3d at 1177 (lodestar multiplier of 0.32 does not justify disproportionate results); *Baby Prods.,* 708 F.3d at 180 n.14 (lodestar multiplier of 0.37 not "outcome determinative").

As discussed in section III, *supra*, any economically realistic review of the settlement would reveal that class counsel and the class representatives have arrogated the entire actual value of the settlement for themselves, in violation of Rule 23(e)(2).

B. Clear sailing and fee segregation insulate counsel's fee.

In addition to a disproportionate fee award, the defendant's agreement not to oppose the fee request ("clear sailing") and the segregation of the fee from class relief such that any reduction in fees reverts to the defendant (a "kicker") are red flags

indicating that the class's interest has been subordinated to that of their putative attorneys. *See Bluetooth*, 654 F.3d at 947-48; *Redman*, 768 F.3d 622; *Pearson*, 772 F.3d 778. The class's representatives did not merely negotiate for themselves the right to request $450,000, they negotiated for themselves the twin security blankets of knowing that Barilla would not oppose their fee and that any reduction would revert to that same non-opposing party.

Clear sailing clauses 'decouple class counsel's financial incentives from those of the class, increasing the risk that the actual distribution will be misallocated between attorney's fees and the plaintiffs' recovery.'" *Vought v. Bank of Am.*, 901 F. Supp. 2d 1071, 1100 (C.D. Ill. 2012) (quoting *Int'l Precious Metals Corp. v. Waters*, 530 U.S. 1223, 1224 (2000) (O'Connor, J., respecting the denial of certiorari)). They indicate that the class attorneys have negotiated "red-carpet treatment" to protect their fee award while urging class settlement "at a low figure or less than optimal basis." *Pampers*, 724 F.3d at 718 (quoting *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991)). "It is unlikely that a defendant will gratuitously accede to the plaintiffs' request for a 'clear sailing' clause without obtaining something in return. That something will normally be at the expense of the plaintiff class." *Malchman v. Davis,* 761 F.2d 893, 908 (2d Cir. 1985) (Newman, J., concurring). As such, a clear-sailing clause must be considered 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*, 768 F.3d at 637; *accord Malchman*, 761 F.2d at 908 (suggesting that "perhaps they should be forbidden in all cases"); *see generally* William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 TUL. L. REV. 813, 816 (2003) (courts

should "adopt a per se rule that rejects all settlements that include clear sailing provisions.").

A segregated fee structure is an inferior settlement structure for one principal reason: the segregation of parts means that the Court cannot remedy any allocation issues by reducing fee awards and/or named representative payments. *See Pearson*, 772 F.3d at 786; *Bluetooth*, 654 F.3d at 949 ("clear sailing…reveals the defendant's willingness to pay, but the kicker deprives the class of that full potential benefit if class counsel negotiates too much for its fees.").

Although Schulman raised an objection to the combination of "clear sailing" and "kicker" below, the court did not appear to subject it to any scrutiny. To the degree it did consider the fee structure, the magistrate judge appeared to agree with plaintiffs' erroneous suggestion (Dkt. 61 at 32-33) that a segregated fee fund is actually a class benefit. A250 ("The timing of the payment of fees would appear to be less relevant, however, where, as here, the fees are being borne entirely by the defendant."). Again, this ignores the economic reality that "[t]he defendant's interest is in knowing his total exposure"[18]; "dollars paid by a defendant are fungible." *Cruz v. T.D. Bank, N.A.*, No. 10-cv-8026, 2017 U.S. Dist. LEXIS 120925 (S.D.N.Y. Jul. 31, 2017).

Additionally, fee segregation has the self-serving effect of protecting class counsel by deterring scrutiny of the fee request. *See Pearson*, 772 F.3d at 786 (calling it a "gimmick for defeating objectors"). Courts and potential objectors have less incentive to scrutinize a request because the kicker combined with the clear-sailing agreement

[18] *Malchman*, 761 F.2d at 907 (Newman, J., concurring).

means that any reversion benefits only the defendant that had already agreed to pay that initial amount. Charles Silver, *Due Process and the Lodestar Method: You Can't Get There From Here*, 74 TUL. L. REV. 1809, 1839 (2000) (such a fee arrangement is "a strategic effort to insulate a fee award from attack"); Lester Brickman, LAWYER BARONS 522-25 (2011) (arguing that reversionary kicker is *per se* unethical).

The settlement's "clear sailing" clause and reversion of unawarded fees to the defendant accentuate the unfairness of this lawyer-driven settlement.

Conclusion

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

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Respectfully submitted,

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