Nos. 15-3912, 16-1203, 16-1408

(Consolidated with Nos. 15-3909, 16-1245)

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

In re Target Corporation Customer Data Security Breach Litigation,

Leif A. Olson,
Objector-Appellant,

v.

Consumer Plaintiffs,
Plaintiff-Appellee,

Target Corporation,
Defendant-Appellee.

On Appeal from the United States District Court
for the District Of Minnesota –No. 0:14-md-02522-PAM
District Judge Paul A. Magnuson

Supplemental Brief of Leif A. Olson

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Table of Contents

Table of Authorities

Cases

Rules and Statutes

Summary of Argument

The district court's order on limited remand (SA1-21) suffers from numerous flaws. This brief addresses four that independently require reversal of class certification.[1]

First, the district court fundamentally misunderstands the Settlement structure. The district court found that there was no intraclass conflict because class members with only statutory or future damages receive a *pro rata* share of the remaining settlement funds. SA10-11. Under the Settlement, however, only class members that incurred costs or expenses before July 31, 2015, can submit a claim for compensation. A355. Class members with post-July 2015 losses or statutory damages receive nothing; there is no *pro rata* distribution of a settlement fund remainder. *Id.* The court's clearly erroneous understanding is a fatally false premise of its finding of 23(a)(4) adequacy.

Second, the district court erroneously concluded that because 13 of the 112 class members did not *plead* immediate out-of-pocket losses, they could adequately represent class members who might only have future or statutory damages. SA5. In fact, the only record evidence contradicts the court's assumption (based on class

[1] OB, RB, A, SA, and Dkt. refers to Olson's Opening Brief; Reply Brief; opening Appendix; Supplemental Appendix filed with this Supplemental Brief; and the docket entries in Case No. 0:14-md-02522-PAM (D. Minn.) below, respectively. Olson incorporates all arguments set forth in his response in opposition to class certification after remand (SA75-125), and renews his previous arguments in this appeal.

members' silence) because most of these representatives *did* incur out-of-pocket losses. SA70-71. The district court's conclusion is also legally deficient because independent legal counsel was necessary for the zero-recovery subgroups.

Third and more importantly, the presence of such class representatives is *necessary*, but not *sufficient*: it is still error as a matter of law to permit subgroups with unique statutory claims—not merely different potential damages—in a single class. *In re Literary Works*, 654 F.3d 242, 252 (2d Cir. 2011). While class members with the same legal claim (but different damages) may not have conflicting interests, subgroups with *distinct legal claims* (and different settlement values) are not adequately represented without the benefit of separate counsel to advocate for their recovery.

Fourth, similarly, the district court erred as a matter of law by not requiring separate representation for class members with future-damages claims—claims for damages incurred after the July 2015 claims deadline. The district court interpreted *Amchem* as concerning only adequacy of class notice, SA9, even though the Supreme Court expressly declined to consider that issue. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997). After *Amchem*, it is "obvious" that a class with "holders of present and future claims" requires separate subclassing and representation. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999). Without evidence, the district court questioned the strength of the future-damages claims and shifted the burden to Olson to prove the value of those future-damages claims, even though they were a central allegation in the complaint. SA10; A48-89. The district court's approach proves too much: the future-claims subgroup needed separate representation and

separate counsel at the negotiating table to advance their best arguments so they weren't left behind with zero recovery. And if indeed the future-damages claims had minimal settlement value, they should have been carved out of the Settlement rather than released for no consideration.

Argument

I. The district court clearly erred in finding that the Settlement provides compensation to the subgroups with only statutory-damages or future-damages claims.

Standard of Review: The Eighth Circuit reviews *de novo* "legal determinations made in the course of deciding whether or not to certify a class despite the overall abuse of discretion standard applicable to certification rulings." *In re Baycol Prods. Litig.*, 593 F.3d 716, 723 (8th Cir. 2010), *rev'd on other grounds sub nom.*, *Smith v. Bayer Corp.*, 564 U.S. 299 (2011). "The district court … abuses its discretion if its conclusions rest on clearly erroneous factual determinations." *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005).

The district court refers to class members with no immediate out-of-pocket losses as individuals with no "demonstrable," "quantifiable" or "monetary" injury. SA5. The district court's finding of no demonstrable or quantifiable injury contradicts its subsequent finding that all class members suffered the same injury. SA13. Conversely, the court suggested such class members would lack standing to proceed on their own, a finding that (if correct) would prohibit *any* class that includes those class members. *Compare* SA6 n.3, *with Avritt v. Reliastar Life Ins. Co.*, 615

F.3d 1023, 1034 (8th Cir. 2010) ("a class cannot be certified if it contains members who lack standing."). Olson agrees that all class members suffered the same injury, *i.e.*, compromise of their personal and financial information from the data breach. But class members have different legal *causes of action* that create conflicting interests. *See infra* Sections III and IV. The district court's repeated confusion of *injury* with *causes of action* mars its analysis. Olson will refer to these class members as individuals with no immediate out-of-pocket losses.

The district court repeatedly asserts that the Settlement provides *pro rata* recovery to class members like Olson who suffered no immediate out-of-pocket losses. SA10; SA11. This is untrue. Class members with no out-of-pocket losses receive not a "pro-rata share" of remaining settlement funds, but zero compensation. Under the Settlement, only class members who incurred costs or unreimbursed expenses before July 2015 can submit a claim and receive compensation. SA22. "Documented" claims receive reimbursement while "undocumented" claims receive a *pro rata* share of the settlement funds remaining after documented claims are paid. A246-A248. But class members who cannot submit a claim because they had no immediate out-of-pocket losses receive nothing.

The district court's error extends to its misapplication of *Dewey v. Volkswagen AG*, 681 F.3d 170 (3d Cir. 2012). SA17-18. *Dewey* involved a single settlement class where one subgroup received reimbursement and one subgroup received goodwill claims on the residual amount. *See* OB at 32-33. The district court reasoned that *Dewey* was inapplicable because here "the settlement draws no lines, much less

arbitrary lines." SA18. In reality, the result here was worse for the disfavored subclasses, who were excluded from *any* access to settlement funds, much less residual amounts.

The district court relied on this erroneous finding—that the zero-recovery subgroups receive a portion of the settlement remainder—in finding that there was no intraclass conflict. SA10-11. The district court based its conclusions on a fundamental misunderstanding of the Settlement structure; that error alone warrants reversal. But that is not the only error: Even if the district court's finding had been correct, its legal conclusion is erroneous and should be reversed. *See Dewey*, 681 F.3d at 189 (finding conflict where disfavored subgroup was restricted to "goodwill" claims from a residual fund).

II. The district court's finding that some named representatives were similarly situated to the subgroups was contradicted by record evidence and legally deficient because separate legal counsel was required.

Standard of Review: The requirements of Rule 23 require "heightened attention" in the settlement context. *Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1145 (8th Cir. 1999). The Court reviews *de novo* the "legal determinations made in the course of deciding whether or not to certify a class despite the overall abuse of discretion standard applicable to certification rulings." *Baycol Prods. Litig.*, 593 F.3d at 722. "The district court . . . abuses its discretion if its conclusions rest on clearly erroneous factual determinations." *Blades*, 400 F.3d at 566. Mixed questions of law

and fact are reviewed *de novo*. *Donaldson Co., Inc. v. Burroughs Diesel, Inc.*, 581 F.3d 726, 731 (8th Cir. 2009).

The district court's holding on adequacy of representation is based on a factual finding contradicted by the evidence and is legally deficient because separate legal counsel was required for the zero-recovery subgroups. A class action cannot be certified unless the court determines that the class representatives "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4); *see* OB30. It is the plaintiffs' burden to prove that 23(a)(4) adequacy is satisfied. *Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 477 (8th Cir. 2016). "[A]ctual, not presumed, conformance with Rule 23(a) remains indispensable." *In re Target Corp. Customer Data Sec. Breach Litig.*, 847 F.3d 608, 612 (8th Cir. 2017) (quotation omitted).

First, the district court clearly erred in finding that some of the named representatives were situated similarly to class members like Olson, who incurred no immediate out-of-pocket losses. SA5. When they first sought final approval in 2015, class counsel informed the district court that they were not going to "hold up recovery for clients who have suffered actual damages" for class members like Olson who did not have out-of-pocket losses. A402. On remand, class counsel reversed their position and argued that class members with no immediate out-of-pocket losses were *actually* represented (even though they were omitted from settlement negotiations) because some of the named representatives did not plead out-of-pocket losses in the Amended Complaint. SA33. They submitted no testimonial evidence from the representatives. The district court nevertheless agreed:

> The class representatives in this case include individuals who suffered no demonstrable or quantifiable injury. Indeed, there are numerous class representatives who, like Olson, allege only that their personal information was stolen in the data breach and do not allege any other element of damages. (See, e.g., 1st Am. Compl. (Docket No. 258) ¶¶ 35, 36, 45, 64, 65, 66; see also Esades Aff. (Docket No. 782) ¶ 6.).

SA5.[2] This finding contradicts the record.

The Amended Complaint does not describe out-of-pocket losses for 13 of the 112 named plaintiffs. A46-89. The district court jumped to the conclusion that because those 13 people did not specifically *plead* out-of-pocket losses, they must not have *incurred* out-of-pocket losses. *Id.* On remand, the claims administrator submitted a declaration showing that nine of those 13 named representatives submitted claims under the Settlement. *Compare* Am. Compl. ¶¶ 35, 36, 45, 64, 65, 66, 86, 98, 104, 109, 111 (A57-88) *with* Administrator Decl. Ex. 1 (SA70-71). Only class members who incurred immediate costs or unreimbursed expenses could submit a claim and receive compensation. SA22.

In *Snell v. Allianz Life Insurance Company of North America*, the Court found clear error where the magistrate's finding was made "[i]n the absence of supporting evidence, and in the face of explicit evidence to the contrary." 327 F.3d 665, 669 (8th Cir. 2003). Here, that the only record evidence, that the named representatives

[2] The district court cites six paragraphs in the Amended Complaint (¶¶ 35, 36, 45, 64, 65, 66), and to a declaration that refers to seven additional paragraphs (¶¶ 86, 98, 101, 103, 104, 109 and 111). SA5; SA65.

filed claims for out-of-pocket losses, contradicts the court's factual finding that they did not have out-of-pocket losses. The district court's factual finding was clear error.

Further, that four of those 13 class representatives did not submit a claim for compensation does not mean that they actually lacked out-of-pocket losses. In fact, 23 named representatives who pleaded that they incurred monetary losses—even significant losses—did not submit a claim. *Compare* Am. Complaint, A40-A74, ¶ 11 (alleging more than $1,200 in unauthorized charges); ¶ 76 (alleging $1,800 unauthorized charge) *with* SA70-71. There are myriad reasons why they may have done so. They may have been apathetic because all class representatives receive at least $500 whether they filed a claim or not. Perhaps class counsel forgot to instruct them to file a claim. Whatever the reason, if the class representatives could not adequately protect their own interests, they were inadequate to protect the rights of other class members. *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 482-483 (5th Cir. 2001). But adequate or not, there is no evidence they were representative at all; the evidence shows a person's failure to submit a claim is not sufficient to show that the person had only statutory or future-damages claims.

Second, and more important, even if there were named representatives that were similarly situated to the unrepresented subgroups because they did not have immediate out-of-pocket losses, this would not cure the intraclass conflicts because separate legal counsel was required. The Supreme Court "recognizes that the adequacy of representation enquiry is also concerned with the 'competency and conflicts of class counsel.'" *Ortiz*, 527 U.S. at 856 n.31 (cleaned up). Resolving

intraclass conflict "requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel." *Id.* at 856 (cleaned up).

Olson argued on remand that separate legal counsel must protect the competing interests of the subgroups (SA104-06), but the district court's order did not address this argument. At the hearing on limited remand, Olson argued that without separate legal counsel during settlement negotiations, the subgroups had no voice to represent their interests and were left with no recovery. SA128-29. The district court dismissed the idea that separate legal counsel was needed because the named representatives were expected to understand the law and their claims: "The reality is you have class representatives in this class from California. They are presumed to know and understand the law and so forth of California." SA129. Not so. The zero-recovery subgroups had no one to present their "most compelling case" and advance[] the strongest arguments" to maximize their recovery. *Literary Works*, 654 F.3d at 253. Even if there were named representatives that had no immediate out-of-pocket losses, the subgroups would not be adequately represented without independent legal counsel.

III. The district court found no conflict based on varying potential damages but failed to consider intraclass conflicts based on separate statutory causes of action.

Standard of Review: *See* Section II Standard of Review above.

The district court wrongly discounted the intraclass conflicts between subgroups as a simple difference in damage amounts. SA14-15. The district court recounted statutory damages available to class members from California ($500 or $1,000), Rhode Island ($200), and the District of Columbia ($1,500), but found no intraclass conflict because "Class actions nearly always involve class members with non-identical damages." SA 14. This conflation of *damages* and *claims* misunderstands the argument. Class members with different *damages* may be certified as a single class (e.g., a consumer fraud settlement where one class member submits a claim for purchasing three boxes of product and another for one box). Instead, Olson contends that Rule 23(a)(4) requires class members with different legal *claims* to be subclassed with separate representation so that one subclass's claims are not favored at the expense of another's. This is why the district court's reliance on *Petrovic* v. *AMOCO Oil* is misplaced. SA14. *Petrovic* involved a single class where all class members had the same legal claim. 200 F.3d at 1145. This Court rejected the idea that subclassing was needed for different amounts of recovery for the same claim. *Id.* at 1146. Unlike this case, *Petrovic* did not face the issue of class members with entirely different legal claims waived for no marginal compensation.

The Second Circuit's *In re Literary Works* is directly on point and illustrates why subgroups with different statutory *claims* require separate representation. There,

class counsel negotiated compensation from Google for a single settlement class with three separate "categories" of class members; each category had a different statutory claim and each received a different damages formula. 654 F.3d at 246; *see* OB at 33-34. There was no dispute that each category had claims with different settlement values. *Id.* The Second Circuit found that 23(a)(4) was not satisfied because the class representatives "cannot have had an interest in maximizing compensation for *every* category." *Id.* at 252 (emphasis in original).

The district court here ignored the striking similarity with *Literary Works* (subgroups with different statutory claims) and again misunderstood Olson's argument to be simply about "inferior recovery." SA12. Even if the statutory-damages subgroups received $5, $10, or $50 under the Settlement, the intraclass conflict would still exist. (Indeed, the disfavored subgroup in *Literary Works* received *some* compensation. 654 F.3d at 246). Intraclass conflicts exist not just because of the outcome of negotiations (though that can illuminate the conflict), but because subgroups with different legal claims (and varying settlement values) lacked separate counsel to zealously advocate on behalf of their recovery:

> We know that Category C claims are worth less than the registered claims, but not by how much. Nor can we know this, in the absence of independent representation. **The Supreme Court counseled in *Ortiz* that subclasses may be necessary when categories of claims have different settlement values**. The rationale is simple: how can the value of any subgroup of claims be properly assessed without independent counsel pressing its most compelling case?

Id. at 253 (emphasis added); *see Ortiz*, 527 U.S. at 858. Without separate representation, the statutory-damages subgroups had no one at the negotiating table to make their most compelling arguments. For example, California class members with no immediate out-of-pocket losses had potential statutory-damages claims of $500 to $1,000 but receive zero compensation under the Settlement. The fact that this subgroup receives nothing is the result of the subgroup having no advocate.

The district court turns *Literary Works*'s reasoning on its head, concluding that separate representation is only necessary "for a court (or plaintiffs) to assess the value of the different claims." SA12. The district court asserts that "the value of all Plaintiffs' claims is easily ascertainable and independent representation is not required for Plaintiffs to understand the damages they suffered," *id.*, ignoring that "the adequacy of representation cannot be determined solely by finding that the settlement … 'fairly' compensates the different types of claims at issue." *Literary Works*, 654 F.3d at 254; *accord Dewey*, 681 F.3d at 189 n.19; OB34. Whether or not named plaintiffs "understood" the face value of their claims, class members with only statutory-damages claims had no legal representation to make their most compelling case. They had no voice at the negotiation table to maximize recovery (or even obtain *any* compensation) in settling their claims.[3]

[3] With zealous advocacy, the freeze out here was not inevitable. In the data breach class action *Remijas v. The Neiman Marcus Group*, class members need not have immediate out-of-pocket losses to submit a claim. *See* Settlement, No. 14-cv-1735, Dkt. 145-2 (N.D. Ill. March 17, 2017).

Finally, the district court concluded that Olson's statutory-damages argument "ignores the substantial barriers to any individual class member actually recovering statutory damages." SA15. A barrier to recovery is simply one of many elements affecting settlement value. The district court found that class members "willingly gave up their uncertain potential recovery of statutory damages for the certain and complete recovery, whether monetary or equitable" which demonstrates "the cohesiveness of the class and an excellent result." *Id.* But the class members with only statutory-damages claims did not "willingly" give up those claims to benefit competing class members when their claims were settled without representation.

IV. The district court misconstrues Supreme Court precedent requiring separate representation for subgroups with present and future-damages claims and based its ruling on a major misstatement of the Settlement benefits.

Standard of Review: *See* Section II Standard of Review above.

The district court erred in finding that there was no intraclass conflict between the subgroup of class members with only future-damages claims and the subgroup with present out-of-pocket losses. SA4-6. Under the Settlement, all future damages (those incurred after the July 31, 2015, claims deadline) were released without compensation. A355. In *Ortiz*, the Supreme Court reversed the Fifth Circuit's approval of a similar settlement for failing to satisfy Rule 23(a)(4):

> [I]t is ***obvious*** after *Amchem* that a class divided between holders of present and future claims (some of the latter involving no physical injury and attributable to claimants not yet born)

> requires division into homogeneous subclasses under [what is now Rule 23(c)(5)], with separate representation to eliminate conflicting interests of counsel.

527 U.S. at 856 (emphasis added) (citing, *inter alia*, *Amchem*, 521 U.S. at 627); *see further discussion* OB at 30-31, RB at 4-5. As in *Ortiz* and *Amchem*, this case also involves an "obvious" conflict between class members with present claims who want to prioritize compensation for their present out-of-pocket losses over subgroup members with future-damages claims.

The dangers of depriving the future-damages subgroup of adequate representation were actually realized. Class members with manifest losses failed to vigorously prosecute the future claims. They instead froze out those class members from any recovery while simultaneously releasing all class members' claims. Indeed, the "conflicting interests of counsel" identified by the Supreme Court, *Amchem*, 521 U.S. at 627, became readily apparent in this case at the fairness hearing when class counsel confirmed that in structuring the settlement, they were "not going to hold up recovery for clients who have suffered actual damages" for those like Olson that had only future-damages claims. A402. The district court ignored counsel's admission, instead presenting misplaced attempts to distinguish *Amchem* and *Ortiz*.

First, the district court wrongly dismissed *Amchem* and *Ortiz* as relating to the adequacy of class notice. The district court found that the "overarching concern" in *Amchem* and *Ortiz* was "the prospect of foreclosing … claims" of the future-injury class, who "might not be or could not be aware of their membership in the class." SA9 (citing *Amchem*, 521 U.S. at 628). It contrasted this case, where "there are no

unascertainable members of the class, and no attendant due process concerns, because all class members received adequate notice and had the opportunity to protect their own interests by opting out of the class." SA10.[4]

The district court's stretch for a distinction falls short. The future-injury subclass in *Amchem* were not exclusively "unascertainable" class members; half of the *named plaintiffs* "alleged that they had not yet manifested any asbestos-related condition." 521 U.S. at 603. More important, the *Amchem* Court specifically declined to rule on what the district court called *Amchem*'s "overarching concern:" "Because we have concluded that the class in this case cannot satisfy the requirements of common issue predominance and adequacy of representation, we need not rule, definitively, on the notice given here." 521 U.S. at 628.

Second, the district court wrongly distinguished *Amchem* and *Ortiz* based on the fairness of the settlement relief to the subgroups. The district court concluded that adequacy was not satisfied in *Amchem* and *Ortiz* because "the settlement in those cases disadvantaged one group of plaintiffs to the benefit of another," but the future-damages subgroup has "all of the relief they could hope to reap from this litigation." SA10-11. Again, the district court's conclusion was based on the plainly erroneous factual finding that class members with no out-of-pocket losses "will also receive a

[4] A Rule 23(b)(3) opt-out right does not remedy a 23(a)(4) conflict. *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 809 (3d Cir. 1995). "The opt-out procedure is not a panacea." *Slade v. Progressive Sec. Ins. Co.*, 856 F.3d 408, 415 n.3 (5th Cir. 2017).

pro-rata share of any remaining settlement fund"; it's further legally erroneous under *Dewey v. Volkswagen*. SA11; *see* Section I.

More importantly, the district court's conclusion is based on misapplication of the law. Its comparison of the strength of the claims with the settlement result improperly replaced the adequacy-of-representation analysis (Rule 23(a)) with a Rule 23(e) fairness assessment. SA11-12. The Supreme Court specifically forbids this approach: "Federal courts … lack authority to substitute for Rule 23's certification criteria a standard never adopted—that if a settlement is 'fair,' then certification is proper." *Amchem*, 521 U.S. at 622; *Ortiz*, 527 U.S. at 858-59; *see also Literary Works*, 654 F.3d at 254. The district court reasoned that it had not conflated Rule 23(e) and 23(a)(4) because adequacy is evinced by "more than the settlement":

> It is evidenced by the relief sought in the Complaint, the fact that Plaintiffs insisted on receiving substantial **equitable relief** as part of their negotiations, and the fact that Plaintiffs sought to ensure that all class members were **fully compensated for whatever type of demonstrable injury they suffered**, whether in the form of impermissible charges on their payment cards, the time a class member had to spend to remedy fraudulent charges or other identity-theft-related issues, and payment for any credit monitoring or identity-theft protection a class member felt compelled to purchase because of the Target data breach.

SA12-13 (emphasis added). But most of the district court's "evidence" of adequacy *outside the settlement* is really just relief for some class members *under the settlement* (equitable relief and compensation for certain class members); the relief sought in

the complaint on behalf of future-damages class members was abandoned. The district court's finding ignores the Supreme Court and infers adequacy of representation based on the fairness of the settlement relief.

(Moreover, the district court's reliance on the injunctive relief was independent legal error. Olson explained that the Settlement's equitable relief is not consideration for release of class members' monetary claims because the injunctive relief is available to class members and non-class members alike. SA98-99; RB15-17. Class members "would be better off opting out, since they would receive the same benefits of the injunctive relief in the Settlement Agreement but would not be giving up their right to sue." *Allen v. Similasan Corp.*, 318 F.R.D. 423, 428 (S.D. Cal. 2016) (repudiating settlement). "Because the settlement gave the absent class members nothing of value, they could not fairly be required to give up anything in return." *Koby v. ARS Nat'l Servs.*, 846 F.3d 1071, 1080 (9th Cir. 2017). The district court failed to address this argument on remand.)

Third, the district court's dismissal of the need for separate subclasses because of the weakness of the future-damages claims was based on no evidence. SA10. It found that class members "have suffered any injury they are reasonably likely to suffer," *id.*, but nothing in the record supports this. *United States v. Houston*, 338 F.3d 876, 881 (8th Cir. 2003) (holding that a record that has no evidence to support a factual finding is clearly erroneous). The district court shifted the burden to Olson, finding that Olson had not provided evidence regarding the viability of those claims.

SA10 at n.6.[5] But characterizing those claims as weak only emphasizes the need for separate representation to protect the interests of that subgroup so that the future-damages claims are not treated as mere bargaining chips. *See Literary Works*, 654 F.3d 242 (finding inadequacy because named representatives had "natural inclination … to favor their more lucrative" claims).

If the potential for recovery on the future-damages claims is so minimal, then why release them rather than carve them out of the Settlement? A class action cannot be a superior method to resolve class members' claims when those claims are released for zero compensation. *Gallego v. Northland Group*, 814 F.3d 123, 129–30 (2d Cir. 2016). And class members who release their claims in exchange for no marginal benefit are not adequately represented. *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 725 (7th Cir. 2016). Zealous representatives would have counseled future-damages class members to opt-out and maintain those claims rather than releasing them for nothing.

Conclusion

This Court should vacate the class certification order; hold that the single settlement class cannot be certified; and remand for certification of separate subclasses with separate representatives and separate counsel.

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[5] Olson pointed out that future damages is a significant part of the named representatives' allegations and mentioned over 60 times in the Complaint. A48-89. The Complaint and Olson's submission on remand both detail the risk of future harm to class members. A105, 107; SA88-90.

Dated: August 15, 2017

Respectfully submitted,

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Dated: August 15, 2017

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