UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ALESSANDRO BERNI, et al., Plaintiffs, v. BARILLA G. e R. FRATELLI, S.p.A., et al., Defendants.	No. 16-cv-4196 (ST)
ADAM SCHULMAN, Objector.	

OBJECTION OF ADAM SCHULMAN TO PROPOSED SETTLEMENT

Adam E. Schulman
DC Bar No. 1001606
COMPETITIVE ENTERPRISE INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1310 L Street NW, 7th Floor
Washington, DC 20005
Phone: (610) 457-0856
Email: shuyande24@gmail.com

In pro per

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INTRODUCTION

Far more substantively empty than any of Barilla's pasta boxes, this settlement fails to produce any compensatory value for class members; yet it still earmarks $450,000 for class counsel and the named representatives. It requires Barilla to alter its labeling to add a minimum fill line and a mundane "tell me what I already know" disclaimer. Neither generates class value.

In structure and design, the proposed settlement is a close cousin of those repudiated by the Sixth Circuit in *In re Dry Max Pampers Litigation* ("*Pampers*"), 724 F.3d 713 (6th Cir. 2013), by the Seventh Circuit in *In re Subway Footlong Sandwich Mkt'g and Sales Practices Litigation* ("*Subway*"), 869 F.3d 551 (7th Cir. 2017) and by this Court earlier this year in *Ma v. Harmless Harvest, Inc.*, No. 16-cv-07102 (JMA) (SIL), 2018 WL 1702740 (E.D.N.Y. Mar. 31, 2018). As in those cases, this settlement's provisions sustain class counsel, the named representatives, and the defendant, but disserve class members through valueless labeling changes. "A class settlement that results in fees for class counsel but yields no meaningful relief for the class is no better than a racket." *Subway*, 869 F.3d at 553 (quoting *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 724 (7th Cir. 2016)). That statement is equally true here and yet the situation is worse because at least the *Pampers* and *Subway* settlements did not burden class members with a broad global release of monetary claims as this one does.

The central problem with the settlement itself is one of allocation. Schulman would not object to Barilla resolving its total liability for just under half a million dollars, but class counsel cannot capture that entire economic benefit themselves with the class receiving nothing. *E.g. Pampers*; *Subway*; *In re Bluetooth Headset Prods. Liab. Litig.* ("*Bluetooth*"), 654 F.3d 935 (9th Cir. 2011).

Class counsel owes a fiduciary duty to their client—but the client is not a free-floating abstract entity akin to the general public; rather it is the class of discrete individuals who meet the class definition by having purchased Barilla products over the last eight years. Rule 23 affords these individuals numerous protections, several of which are flagrantly violated by this settlement. *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 617, 620, 623 (1997). This settlement flouts subsection (b)(2) because injunctive relief does not befit a class of past purchasers, nor will (b)(2) support a waiver of

monetary claims. It flouts (a)(4), (e)(2), and (g)(4) by waiving class members' claims while allocating the entirety of the settlement proceeds to class counsel and the named representatives. *See, e.g., Gallego v. Northland Group*, 814 F.3d 123, 129 (2d Cir. 2016); *Subway; Pampers*.

I. Objector Adam Schulman is a member of the class, and intends to appear *in propria persona* at the fairness hearing.

Adam Ezra Schulman is a member of the putative class; during the class period he purchased, at retail and for personal consumer use, multiple Barilla Products, as defined in the settlement agreement, from a Safeway supermarket in Rose Hill, Virginia. *See* Declaration of Adam Schulman ¶ 4 & Ex. A. Schulman, an attorney with the Competitive Enterprise Institute's Center for Class Action Fairness ("CCAF") is resident of Virginia. Schulman Decl. ¶¶ 2-3. His business address is 1310 L Street NW, 7th Floor, Washington, DC, 20005 and his phone number is (610) 457-0856. Schulman Decl. ¶ 3. Schulman qualifies as a class member, with standing to object to the settlement and fee request. Schulman Decl. ¶¶ 4-6; Class Action Settlement Agreement ("Settlement") (Docket Entry "DE" 55-1) ¶ 6.1. His signature can be found at the end of this objection. As described in his Notice of Intent to Appear, Schulman intends to appear on his own behalf at the fairness hearing. He joins any objections not inconsistent with the objections he makes below.

The settlement's demand that objectors list all objections they have submitted to any court in the last five years is irrelevant to the matter at hand, and thus constitutes an unreasonable burden on the Rule 23(e) right of objection. *See Trabakoolas v. Watts Water Tech., Inc.*, 2014 WL 12814348, at *2 (N.D. Cal. Feb. 14, 2014) (excising from class notice a similar requirement). Though maintaining his objection to this requirement, Schulman has compiled this list. Schulman Decl. ¶¶ 22-24.

CCAF represents class members *pro bono i*n class actions where class counsel employs unfair procedures to benefit themselves at the expense of the class. *See* Schulman Decl. ¶¶ 12-17. Since it was founded in 2009,[1] CCAF has "recouped more than $100 million for class members" by driving

[1] In 2015, CCAF merged with the Competitive Enterprise Institute and became a division within CEI's law and litigation program.

the settling parties to reach an improved bargain or by reducing outsized fee awards. Andrea Estes, *Critics hit law firms' bills after class-action lawsuits,* BOSTON GLOBE (Dec. 17, 2016); *see, e.g., In re Citigroup Inc. Secs. Litig.*, 965 F. Supp. 2d 369 (S.D.N.Y. 2013) (reducing fees by $26 million after CCAF objection). Unlike bad faith objectors, CCAF refuses to engage in *quid pro quo* settlements, does not extort attorneys, and has never withdrawn an objection in exchange for payment. It is funded entirely through charitable donations and court-awarded attorneys' fees.

Nonetheless, to preempt any possibility of a false and unjustifiable accusation of objecting in bad faith and seeking to extort class counsel, Schulman would gladly stipulate to an injunction prohibiting himself from accepting compensation in exchange for the settlement of this objection. Schulman Decl. ¶ 18 (citing Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623 (2009) (suggesting inalienability of objections as solution to objector blackmail problem)). Schulman brings this objection through CCAF to protect the interests of the class.

II. The Court has a fiduciary duty to absent members of the class.

"Class-action settlements are different from other settlements. The parties to an ordinary settlement bargain away only their own rights—which is why ordinary settlements do not require court approval." *Pampers*, 724 F.3d at 715. Unlike ordinary settlements, "class-action settlements affect not only the interests of the parties and counsel who negotiate them, but also the interests of unnamed class members who by definition are not present during the negotiations. *Id.* "[T]hus, there is always the danger that the parties and counsel will bargain away the interests of unnamed class members in order to maximize their own." *Id.* 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). The representatives assume a fiduciary obligation to the class, and the Court, through its oversight responsibility, itself assumes a derivative fiduciary obligation to the class. *Plummer v. Chemical Bank*, 668 F.2d 654, 658 (2d Cir. 1982).

The Court's oversight role does not end at making sure that the settling parties engaged in arm's length settlement negotiations. "In class-action settlements, the adversarial process—or what the parties here refer to as their 'hard-fought' negotiations—extends only to the amount the defendant will pay, not the manner in which that amount is allocated between the class representatives, class counsel, and unnamed class members. For the economic reality [is] that a settling defendant is concerned only with its total liability, and thus a settlement's allocation between the class payment and the attorneys' fees is of little or no interest to the defense." *Pampers*, 724 F.3d at 717-18. Thus, although it is *necessary* that a settlement is at "arm's length" without express collusion between the settling parties, it is not *sufficient*. *See Redman v. RadioShack Corp.*, 768 F.3d 622, 628 (7th Cir. 2014). Due to the defendant's indifference as to the allocation of the settlement funds, courts must look for "subtle signs that class counsel have allowed pursuit of their own self-interest and that of certain class members to infect the negotiations." *Pampers*, 724 F.3d at 718 (internal quotation omitted).

III. The settlement-only class certification does not satisfy the requirements of Rule 23(a)(4), 23(b)(2) or 23(g)(4).

The judicial duty to vouchsafe the rights of the absent plaintiffs extends to the decision to grant class certification, obliging district courts to conduct a "rigorous analysis" to ensure compliance with the Rule 23 certification prerequisites. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011); *accord Ma*, 2018 WL 1702740, at *9 n.8. Aside from trial manageability concerns, that burden is no lighter when the Court is confronted with a settlement-only class certification. In fact, the specifications of Rule 23(a) and (b) are "designed to protect absentees by blocking unwarranted or overbroad class definition" and "demand undiluted, even heightened, attention in the settlement context." *Amchem*, 521 U.S. at 620; *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.* ("*Payment Card*"), 827 F.3d 223, 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"). Put another way, "it is not the mission of Rule 23(e) to assure the class cohesion that legitimizes representative action in the first place." *Amchem*, 521 U.S. at 623. The same "rigorous analysis" applies.

In re Target Corp. Customer Data Sec. Breach Litig., 847 F.3d 608, 612 (8th Cir. 2017). The proponents of certification bear the burden to demonstrate compliance with the subsections of Rule 23. *Johnson v. Nextel Comms. Inc.*, 780 F.3d 128, 137 (2d Cir. 2015).

Plaintiffs fail to satisfy the requirements of subsections 23(a)(4), 23(b)(2), and 23(g)(4). Certification of the settlement class thus should be denied.

A. The settlement demonstrates inadequate representation of absent class members in violation of Rule 23(a)(4) and 23(g)(4).

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 prospective injunctive relief-only settlement 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; *Gallego*, 814 F.3d at 129-30; *Ma*, 2018 WL 1702740, at *8; *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, decided last year, is directly on point. 869 F.3d 551. Plaintiffs there alleged that the sandwich mega-chain had perpetrated a massive 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 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 as contrary to 23(a)(4). *Id.*

Subway announces the 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 their 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 when 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 feebleness 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.

Following *Pampers* and *Subway*, this Court confronted a similar settlement earlier this year in *Ma v. Harmless Harvest.* 2018 WL 1702740. Class counsel and the representatives negotiated $575,000

for themselves, leaving absent class members solely with an injunction preventing the defendant from advertising its coconut water as "100% organic" or "100% raw." *Id.* at *2. Notwithstanding class counsel's "qualifications and experience in litigating class actions," Judge Azrack suggested the class had been inadequately represented. *Id.* at *8. When the class's fiduciaries "are receiving the totality of the economic benefit with the class essentially receiving meaningless injunctive relief in exchange for a broad release of past and future claims," it indicates inadequate representation. *Id.*

When the settlement here is reduced to its only concrete component—the $450,000 allocated to the attorneys' fee, incentive awards and administrative costs—it is clear that the class counsel have prosecuted the suit "just in their interests as lawyers"[2] 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); *see also Ma*, No. 16-cv-7102, DE 36 (E.D.N.Y. Aug. 7, 2018) (entering order of stipulated dismissal after rejection of settlement and class certification).

In fact, the path of these proceedings confirms the impression that this settlement revolves around the $450,000 fee rather than any "vigorous[] prosecut[ion] [of] the interests of the class." *Pampers*, 724 F.3d at 721. Plaintiffs filed a complaint and then an amended complaint seeking, *inter alia*, an order declaring defendants' conduct violates the statutes referenced, compensatory and punitive damages, an order of restitution, injunctive relief ordering defendant to repackage the pastas without non-functional slack-fill, and reasonable attorneys' fees. *See* Amended Complaint, DE 26 at 18-19. But before any substantive motion had been decided, plaintiffs negotiated a settlement granting defendants a full release of claims in exchange for ***none*** of this relief except attorneys' fees.

This presents two indicia of inadequacy. First, "when a plaintiff begins a lawsuit with the desire to negotiate settlement rather than the desire to be 'made whole,' and does not even press his

[2] *Creative Montessori*, 662 F.3d at 917.

attorney to conduct discovery to determine the likelihood of victory on the merits or to give some context to the terms of the settlement offer, the Court [should be] concerned that such a plaintiff will not vigorously prosecute the interests of a class." *Day v. Whirlpool Corp.*, 2014 WL 12461378, at *5 (W.D. Ark. Dec. 3, 2014); *see also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*("*GM Trucks*"), 55 F.3d 768, 801 (3d Cir. 1995) (doubting adequacy of representation given "the lack of significant discovery and an extremely expedited settlement of questionable value accompanied by an enormous legal fee"). Second, "[a] representative can't throw away what could be a major component of the class's recovery." *Back Doctors Ltd. v. Metropolitan Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011); *see also In re Cmty. Bank of N. Va.*, 418 F.3d 277, 307-08 (3d Cir. 2005) ("question[ing] whether the absent class members' interests were sufficiently pursued by class counsel" where claims that were not pursued by class counsel were released in settlement and noting that such "may suggest that class counsel subrogated their duty to the class in favor of the enormous class-action fee offered by defendant"); *Grok Lines Inc. v. Paschall Truck Lines, Inc.*, 2015 WL 5544504, at *7 (N.D. Ill. Sept. 18, 2015) (rejecting as unacceptable a settlement where class counsel simply "abandoned pursuit of a monetary recovery for the class" in favor of an injunctive relief only settlement and attorneys' fees). "A class representative is not an adequate representative when the class representative abandons particular remedies to the detriment of the class." *Drimmer v. WD-40 Co.*, 2007 WL 2456003, at *3 (S.D. Cal. Aug. 24, 2007) (internal quotation marks omitted). Here, plaintiffs did not simply abandon particular remedies, they abandoned nearly every remedy sought in the adversarial context of the initial and amended complaints—aside from attorneys' fees. Perhaps plaintiffs will argue that the settlement sprung from their genuine preference for injunctive relief rather than any selfish desire to capture the settlement proceeds. Regardless of whether this is true, a putative class representative "who values non-monetary vindication over individual recovery" cannot satisfy the requirements of 23(a)(4). *Franco v. Allied Interstate LLC*, 2018 WL 3410009, at *5 (S.D.N.Y. Jul. 13, 2018).

Whether it is class counsel or the named representatives steering the decision-making (it is likely class counsel[3]), both have now signed off upon a settlement that divides the entirety of the $450,000 settlement proceeds between themselves, generating no demonstrable benefit for absent class members. In *Gallego*, the Second Circuit addressed a proposed settlement that 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). The Second Circuit affirmed this rationale *and* independently remarked 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 proposal 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.

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. Plaintiffs fail to demonstrate that the class representation satisfies either (a)(4) or (g)(4).

B. 23(b)(2) class certification is not warranted.

Rule 23(b)(2) allows a class action to be maintained if, *inter alia*, "final injunctive relief or corresponding declaratory relief is appropriate respecting the class *as a whole*." *Wal-Mart*, 564 U.S. at 365 (quoting Rule 23(b)(2) and adding emphasis). Several consequences follow from this textual prescription.

[3] "Even a conflict-free representative is unlikely to be much of a watchdog." *Wexler v. AT&T Corp.*, 323 F.R.D. 128, 131 (E.D.N.Y. 2018) (citing authorities).

First, 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," (b)(2) certification is improper. *Hecht v. United Collection Bureau*, 691 F.3d 218, 223-24 (2d Cir. 2012); *accord Wal-Mart*, 564 U.S. at 365 (declaring it erroneous to certify a (b)(2) class for prospective relief when "about half of the class" was no longer employed by defendant). Similarly, (b)(2) classes are not suitable—in fact they are "necessarily improper"—for class claims alleging economic harm, at least when such claims accrue on an individual basis. *Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 892 (7th Cir. 2011); *see also Wal-Mart*, 564 U.S. at 360-61 ((b)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages"). Lastly, "cohesiveness is a significant touchstone of a (b)(2) class." *Blackman v. District of Columbia*, 633 F.3d 1088, 1094 (D.C. Cir. 2011) (Brown, J., concurring); *accord Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639 (6th Cir. 2006) ("homogeneity of interests" required for mandatory class treatment).

The putative class here cannot satisfy any of these standards. Defined as past purchasers of products; inevitably there are many putative class members who will never purchase the products again. The putative class asserts individual consumer fraud claims for which damages are an adequate remedy, and lacks a homogenous interest in prospective injunctive relief. The Court should not be satisfied that "a reasonable plaintiff, based on…economic calculus, would have sued solely for [injunctive relief], not merely that a lawyer could have been found who would have located a plaintiff and brought a class action in the hope of a fee." *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1122 (8th Cir. 2005) (quoting *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 73 (S.D.N.Y. 2002)).

1. 23(b)(2) certification does not befit the putative class members.

Cohesive classes coalesce behind a common interest that makes appropriate the granting of final injunctive or corresponding declaratory relief. Consumers who "*purchased*" a Barilla product sometime the last eight years have no such common interest in injunctive relief. Settlement ¶ 6.1.

(emphasis added). There is a discontinuity between the class definition—former buyers—and the prospective injunctive relief obtained in the settlement. Settlement ¶ 2.1. All settlement relief could benefit only future purchasers of Barilla products, but the class comprises past purchasers.

Hecht demonstrates how attempting (b)(2) certification is futile: 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," (b)(2) certification is improper. 691 F.3d at 223-24. *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 and who no longer have an ongoing relationship into 23(b)(2) classes that offer prospective injunctive relief. *See e.g., Wal-Mart*, 564 U.S. at 365; *Brown v. Kelly*, 609 F.3d 467, 482 (2d Cir. 2010); *Charrons v. Pinnacle Group N.Y. LLC*, 269 F.R.D. 221, 229 (S.D.N.Y. 2010). Post-*Wal-Mart*, courts frequently deny (b)(2) certification as inconsistent with retrospectively-defined classes. *See e.g.*, *Felix v. Northstar Location Servs.*, 290 F.R.D. 397, 406 (W.D.N.Y. 2013) (denying class certification of those who had "*received*" telephonic messages in the past) (emphasis in original)). 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).

Certainly, a 23(b)(2) class might be appropriate when the class comprises individuals who maintain 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 eight years, the requisite homogeneous interests necessary to cohere a class around injunctive relief are 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*, 633 F.3d at 1094. It is not logically 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. (Indeed, it does not benefit *any* class members. *See* section III.A.) *See* Schulman Decl. ¶¶8-9.

2. Rule 23(b)(2) certification does not befit the putative class's claims.

In determining whether (b)(2) certification is appropriate, analyzing the complaint is customary procedure in courts across the nation. *E.g., Reeb*, 435 F.3d at 642. Even where the court is dealing with a settlement-only class certification, looking to an adversarial complaint is still advisable. *See Hecht*, 691 F.3d at 223 ("The … complaint requested 'the maximum statutory damages' under the FDCPA but failed even to mention injunctive relief."); *Crawford v. Equifax Payment Servs.*, 201 F.3d 877 881 (7th Cir. 2000) ("Crawford's pleadings sought certification under Rule 23(b)(3), and the switch to Rule 23(b)(2) was a last-minute change.").

Here too, as in *Crawford*, the proposed settlement pulls a last minute switch to seek solely injunctive relief and a (b)(2) certification. Disingenuous attempts to turn monetary claims into injunctive ones do not suffice to satisfy (b)(2). *E.g., Kartman*, 634 F.3d at 889; *Segal v. Bitar*, 2015 WL 3644479, at *15 (S.D.N.Y. May, 26, 2015).

Kartman itself disposes of this proposed (b)(2) certification. As in *Kartman*, the plaintiffs here "have only one cognizable injury—underpayment [of pasta product]—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 injunction requires a showing that: (1) the plaintiffs have suffered irreparable harm; (2) monetary damages are inadequate to remedy the injury…" *Id.* at 892. *Segal*, 2015 WL 3644479, at *14-*15 (denying (b)(2) settlement certification when money damages were an adequate remedy at law). Putting together the pieces, we can see why (b)(2) classes are far more suited to remedying civil rights violations than consumer fraud cases.

That monetary damages are an adequate remedy for consumer protection claims is underscored by the fact that, while the 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).[4] A (b)(2) certification cannot lie where the underlying law allows only for a damages remedy. *Crawford*, 201 F.3d at 882; *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 977 n.39 (5th Cir. 2000) ("Of course, the unavailability of injunctive relief under a statute would automatically make (b)(2) certification an abuse of discretion.").

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).

3. Rule 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 terms that afforded class

[4] Again, this state-by-state issue illuminates the lack of intra-class cohesiveness necessary for a (b)(2) certification.

members no monetary damages, only prospective relief and a *cy pres* payment to third parties); *contra In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 986 F. Supp. 2d 207, 239 (E.D.N.Y. Dec. 13, 2013), *rev'd* 827 F.3d 223 (2d Cir. 2016). A thorough analysis also entails examining the preclusive effects that the settling parties intend to foist upon absent class members. *E.g.,* Samuel Isaacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1068-73 (2002). "[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).

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

4. 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. 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." *United States v. City of New York*, 276 F.R.D. 22, 27 (E.D.N.Y. 2011); *see Wal-Mart*, 564 U.S. at 362 (cataloging "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." *GM Trucks*, 55 F.3d at 809. 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 indispensible 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 (1997). "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 allowing the class." *Wal-Mart*, 564 U.S. at 362-63.

This is not merely an academic exercise. There are serious doubts here about whether (b)(3) superiority is 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*, aff'd* 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. The Second Circuit 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 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).[5]

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."). And so, 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.

IV. Even if the class is certifiable, this settlement is not fair.

As discussed immediately above, this Court should reject the requested class certification. 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 offers only injunctive relief will be *per se* inadequate. Similarly, when the terms of settlement manifest inadequate representation of absent class members, it follows that the settlement is often 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 monetary relief for class members signals an unfair, lawyer-driven settlement. The settlement agreement permits class counsel to seek, unopposed, an award of fees, expenses, class representative awards, and class notice

[5] Although Schulman recognizes that the complaint alleges only New York consumer protection claims (it also alleges 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*, 780 F.3d 128, 140-48. The fact that all putative class representatives are citizens of New York (see DE 26 at 4-5) 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.

costs totaling up to $450,000. Settlement ¶7.1. If any amount less than the full fee is awarded, it for "no apparent reason" is structured to revert to the defendant. *Blueooth*, 654 F.3d at 949. Putative class members are entitled only to cosmetic injunctive relief measures that offer no genuine improvement over the status quo. Settlement ¶2.1. 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.

The burden of proving settlement fairness rests with the moving party. *Pampers*, 724 F.3d at 718 (compiling cases and authorities); *Ma*, 2018 WL 1702740, at *4. And because the settlement here is pre-certification, an even higher degree of careful scrutiny is required. *Payment Card*, 827 F.3d 223, 235-36; *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (citing cases); *Ma*, 2018 WL 1702740, at *4. 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).

The plaintiffs belabor the nine *Grinnell*[6] fairness criteria in their approval papers. Memorandum of Law in Support of Final Settlement Approval ("MFA") (DE 61) at 7-13. While satisfaction of those factors is necessary for approval under Rule 23(e), it is not sufficient. Like the multi-factor tests of other circuits[7]—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

[6] *Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974).

[7] *See, e.g., Pampers*, 724 F.3d at 718 (looking beyond Sixth Circuit's seven-factor test to find settlement unfair when it constitutes "preferential treatment" for class counsel); *In re Baby Prods Antitrust Litig.*, 708 F.3d 163, 174 (3d Cir. 2013) (adding to Third Circuit's nine-factor fairness test, a new consideration: "the degree of direct benefit provided to the class"); *Bluetooth*, 654 F.3d at 946 (consideration of eight-factor test "alone is not enough to survive appellate review).

defendant); *Plummer*, 668 F.2d at 660 (affirming rejection of settlement due to "preferential treatment" afforded the named plaintiffs). The most common settlement defects are ones of allocation. Again, this is because the adversarial process does not 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 Pampers*, 724 F.3d at 717-18; *Bluetooth*, 654 F.3d at 943. "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).

As the Second Circuit has described it, "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). In accord with *Agent Orange's* directive to root out situations where the class's interests are encroached by the attorneys' interests, the Ninth Circuit has identified three warning signs of a class action settlement that is inequitable as between class counsel and the class: 1) a disproportionate fee allocation; 2) a clear sailing clause; and 3) a fee reversion/kicker clause. *Bluetooth*, 654 F.3d at 947-48; *see also Ma*, 2018 WL 1702740, at *5, *6-*7 (analyzing these issues under the *Grinnell* factor relating to "the range of reasonableness of the settlement in light of the best possible recovery and all the attendant risks of litigation").

A. Disproportionate fees

The first signal is "when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are 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."); *Ma*, 2018 WL 1702740 (denying approval of settlement that allocated $575,000 to attorneys, $5000 to each class representative, and only prospective injunctive changes for the class members); *Richardson*, 991 F. Supp. 2d at 204 (denying approval of settlement that allocated nearly $1 million to attorneys, $1000 to each class representative, and only prospective

labeling changes for the class members); *Allen v. Similasan Corp.*, 318 F.R.D. 423 (S.D. Cal. 2016) (denying approval of settlement that allocated $550,000 to attorneys, $2500 to each class representative, and only prospective labeling changes for the class members). This is an example of the latter scenario; the class receives solely injunctive relief while the agreement permits class counsel to seek, unopposed, an award of fees, costs and incentive awards of $450,000.

A proportionate attorney award is roughly 25% of the settlement value.[8] Conversely, an award that vastly exceeds this benchmark 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"); *Oladapo v. Smart One Energy, LLC*, 2017 WL 5956907, at *15 (S.D.N.Y. Nov. 9, 2017) (denying settlement approval where proposed fee award "would significantly exceed the aggregate award to the class"); *Brown v. Sega Amusements, U.S.A., Inc.*, 2015 WL 1062409 (S.D.N.Y. Mar. 9, 2015) (rejecting settlement where class counsel sought 56% of the proceeds); *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."). To reach the appropriate ratio here, the class benefit would have to be valued at nearly $1.5 million. And the burden of proving that quantum of benefit lies with the proponents of the settlement, *Pampers*, 724 F.3d at 719.

But, as a matter of law, the injunctive relief that this settlement offers is not worth anywhere near $1.5 million. No later than eighteen months after the effective date, the defendant agrees to modify its packaging to include a "minimum fill line" and a disclaimer that reads as follows:

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[8] *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorneys Fees & Expenses in Class Action Litigation: 1993-2008*, 7 J. OF EMPIRICAL LEGAL STUD. 248, 262 (2010) (surveying cases and finding a mean fee in consumer cases of 25%); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 833 (2010) (analyzing 688 class action settlements in 2006 and 2007 and finding a mean of 25% and a median of 25.4% for the award of attorneys' fees "with almost no awards more than 35 percent").

"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." Settlement ¶ 2.1.1; Exhibit D to Settlement Agreement (DE 55-5).

First and foremost, as a matter of common sense, this combination of labeling relief "denigrates the intelligence of ordinary consumers" by spoonfeeding them obvious, and in the case of the minimum fill line, irrelevant, information. *Pampers*, 724 F.3d at 720. Deprecating the intelligence of putative clients is an unfortunately common theme in valueless injunctive settlements. In *Subway* the plaintiffs alleged that Subway patrons were duped by "Footlong" sandwiches that only measured 11 inches in length, even though every sandwich still contains the exact same amount of bread simply in a slightly different shape. When the parties settled by requiring *Subway* franchisees to, among other things, publish a disclaimer of this fact in their establishments, the Seventh Circuit found this relief "utterly worthless." *Subway*, 869 F.3d at 557. In *Richardson*, the plaintiffs alleged that L'Oreal shampoo purchasers—many of whom purchased the product in big box retailers—were deceived by an *on-product* representation that the products were sold exclusively in salons. 991 F. Supp. 2d 181. One of the plaintiffs purchased the product in a Big Kmart and yet, without alleging an out-of-body experience, somehow alleged she was deceived by the representation she saw in the store. When the parties attempted to settle by having the defendant remove the representations, Judge Bates in rejecting the settlement, politely found the injunction "of limited value." *Id.* at 206. One final example: in *Polar Int'l Brokerage Corp. v. Reeve,* a precursor to the now-fashionable trend[9] of meritless merger litigation, plaintiffs sued on behalf of a class of shareholders alleging that corporate management had, among other things, breached their fiduciary duty by accepting too cheap a merger offer. 187 F.R.D. 108, 110 (S.D.N.Y. 1999). After 93% of shareholders accepted the tender, they

[9] *See, e.g., In re Walgreen Co. Stockholder Litigation*, 832 F.3d 718, 724 (7th Cir. 2016) (calling the practice of bringing such claims and settling them for disclosure-only relief "no better than a racket"); *see generally* Jill E. Fisch, Sean J. Griffith & Steven M. Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557 (2015).

reached a proposed settlement. *Id.* at 111. In exchange for a $200,000 fee to class counsel, class members would be provided "reassurance" that indeed the price was fair. *Id.* at 111-12. Judge Scheindlin rebuffed plaintiff's theory that providing "some psychic reassurance for an action already taken [*i.e.* tendering their shares]" was of any meaningful value. *Id.* at 118. How feeble of mind must counsel think its putative clients to believe that psychic reassurance provided an actual benefit?

Plaintiffs' theory of this case and settlement fares no better. The preexisting labels on Barilla products *already* make crystal clear that the product is sold by weight and not by volume. *See* DE 55-5 (displaying "NET WT. 12 OZ" on the front label of Veggie Rotini and a recommended six servings of two ounces each on the side label). To argue that class members or the public are benefited by a superfluous disclaimer is to insist that they do not know basic English or basic multiplication tables. 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. Pure "egocentrism!" *Pampers*, 724 F.3d at 720. Selling pasta by volume is particularly nonsensical as it isn't a product that 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 country is in better shape than plaintiffs suggest, but their settlement is not because they have provided no value to absent class members.

Second, class counsel do not meet their burden to quantify any degree of benefit. *See Koby v. ARS Nat'l Servs., Inc*, 846 F.3d 1071, 1079 (9th Cir. 2017). Class action settlements are plagued by pie-in-the-sky valuations of inestimable injunctions, attempts which do nothing to serve the interest

of the class and everything to serve the interest of class counsel. *See, e.g., Kaplan v. Rand*, 192 F.3d 60, 70-72 (2d Cir. 1999) ("Far from providing a remedy for clearly identified past misconduct, the settlement in this case strives to provide therapeutic 'benefits' that can only be characterized as illusory"); *Pearson*, 772 F.3d at 785 (bemoaning "substantively empty" labeling changes); *Polar,* 187 F.R.D. at 118 (abjuring the "'politely' collusive settlement: one providing a nonpecuniary benefit of very little value to shareholders and a fairly substantial award of attorney's fees to plaintiff's counsel")."Precisely because the value of injunctive relief is difficult to quantify, its value is also easily manipulable by overreaching lawyers seeking to increase the value assigned to a common fund." *Staton*, 327 F.3d at 974. Assertions of a "fanciful, contrived, and mutually inconsistent character" cannot carry the day. *Schechtman v. Wolfson*, 244 F.2d 537, 540 (2d Cir. 1957). Here, the plaintiffs make no attempt to delineate the value of the settlement relief. DE 61 at 32-33.

However, even if the parties were to provide a credible quantification of the value to the public at large of said changes, a $1.5 million *class* valuation still could not stand as a matter of law, simply because "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. These are proper recognitions of the principle that the class is composed of people who interacted with defendants *in the past*; while the prospective injunctive relief can only benefit those who interact with defendants *in the future. See, e.g.*, *Koby*, 846 F.3d at 1079 (observing "an obvious mismatch between the injunctive relief provided and the definition of the proposed class"). "No changes to future advertising by [defendant] will benefit those who already were misled by [defendant's] representations regarding

[the product]." *True v. Honda*, 749 F. Supp. 2d 1052, 1077 (C.D. Cal. 2010); *accord Oladapo*, 2017 WL 5956907, at *14.[10]

Thus, the settlement, which includes a plenary waiver of class members' monetary claims, should not be approved, as it would provide class members *qua* class members with no marginal value above members of the general public. *E.g., Koby*, 846 F.3d at 1080; *see also Ma*, 2018 WL 1702740, at *7 (broad release "mak[es] matters worse"). 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*, 318 F.R.D. at 428. Illusory non-class injunctive relief simply does not justify a $450,000 award to class counsel and the named representatives. The first warning sign of a lawyer-driven deal is apparent.[11]

B. Clear-sailing

A second telltale indication of preferential treatment is the presence of a "clear-sailing" clause (whereby defendant consents not to challenge the award of fees to plaintiffs' counsel).

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[10] Commentators have also recognized the problem of fictive injunctive relief settlements that remit no benefit to class members. *See e.g.*, Erin L. Sheley & Theodore H. Frank, *Prospective Injunctive Relief and Class Settlements*, 39 HARV. J. L. & PUB. POL'Y 769, 832 (2016) ("[T]here should be a presumption against approval of such settlements or awarding fees for such relief outside of the actions against public institutions originally contemplated by Rule 23(b)(2)."); Howard Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. 859, 872-78 (2016) (discussing the warning sign of "spurious injunctive relief").

[11] That class counsel seeks less than their base lodestar does not remedy the disproportion. "[H]ours can't be given controlling weight in determining what share of the class action settlement pot should go to class counsel." *Redman*, 768 F.3d 622, 635. Even a modest request relative to lodestar cannot justify a misallocated settlement. *See Bluetooth*, 654 F.3d at 943 (reversing even though lodestar "substantially exceed[ed]" fee award); *Baby Prods.*, 708 F.3d at 180 n.14 (lodestar multiplier of .37 not "outcome determinative"); *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1177 (9th Cir. 2013) (same with multiplier of .32). Here, though, it is worse because the proclaimed lodestar of $673,612.50 is based upon an outrageous blended hourly rate of $677.20/hr. DE 60 at 21. *See McLaughlin v. IDT Energy*, 2018 WL 3642627, at *16 (E.D.N.Y. Jul. 30, 2018) ("partner rates higher than $350 per hour are generally reserved for the unusually expert litigator or other special circumstances") (citing cases). At a $350/hr blended rate, the lodestar becomes $348,145.85 and the multiplier becomes 1.29.

Bluetooth, 654 F.3d at 948. This is also present here. Settlement ¶7.1. "Provisions for 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)). It indicates 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)).[12] 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 Ma*, 2018 WL 1702740, at *5; *see also* 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.").

C. Fee segregation

A third telltale indication of preferential treatment is the presence of a "kicker" clause whereby class counsel's fee fund is segregated from the class benefit such that any unawarded fees revert to the defendant rather than going to benefit the class. *Bluetooth*, 654 F.3d at 948-49; *Ma*, 2018 WL 1702740, at *5. In this case, the awarded fees never leave Barilla's pocket. Settlement ¶7.1-7.2. 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

[12] Negotiating class benefit and fees separately does nothing to allay the inherent conflict when representatives negotiate for their own compensation unless "fee negotiations [are] postponed until the settlement was judicially approved." *In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortg. Litig.*, 418 F.3d 277, 308 (3d Cir. 2005); *accord Pearson*, 772 F.3d at 786-87 (finding implausible that separate negotiation could benefit the class); *Richardson*, 991 F. Supp. 2d at 204 (separate negotiation cannot cure unfair allocation between class and counsel).

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."). Plaintiffs' protestation that a segregated fee fund is actually a class benefit (DE 61 at 20-21) overlooks the economic reality that "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). Fee segregation thus 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"). A court and potential objectors have less incentive to scrutinize a request because the kicker combined with the clear-sailing agreement 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*, 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).

* * *

Given the disproportionate, segregated, and unopposed fees that have been negotiated, this settlement must fall. When injunctive relief "may be largely or even entirely worthless" "even a modest award of attorneys' fees...is excessive." *Walgreen*, 832 F.3d at 721; *see also Ma*, 2018 WL 1702740 ($575,000 negotiated fee). Even were the fees reduced by 80%, the settlement would still be too lopsided to approve. *See Koby*, 846 F.3d 1071 ($67,500 - $0 ratio untenable); *Crawford v. Equifax Payment Info*, 201 F.3d 877, 882 (7th Cir. 2000) ($78,000 - $0 ratio unsupportable); *Scott v. Weig*, 2018 WL 2254541 (S.D.N.Y. May 17, 2018) ($75,000 - $0 ratio unacceptable); *Felix v. Northstar Location Servs.*, 290 F.R.D. 397, 408 (W.D.N.Y. 2013) ($65,000 - $0 ratio unapprovable).

CONCLUSION

For the foregoing reasons, Schulman urges the Court to deny class certification and settlement approval.

Dated: November 16, 2018.

Adam E. Schulman
DC Bar No. 1001606
COMPETITIVE ENTERPRISE INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1310 L Street, NW, 7th Floor
Washington, DC 20005
Phone: (610) 457-0856
Email: shuyande24@gmail.com

In Pro Per

Certificate of Service

The undersigned certifies he electronically filed the foregoing Objection and associated Declaration and Notice of Intent to Appear via the ECF system for the Eastern District of New York, thus sending the Objection in writing to the Clerk of the Court and also effecting service on all attorneys registered for electronic filing. Additionally, he caused to be served via first class mail, a copy of the this Objection and associated documents upon the following attorneys:

Robert I. Harwood **Daniella Quitt** Harwood Feffer LLP 712 Fifth Avenue New York, NY 10019	**Steven Blonder** Much Shelist PC 191 North Wacker Dr., Suite 1800 Chicago, IL 60606
Ronen Sarraf **Joseph Gentile** Sarraf Gentile LLP 14 Bond Street, Suite 212 Great Neck, NY 11021	

Dated: November 16, 2018.

Adam E. Schulman