NO. 17-16405

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROHINI KUMAR, an individual, on behalf of herself, the general public and those similarly situated,
Plaintiff-Appellee,

v.

THEODORE H. FRANK,
Objector-Appellant,

v.

SALOV NORTH AMERICA CORP.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California, No. 4:14-cv-02411-YGR

Opening Brief of Appellant Theodore H. Frank

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Corporate Disclosure Statement (FRAP 26.1)

Pursuant to the disclosure requirements of FRAP 26.1, Theodore H. Frank declares that he is an individual and, as such, is not a subsidiary or affiliate of a publicly owned corporation and there is no publicly held corporation that owns ten percent or more of any stock issued by him.

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Statement of Subject Matter and Appellate Jurisdiction

The district court has jurisdiction under 28 U.S.C. § 1332(d)(2) because plaintiff's class-action complaint alleges claims that exceed $5,000,000 exclusive of interest and costs, there are millions of class members, most of which are citizens of states other than defendant's state of citizenship. For example, named plaintiff Rohini Kumar is a citizen of the State of California, while defendant Salov North America Corp. ("Salov") is a New York corporation with its principal place of business in New Jersey. *See* Amended Complaint, Dkt.153 at 1.

This court has appellate jurisdiction under 28 U.S.C. § 1291. The district court ordered final approval of the settlement on July 7, 2017 ("Final Approval Order"), and issued final judgment under Fed. R. Civ. P. 54(b) on July 7, 2017 ("Final Judgment"). ER2-20, ER1.[1] Objector Theodore H. Frank, the appellant in this case, filed a notice of appeal on July 11, 2017, appealing the Final Approval Order. ER24. On July 17, 2017, Frank filed an amended notice of appeal, appealing both the Final Approval Order and the Final Judgment. ER21. Frank's notices of appeal are timely under Fed. R. App. P. 4(a)(1)(A). Frank, as a class member who objected to settlement approval below, has standing to appeal a final approval of a class action settlement without the need to intervene formally in the case. *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

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[1] "ER" refers to Frank's Excerpts of Record. "Dkt." refers to the district court docket in this case.

Statement of the Issues

1. This Court demands that the district court investigate the "economic reality" of the class benefits vis-à-vis the fee award in determining settlement fairness. *Allen v. Bedolla*, 787 F.3d 1218, 1224 & n.4 (9th Cir. 2015). Did the district court err by valuing the settlement based on the $5 million made available for claims and administration costs rather than the $210,986 the class would actually receive, when class counsel acknowledged that it did not expect there to be $5 million of claims under the restrictive claims process? (Raised at ER76, 82-84; ruled on at ER9.)

2. This Court holds that an injunction is "of no real value" where "it does not obligate [defendant] to do anything it was not already doing." *Koby v. ARS Nat'l Servs.*, 846 F.3d 1071, 1080 (9th Cir. 2017). Did the district court err in finding a settlement fair based on injunctive relief of labeling changes that the defendant had voluntarily made prior to the settlement where there was no evidence that the injunction would change the defendant's behavior? (Raised at ER87-88; ruled on at ER9.)

3. Did the district court err in finding value for the injunctive relief when the plaintiff's expert—who theorized that the injunctive relief should be valued at the difference in the drop in retail price after the label change—relied on his own predictions of retail sales prices even though he had access to actual sales data that falsified his predictions? (Raised at ER89-90; ruled on at ER9-10.)

Standard of Review

A district court's decision to approve a class action settlement is reviewed for abuse of discretion. *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 940 (9th Cir.

2011). A failure to apply the correct standard of law is an abuse of discretion. *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1257 (9th Cir. 2004). Questions of law are reviewed *de novo*. *Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000). The abuse of discretion standard does not preclude an appeals court from "interven[ing] when a District Court makes a finding that is methodologically flawed." *United States v. Allegheny Ludlum Corp.*, 366 F.3d 164, 184 (3d Cir. 2004) (Becker, J.); *cf. also Transcraft, Inc. v. Galvin Stalmack Kirschner Clark*, 39 F.3d 812, 818-20 (7th Cir. 1995) (Posner, J.) ("fantastic" economic theory of damages cannot support jury verdict).

Statutes and Rules

Federal Rule of Civil Procedure 23. Class Actions.

…

(e) Settlement, Voluntary Dismissal, or Compromise.

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

…

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

…

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdraw only with the court's approval.

…

Statement of the Case

A. Consumers sue Salov over olive oil labeling.

The underlying class action litigation alleged deceptive marketing and sale of Filippo Berio olive oil. Dkt. 1 at 1-2. Plaintiff Rohini Kumar alleged that "IMPORTED FROM ITALY" on Salov's olive oil labeling led consumers to believe that the olives were grown or pressed in Italy but many of Salov's olive oils were "pressed (from olives grown) in other countries, and (at best) [were] trucked or shipped to Italy, bottled and then exported." *Id.* at 1. Three front labels used during the alleged time period on the most popular size package, the 16.9 ounce bottle, appeared as follows:

ER332. The back labels stated that the bottles included olive oils from Italy, Spain, Greece, and Tunisia. ER329. Back labels for the 16.9 ounce bottles during the alleged time period appeared as follows:

ER333.

Kumar also alleged that the olive oil was falsely labeled "Extra Virgin" but the oil was bottled in clear bottles that allowed the oil to degrade and degenerate during shipping, losing its "extra virgin" designation. Dkt. 1 at 2.

Kumar brought the action for a California class of olive oil purchasers, a nationwide class of "Extra Virgin" olive oil purchasers, and a California subclass of "Extra Virgin" olive oil purchasers:

> All persons who, between May 23, 2010 and the present, purchased, in California, any of Defendants' Mock Italian Products (the "California Italian Class");

> All persons who, between May 23, 2010 and the present, purchased, in the United States, any of Defendants' Mock EVOO Products (the "EVOO Class"); and
>
> All members of the EVOO Class who made their Fake EVOO Product purchases in California (the "California EVOO Subclass").

Id. at 14. Kumar alleged fraud, breach of contract, breach of the covenant of good faith and fair dealing, and violations of California law: Consumers Legal Remedies Act, California Civil Code § 1750, *et seq*.; False Advertising, Business and Professions Code § 17500, *et seq*.; and Unfair, Unlawful and Deceptive Trade Practices, Business and Professions Code § 17200, *et seq*. Dkt. 1 at 17-25.

Salov moved to dismiss the claims, which the court granted in part, dismissing the claims for breach of contract and for covenant of good faith and fair dealing. Dkt. 50 at 1.

B. Salov removes "Imported From Italy" from labels in 2015.

In 2015—before certification or settlement—Salov voluntarily removed "Imported from Italy" on the label of the challenged products and replaced it with an "Imported" label statement. ER300. The new label appeared in U.S. retail stores in mid-2015. *Id.*

Salov decided to change "Imported from Italy" to "Imported" before this lawsuit was filed. ER334. Thomas Mueller, Salov's president and CEO, explained that Salov made the decision to change the label because of a similar lawsuit against one of Salov's retailers in the Superior Court of D.C. challenging the "Imported from Italy" label. *Id.* He explained that the phrase "from Italy" was not significant to purchasers because the phrase was "printed so small as to be illegible to consumers walking by shelves" and because most olive oils are exported from Italy and thus, the phrase did not differentiate defendant's product from others. *Id.*

After the label change, Salov's pricing to retailers and wholesalers did not change and the average retail price of the challenged products trended slightly upward. ER341.

C. Kumar abandons the "extra virgin" classes and seeks certification of a California "Imported from Italy" class.

Kumar alleged that the olive oil was not "extra virgin" based on laboratory tests. Dkt. 1 at 8. After Salov served Rule 11 motions, letters rogatory for documents and deposition testimony from the Australian laboratory that performed the tests, and deposition subpoenas to Kumar's counsel, the parties stipulated on January 7, 2016 to dismiss with prejudice Kumar's "extra virgin" allegations. Dkt. 81 at 2-3. The parties agreed that certification of a nationwide class would be unlikely given the choice-of-law issues identified in recent case law. *Id.* at 3.

On January 20, 2016, Kumar moved for certification of a California-only class challenging the "Imported from Italy" labeling. Dkt. 85. Kumar redacted significant portions of the certification motion as containing confidential information of Salov or a third party, including 22 exhibits. Dkt. 84.

In support of certification, Kumar submitted the expert report of Colin B. Weir. ER345-72. Weir opined that the class's damages were measured as "Price Premium Damages" or "the additional amount that consumers paid for the Products as the direct result" of the "Imported from Italy" label. ER351 n.17. Weir used sales data of the challenged products from January 2009 through May 2015. ER363. The parties obtained actual retail prices for the challenged products and other olive oils sold by California grocery stores through February 21, 2016—more than six months after defendant removed "Imported from Italy" from the challenged products' labels. *See* ER277. Weir did not analyze sales data for the time after the label was revised. ER363.

D. Salov opposes class certification.

Salov opposed class certification on several independent grounds, including:

1. **Inadequate class representative.** In opposing certification, Salov argued that Kumar was an inadequate class representative because she was not misled: she testified she believed that "imported" meant "shipped out of" Italy, and she admitted that she read the "best by" date on the back label that states "Packed in Italy with oils from Italy, Spain, Greece, and Tunisia." Dkt. 93 at 8. Salov challenged Kumar's credibility given her incomplete deposition and discovery responses, her personal ties to class counsel, and her felony conviction. *Id.* at 9-10.

2. **Kumar's defective expert report.** Salov challenged the conclusions of Weir, Kumar's expert, on multiple grounds. Dkt. 93 at 10-24. Salov argued that Weir improperly relied on a fraud-on-the-market theory that courts had rejected outside of securities cases. *Id.* at 19. Salov also argued that courts had specifically rejected Weir's approach because it failed to isolate a price premium for the challenged language. *Id.* at 20-21.

Salov submitted the expert report of Dr. Keith R. Ugone to rebut Weir. ER265-324. Dr. Ugone challenged Weir's analysis in numerous respects. Weir had failed to analyze the sales data after May 2015 when the "Imported from Italy" language was removed from the label. ER300. Dr. Ugone explained that a comparison of the data before and after the "Imported from Italy" label was changed showed that, contrary to Weir's theory, there was no price premium:

> If the retail prices that all putative Class members paid for the Challenged Products were affected by the presence of the "Imported from Italy" claim on the product label as asserted by Weir, then the average prices of the Challenged Products would experience a <u>discernible, systematic, and persistent decrease</u> following the removal of the "Imported from Italy" claim. However, an analysis of the observed and actual pricing patterns for the Challenged Products demonstrates that such a price decrease did not occur. This analysis indicates that there was no retail "price premium" associated with the "Imported from Italy" claim that could be quantified on a Class-wide basis.

ER301 (emphasis in original).

E. Kumar's response regarding the ignored sales data.

Kumar submitted an additional declaration of Weir responding to Dr. Ugone's report. ER212-64. Weir challenged Dr. Ugone's analysis regarding a comparison of the sales data before and after the 2015 label change, arguing that Dr. Ugone's analysis did not control for other elements of the product's new label. ER230. Weir's response, however, did not explain what a comparison that controlled for those variables would look like, nor did Weir explain why Weir did not analyze the sales data after the 2015 label change. ER230-31.

F. The court certifies a California class.

On July 15, 2016, the district court certified a California class of olive oil purchasers. ER190. With respect to Kumar's damages model, the district court accepted Kumar's explanation that the model was not a "fraud-on-the-market" theory, but a "diminution in value theory, i.e., the difference between what was paid and what a reasonable consumer would have paid at the time of purchase without the fraudulent or omitted information." ER208-09. But as to the "completeness of the variable set used," the district court concluded that the "ultimate persuasiveness of the model is a matter to be decided by a trier of fact." ER209.

G. The parties seek approval of a nationwide class action settlement.

On December 30, 2016, the parties entered into a settlement agreement ("Settlement") to settle not only the California class that had been certified by the district court, but a nationwide class of approximately 5,386,424 class members. ER160; Dkt. 161-1 ¶ 3. The Settlement defines the class as "all natural persons who, between May 23, 2010 and June 30, 2015, purchased, in the United States, any Product for personal use, not resale," with Product defined as "any bottle or can of Filippo Berio Robusto Extra Virgin Olive Oil, Filippo Berio Extra Virgin Olive Oil, Filippo Berio Delicato Extra Virgin Olive Oil, Filippo Berio Organic Extra Virgin Olive Oil, Filippo Berio Olive Oil, or Filippo Berio Light Tasting Olive Oil." ER160.

Under the Settlement, class members could file a claim for a cash payment of fifty cents ($0.50) for each bottle purchased with a minimum payment for valid claims of $2.00 and a maximum payment of $5.00 per household for claims without proof of purchase; there is no cap for claims with proof of purchase. ER163. The Settlement requires that claimants state on the claim form, which they must sign under penalty of perjury, the number of bottles and dates purchased and that "the Settlement Class Member would not have paid the price charged and/or made the purchase(s) in the absence of the phrase 'Imported from Italy.'" ER162-63. Salov's financial liability is limited to payment of attorneys' fees, administration costs, and valid claims by class members. ER166-68. Salov agreed to not challenge Kumar's request for attorneys' fees, costs, and incentive award totaling $982,500 (clear sailing). ER167-68. Should the court award less than $982,500, the money remains with Salov—a "kicker" provision. *Id.* If projected claims and notice and administration costs exceed $5 million, Salov has the option of terminating the agreement. ER181-82.

The Settlement also provides that Salov will continue to use the revised label "Imported" for three years after the effective date of the Settlement. ER161.

In seeking approval, class counsel explained that when negotiating the settlement, Salov was "extremely resistant" to a common fund. ER31. The district court asked class counsel about the anticipated claims rate and class counsel represented "that there will be tens of thousands of claims and perhaps hundreds of thousands of claims." ER35.

The district court granted preliminary approval of the Settlement on January 27, 2017. ER143-51.

H. Kumar amends the complaint to allege New Jersey law violations.

After the preliminary approval, Kumar filed an amended class action complaint that replaced the California causes of action with two causes of action under New Jersey law: New Jersey's Consumer Fraud Act, N.J.S.A. 56:8–1 *et. seq*., and New Jersey's Truth in Consumer Contract, Warranty and Notice Act, N.J.S.A. 56:12-14, *et. seq*. Dkt. 153 at 9-12.

I. Kumar seeks final approval of the Settlement.

In seeking final approval, Kumar argued that the Settlement amount included $5 million defendant made "available" for notice, administration, and claims, $982,500 for attorneys' fees and costs, and $19.9 million in injunctive relief for maintaining the revised label for three years. Dkt. 154 at 10. Class counsel estimated administration costs at $450,000, leaving $4,550,000 available for claims. Dkt. 154 at 8, 10. Class counsel submitted a lodestar calculation of $1.4 million. Dkt. 154 at 16.

In support of final approval, Kumar submitted a third declaration from Weir. ER127-38. While Weir had actual sales data through February 2016—including over six months of sales data after the mid-2015 label revision—Weir used sales data from January 2009 through May 2015 to forecast post-label change sales prices for the products from August 2015 through August 2020. ER132. Weir concluded that "the total amount that will be paid by consumers for the Products during the period of changed practices will be at least $19.91 million less than it would have been in the absence of these changes." ER135. Weir's analysis did not mention that or explain why prices had increased after the 2015 label change.

J. Frank objects to the Settlement and class certification.

Theodore H. Frank objected to the Settlement and class certification. ER71-102. He is represented *pro bono* by attorneys at the non-profit Center for Class Action

Fairness ("CCAF"), and brought his objection in good faith to prevent approval of an unfair settlement and ratification of an improper class certification. ER78-79.

Frank is a class member because he purchased several bottles of the challenged olive oil during the class period. ER104-05. Frank did not however submit a claim for settlement relief. ER105. As Frank explained in his declaration supporting his objection, he was unable to make the statement under penalty of perjury (as required by the Settlement) that he would not have purchased the olive oil bottles or paid the price charged if the product had not included "Imported from Italy" on the label. ER105.

Frank objected, *inter alia*, that because the Settlement only provides relief to those class members who could attest to their reliance on the "Imported from Italy" label, the Settlement creates a zero-recovery subclass. ER95-97. The intraclass conflict precludes class certification under Rule 23(a)(4) because the class representative cannot adequately represent those class members who are frozen out of relief. *Id.*

Frank also objected that the Settlement is unfair under Rule 23(e) because class counsel was receiving 80% of the settlement fund: $982,500 in attorneys' fees and costs compared to $150,000 in actual relief (the value of the claims received at the time of Frank's objection). ER87-88. Frank argued that under Ninth Circuit law, the Settlement must be valued based on what the class *actually* receives and not what the defendant "makes available." ER83 (citing *Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015)). Frank argued that in addition to the disproportionate fee request, the Settlement contains other warning signs of class counsel's self-dealing including "clear-sailing" (where defendant agrees not to oppose the fee request) and a "reversion" agreement (where any reduction in fees reverts back to defendant). ER80-81.

Frank also argued that the Settlement's injunctive relief of maintaining the revised "Imported" label provides no incremental value to the class because it is directed at future purchasers and because the labeling change occurred prior to the Settlement. ER88-89 (citing *Koby v. ARS Nat'l Servs.*, 846 F.3d 1071 (9th Cir. 2017)). Frank argued that Kumar had failed to prove that the injunctive relief had any value because Weir, Kumar's expert, disregarded the actual sales data after the label revision. ER89.

Finally, Frank argued that the Settlement's provision that permits defendant to terminate if claims exceed $5 million created a substantial conflict of interest between class counsel and class members because class counsel is incentivized to depress claims to protect their fee request. ER93-95.

K. Claims totaled $210,985 for class members.

The administrator reported that there were 53,030 valid claims (out of approximately 5,386,424 class members) for a total distribution to class members of $210,985. ER38; Dkt. 161-1 ¶ 3. There were only 33 claims that included proof of purchase, totaling $1,295.50. ER38.

L. The court overrules Frank's objection and approves the Settlement.

The district court held the fairness hearing on May 30, 2017. Dkt. 167. On July 7, 2017, the district court granted final approval of the Settlement and awarded attorneys' fees and costs of $982,500. ER2-20. Overruling Frank's objections, the district court held that the claim form did not create a subclass because it did not require class members to establish reliance but required claimants to attest that the labeling caused them damage. ER10.

The district court did not consider the clear sailing or kicker provisions, but held that the Settlement was not subject to *Bluetooth* standards because a California class had been certified prior to settlement. ER8-9. The district court held that even under *Bluetooth* the fee award was not disproportionate because the court "looks to the entire value of the settlement, rather than just the amount of the claims made by class members." ER9. The court did not discuss *Allen's* requirement that a district court must look at the economic reality based on actual claims rates. *Id.*

The district court held that class counsel was entitled to fees for the injunctive relief because the litigation was a catalyst for the label changes. ER9. The district court did not discuss *Koby's* requirement that injunctive relief be directed to class members and not future purchasers of olive oil. *Id.* The district court did not cite *Koby* at all.

The court further overruled Frank's objection regarding class counsel's conflict of interest based on the Settlement's termination provision. ER11. The court found that "the likelihood of the claims approaching the termination limit was exceedingly remote." *Id.*

The court issued final judgment under Rule 54(b). ER1. This timely appeal followed. ER24, ER21.

Summary of Argument

The district court approved a settlement that pays the class $210,985 and the attorneys $982,500 in fees and expenses. The court reasoned that this upside-down result was acceptable because, when considering fairness, the "entire value of the settlement"—including the amount the defendant "made available" to the class—must be considered. This approach contravenes the Court's requirement that a district court look at the economic reality of a class-action settlement based on the actual claims rate in assessing settlement fairness. *Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015).

The reason a district court must look at the actual claims rate is to protect absent class members; both defendant and class counsel have the incentive to create an *illusion* of substantial class benefit. Salov was "extremely resistant" to a common fund because a low-value claims-made settlement would be cheaper: In claims-made settlements in which the class receives only publication notice, the median claims rate is less than 0.1%. *See infra* at 22. Thus, while Salov agreed to up to $5 million for claims and administrative payments, it knew that it actually would pay far less than that amount. *See* Declaration of Sean A. Commons, Dkt. 162-1 at 4-6. Meanwhile, class counsel benefited from the *appearance* of a large settlement that it could use to justify higher fees, but not from a high claims rate.

The district court further justified its approval of the Settlement based on the alleged value of injunctive relief that duplicated a two-word labeling change Salov had already adopted on its own. The court erred as a matter of law by accepting Kumar's multi-million valuation when it should not have assigned any value to the injunction under *Koby v. ARS Natl. Services, Inc.*, 846 F.3d 1071 (9th Cir. 2017). The injunction simply committed Salov to maintaining for three years the minor change in labeling that Salov had voluntarily undertaken 16 months before the Settlement was entered and that it showed no likelihood of reversing. And while courts are required to accurately quantify injunctive relief if they wish to consider it part of the settlement value, the district court instead assumed "some value" because of Kumar's expert who argued that after the label change, consumers paid millions less than they would have paid before the label change. The expert, however, based his conclusions on his own sales predictions even though he had access to sales data showing what class members paid pre- and post-label change. By allowing Kumar to hide the worthlessness of the relief, the district court undercut *Koby* and failed to protect the class.

The allocation of the only concrete relief provided by the Settlement—the approximately $1.2 million in cash—overwhelmingly favored class counsel at the expense of the class in violation of Circuit precedent. Settlement approval must be reversed.

Preliminary Statement

Attorneys with the Center for Class Action Fairness, which became part of the non-profit Competitive Enterprise Institute on October 1, 2015, bring Objector Frank's objection and appeal. (Mr. Frank is the founder and director of the Center.) The Center's mission is to litigate on behalf of class members against unfair class-action procedures and settlements, and it has won more than $100 million for class members. Andrea Estes, *Critics hit law firms' bills after class-action lawsuits,* BOSTON GLOBE (Dec. 17, 2016); *see also, e.g.*, Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 13, 2013, at A12 (calling Frank "the leading critic of abusive class action settlements"); Ashby Jones, *A Litigator Fights Class-Action Suits*, WALL ST. J. (Oct. 31, 2011); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (praising the Center's work); *In re Classmates.com Consol. Litig.*, No. 09-cv-0045-RAJ, 2012 WL 3854501, at *11 (W.D. Wash. Jun. 15, 2012) (same); ER107-21 (documenting dozens of successful objections as required by preliminary approval order). This appeal is brought in good faith to protect class members in this and future class actions against unfair and abusive settlements.

Argument

I. The recognized incentive problem of class-action settlements.

Unlike settlements in other civil litigation, class-action settlements require court approval pursuant to the standards set out in Federal Rule of Civil Procedure 23. The need for this additional layer of review, during which the court acts as a fiduciary of the class, arises from the self-interested incentives inherent in class actions:

> "Class-action settlements 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. In contrast, class-action settlements affect not only the interests of the parties and counsel who negotiate them, but also the interests of the unnamed class members who by definition are not present during the negotiations. And thus there is always the danger that the parties and counsel will bargain away the interests of the unnamed class members in order to maximize their own."

In re Dry Max Pampers Litig., 724 F.3d 713, 715 (6th Cir. 2013) ("*Pampers*").

As this Court has observed, the potential for conflict in class-action settlements is structural and acute because every dollar reserved to the class is a dollar defendants cannot pay class counsel. "Ordinarily, 'a defendant is interested only in disposing of the total claim asserted against it,' and 'the allocation between the class payment and the attorneys' fees is of little or no interest to the defense.'" *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 949 (9th Cir. 2011) ("*Bluetooth*") (quoting *Staton v. Boeing*, 327 F.3d 938, 964 (9th Cir. 2003)). Thus, while class counsel and defendants have proper incentives to bargain effectively over the *size* of a settlement, similar incentives do not govern their critical decisions about how to *allocate* it—either between the payments to class members and the fees for class counsel or amongst the different class members themselves. *Id.*; *see also Pampers*, 724 F.3d at 717.

The dysfunction that can result from these incentives is a problem because class actions often are the only way plaintiffs can be compensated and defendants held to account for serious misdeeds with diffuse harm. Our adversary system—and the value of class actions within it—depends upon unconflicted counsel's zealous advocacy for their clients, especially where those clients are absent class members who do not get to choose their counsel for themselves and may not even know their legal rights are at stake. *Cf. Radcliffe v. Experian Info. Solutions Inc.*, 715 F.3d 1157, 1167 (9th Cir. 2013). As a result, rigorous adherence to the safeguards of Rule 23 is necessary to ensure that counsel is not self-dealing at the class's expense. Where, as here, class counsel favor themselves over their clients, a district court has a legal obligation to reject the settlement. *Bluetooth*, 654 F.3d at 948-49; *see also Pearson*, 772 F.3d at 786; *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014).

Various tools enable class counsel to obscure settlement misallocations. The tools function primarily by artificially inflating the settlement's apparent relief. The illusion of a large settlement benefits both class counsel and a defendant: "The more valuable the settlement appears to the judge, the more likely the judge will approve it. And the bigger the settlement, the bigger the fee for class counsel." *See* Howard M. Erichson, *How to Exaggerate the Size of Your Class Action Settlement*, DAILY JOURNAL (Nov. 8, 2017).[2] Without judicial oversight to weed out such practices, class members are left with disproportionate settlements in which class counsel recovers far more than the 25-percent benchmark set by this Court. *See* Howard Erichson, *Aggregation as Disempowerment*, 92 NOTRE DAME L. REV. 859 (2016).

To illustrate this practice, consider the likelihood of settlement approval if class counsel openly sought approval of a cash settlement of $1,193,485, which paid the lawyers $982,500 in fees and expenses and paid class members $210,985.00 in collective damages—as this settlement ultimately does. Few judges would approve that deal, and it is foreclosed by precedent. *See, e.g.*, *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012) (class counsel receiving even 38.9% of settlement benefit is "clearly excessive"); *Bluetooth*, 654 F.3d at 947-49 (disproportionate fee award is a hallmark of an unfair settlement). For the deal to have any chance of court approval, it must be structured to conceal this result. The parties can do so by creating hypothetical class recoveries and difficult-to-calculate "benefits" that ultimately have little value to the class but are cheap for defendants to provide (perhaps because, as here, they have already provided them) and so easy to include in the deal.

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

A "claims-made" structure is among the most common tools used to achieve the mirage of value. In this type of settlement, rather than make direct payment to class members, a defendant agrees to make a specified amount of money *available* to the class, in theory at least, but only pay out on the claims that class members actually file. As class counsel themselves predicted, the vast majority of class members will not file a claim and thus will go uncompensated. ER35. Indeed, defense counsel averred a belief that at least 93% of class members did not rely on "Imported from Italy," *see* Dkt. 162-1 at 5, which was required to sign the jurat necessary to submit a claim. ER162-63. The majority of the $5 million that Salov "made available" here remains with Salov because, as foreseen by everyone involved, the number of claims filed fell far below the number needed to reach that threshold. ER38.

The parties' prediction was accurate because single digit claims rates are endemic to class actions, particularly where there is no direct notice to the class. *See, e.g.*, Dkt. 161 (noting that 1.2% gross claims rate, including invalid claims, was "a substantially higher-than-average result" and citing median claims rate of 0.023%); *see also In re Carrier iQ Inc. Consumer Privacy Litig.*, No. 12-md-02330-EMC, 2016 WL 4474366, at *4 (N.D. Cal. Aug. 25, 2016) (prominent settlement administrator found a median claims rate of 0.023% in settlements with publication-only notice); *Pearson*, 772 F.3d at 782 ("the percentage of class members who file claims [in consumer class actions] is often quite low"); Alison Frankel, *A Smoking Gun in Debate over Consumer Class Actions?*, REUTERS (May 9, 2014) (noting settlement administrator declaration that settlements in which class members do not receive direct notice "will almost always have a claims rate of less than 1 percent");[3] Daniel Fischer, *Odds of a Payoff in Consumer Class Action? Less Than a Straight Flush*, FORBES (May 8, 2014) (noting lack of deterrence where defendants pay claims of less than 1% of the class and attorneys' fees are guaranteed to class counsel).[4] In fact, private services are now available to forecast the cost of class-action settlements with actuarial certainty and assume 100% of the risk should payouts be higher. Theodore H. Frank, *Settlement Insurance Shows Need for Court Skepticism in Class Actions*, OpenMarket blog (Aug. 31, 2016).[5] Under the claims-made structure, class members recover—and a defendant pays—much less than when a defendant disburses funds directly to the class. At the same time, class counsel can boast about the amount purportedly "made available" and seek to justify a large fee award, even though class members will receive a small fraction of that amount.

Incentivizing counsel to seek out absent members can help ameliorate the problem. But as long as class counsel can obtain more fees by relying on the illusory amount "made available" and defendants can buy global peace at a fraction of that amount, class counsel will not undertake additional effort to ensure that more of their putative clients are compensated.

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[3] *Available at* http://blogs.reuters.com/alison-frankel/2014/05/09/a-smoking-gun-in-debate-over-consumer-class-actions/.

[4] *Available at* https://www.forbes.com/sites/danielfisher/2014/05/08/odds-of-a-payoff-in-consumer-class-action-less-than-a-straight-flush/#544c14a82782

[5] *Available at* https://cei.org/blog/settlement-insurance-shows-need-court-skepticism-class-actions.

Injunctive relief is another tool that enables class counsel and the defendant to inflate the perceived value of the settlement. *See Staton*, 327 F.3d at 974 (value of injunctive relief is "easily manipulable by overreaching lawyers seeking to increase the value assigned to a common fund."). Defendants benefit from res judicata following judicial approval of the settlement and the minimal cost of such relief, while class counsel hopes for approval of a higher fee request. The critical question for a reviewing court is whether the change achieved by the settlement actually benefits class members. Even if commencement of the *litigation* might have spurred a defendant to alter its conduct, that change in conduct is not consideration for the class members' release of claims. If a defendant agrees in the settlement to stop doing something it already stopped, the value to class members is virtually zero. *See* Erichson, 92 NOTRE DAME L. REV. at 874-76; *Koby*, 846 F.3d at 1080; *Staton*, 327 F.3d at 961.

Where settling parties are not prodded to do better, settlements often look a lot like the one here: illusory cash relief and valueless injunctive relief, a claims process that limits class members' collective recovery, and attorneys' fees disproportionate to the actual payout to the class. The Settlement at issue has these telltale signs and worse, included a provision that incentivized class counsel to keep the claims rate low by giving Salov the right to terminate the settlement (and with it counsel's fee) if the total payments exceeded $5 million and the creation of a zero-recovery sub-class. ER181-82. Meanwhile, class counsel capitalized on Salov's voluntary, pre-settlement replacement of the phrase "Imported from Italy" with "Imported" by deeming it a settlement benefit that somehow compensated class members for their release of claims. Dkt. 154 at 10. Exacerbating the problems, the Settlement includes a "clear sailing" clause whereby defendant agreed not to challenge the attorneys' fees as well as a "kicker" such that any reduction in the fee award reverts to defendant rather than the class. ER168-69. "The clear sailing provision reveals the defendant's willingness to pay, but the kicker deprives the class of that full potential benefit if class counsel negotiates too much for its fees." *Bluetooth*, 654 F.3d at 949.

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

II. The settlement approval cannot stand because class counsel negotiated $982,500 for themselves in a settlement where the class receives $210,985.

"While attorneys' fees and costs may be awarded in a certified class action where so authorized by law or the parties' agreement, Fed. R. Civ. Proc. 23(h), courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." *Bluetooth*, 654 F.3d at 941. "That the defendant in form agrees to pay the fees independently of any money award or injunctive relief provided to the class in the agreement does not detract from the need to carefully scrutinize the fee award." *Staton*, 327 F.3d at 964. The benchmark for a reasonable attorneys' fee award in the Ninth Circuit in a case alleging economic injury is 25% of the class benefit. *Bluetooth*, 654 F.3d at 942.[6] A settlement that allocates to

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[6] The district court held that because the Settlement was negotiated after the district court had considered plaintiff's motion for class certification, the Settlement

class counsel well in excess of the Ninth Circuit's 25% benchmark cannot be approved. *See, e.g, Dennis*, 697 F.3d at 868 (38.9% fee would be "clearly excessive"); *Allen*, 737 F.3d at 1224 n.4 (fee award that exceeds class recovery by a factor of three is disproportionate); *Pearson*, 772 F.3d at 781 (69% fee is "outlandish"); *Redman v. RadioShack Corp.*, 768 F.3d 622, 630-32 (7th Cir. 2014) (55%-67% allocation unfair).

"The ratio that is relevant is the ratio of (1) the fee to (2) the fee plus what the class members received." *Redman*, 768 F.3d at 630. Here, the class stands to recover only $210,985, while class counsel sought unopposed, and was awarded, fees and costs of $982,500. ER15 n.5. Using that ratio, class counsel's allocation here was over 82% of the constructive common fund ((1) $982,500 to (2) $982,500 + $210,985)—substantially higher than the figures rejected as inappropriate in *Dennis, Pearson*, and *Redman*.

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was not subject to *Bluetooth's* stricter standard of review. ER8. The district court's certification, however, applied only to a California class with California claims, while the Settlement expanded to a nationwide class and amended complaint with different causes of action. ER160; Dkt. 153. Not only was it error to decline to apply *Bluetooth* scrutiny, expansion of the class at settlement is *itself* a red flag for settlement unfairness. *See* Erichson, 92 NOTRE DAME L. REV. at 895-97. Under any procedural level of review, however, the Settlement is substantively unfair because fees grossly exceed the 25% benchmark. Indeed, the Settlement's clear-sailing and reversion clauses are similarly unfair, *see Pearson*, 772 F.3d at 787 (holding that reversion clause has "strong presumption of invalidity"), and do not suddenly become substantively less offending simply because a class had already been certified before settlement. *See, e.g., Eubank*, 753 F.3d at 723 (highlighting reversion as a "questionable provision" that should have been "deleted" even though a class had been certificated before settlement).

Despite this significant imbalance, the district court found the fees proportionate to class relief. ER9. Rather than looking at what the class would *actually* receive ($210,985), the court misapplied Ninth Circuit precedent and based its proportionality ruling on the $5 million defendant made *available* for claims and administration costs: "[t]he court looks to the entire value of the settlement, rather than just the amount of the claims made by class members." ER9. Inexplicably and inconsistent with this finding, the district court in a subsequent footnote found that fees were proportionate using actual claims:

> For example, if the valuation of the injunctive relief were decreased to only 20% of the estimate provided by Kumar's expert, the calculation would still render a total settlement value of approximately $5 million: actual claims ($210,985) + administrative costs ($450,000) + 20% of injunctive relief valuation ($3.98 million) + fees ($874,231.80) + costs ($108,268.20)= $5,174,710. The fee award would represent of 16.9% of this total. And even if the injunctive relief value is eliminated entirely, the attorneys' fees remain below the 25% benchmark.

ER15. As explained below, the district court erred in assigning any value to the injunctive relief, *see infra* at Section III, but most puzzling in this footnote is that the district court provides no explanation on how its fee calculation remains below 25% if the injunctive relief has no value. Using the district court's calculation above, if the injunctive relief were zero, fees would still be an untenable 59.7%:

Fee Percentage Using *Redman* Ratio

Attorneys' Fees/Costs	$982,500
Claims	$210,985
TOTAL	$1,193,485

$982,500 fees ÷ $1.193 million fund

= 82.3% of fund award

Fee Percentage Using Court's Calculation[7]

Attorneys' Fees/Costs	$982,500
Claims	$210,985
Administration Costs	$450,000
TOTAL	$1,643,485

$982,500 fees ÷ $1.643 million fund

= 59.7% of fund award

Either the district court based its fee percentage on the $5 million defendant "made available" in contravention of Ninth Circuit law or the district court used actual claims and miscalculated the fee percentage. Either error requires reversal.

The Ninth Circuit requires district courts to look at the "economic reality" of actual claims in assessing the settlement's fairness. ER76 (citing *Allen*, 787 F.3d at 1224 n.4). In *Allen*, this Court found that the settlement had multiple signs of self-dealing, including a disproportionate amount of fees. 787 F.3d at 1224. The Court found the fees disproportionate because the $1.125 million attorneys' fee award was *three times* the $373,675 in actual claims that the class would receive. *Id.* at 1224 n.4. The *Allen* settling

[7] While the Ninth Circuit gives district courts discretion to include administration costs in calculating the fee percentage, *Redman* explains that such costs should be excluded to properly align the incentives of class counsel with the class and both maximize class recovery and minimize extraneous cost. 768 F.3d at 630. Exclusion is particularly appropriate here where the administration costs are twice what the class will actually receive. Class members do not value a check for $4 as worth $12 just because the administrator spent an average of $8/class member processing claims.

parties stated at preliminary approval that they anticipated a 10-15% claims rate (actual claims rate was less than 8%). *Id.* This Court criticized the district court for not investigating the disproportion between fees and relief after the parties estimated the low claims rate. *Id.*

This case is worse. The $982,500 fee award is over *four times* what the class will actually receive. The defendant made $4,550,000 available for claims ($5,000,000 less the $450,000 notice and administration costs). Dkt. 154 at 8, 10. At preliminary approval, class counsel estimated claims to be tens of thousands to hundreds of thousands (a tiny fraction of the 5,386,424 class members). ER35; Dkt. 161-1 ¶ 3. And indeed, there were 53,030 claims totaling $210,985. ER38. The district court even recognized that the chances of claims reaching the $4.55 million limit were "exceedingly remote." ER11. But the district court simultaneously disregarded this economic reality and valued the settlement as if over a million claims had been filed. Ignoring Frank's arguments, the district court didn't discuss *Allen.* ER9. The district court's failure to follow Ninth Circuit law led to approval of a settlement with fees that are indefensibly disproportionate to class relief.

The Ninth Circuit is not alone in its requirement that courts take a realistic approach in evaluating settlements. *E.g., Pearson*, 772 F.3d 778; *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 179 n.13 (3d Cir. 2013) (district court should consider actual receipts to class to determine settlement fairness); *Fager v. CenturyLink Comms., LLC*, 854 F.3d 1167, 1177 (10th Cir. 2016) ("We see merit in an approach that ties attorney recovery to the amount actually paid to the class."); Notes of Advisory Committee on 2003 Amendments to Rule 23 ("it may be appropriate to defer some portion of the fee award until *actual payouts* to class members are known" (emphasis added)); *id.* ("fundamental focus is the result *actually achieved* for class members" (emphasis added); *id.* (*citing* 15 U.S.C. §§ 77z-1(a)(6); 78u-4(a)(6) (fee award should not exceed a "reasonable percentage of the amount of any damages and prejudgment interest *actually paid* to the class" (emphasis added))). *See also* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.13 (2010) ("*ALI Principles*"); Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.71 (2004) ("In cases involving a claims procedure…, the court should not base the attorney fee award on the amount of money set aside to satisfy potential claims. Rather, the fee awards should be based only on the benefits actually delivered."); *cf. Dennis*, 697 F.3d at 868 (chronicling problem of "fictitious" fund valuations that "serve[] only the 'self-interests' of the attorneys and the parties, and not the class.").

In *Pearson*, the Seventh Circuit rejected a settlement where claims totaled $865,284, the attorneys' fees were $1.93 million, and $1.13 million went to *cy pres*. 772 F.3d at 781-82. The district court had approved fees based on a maximum *potential* payment to class members of $14.2 million as if "every one of the 4.72 million class members who had received postcard rather than publication notice of the class action would file a $3 claim." *Id.* at 781. The Seventh Circuit reversed, finding that the $14.2 million potential benefit was a "fiction." *Id.* The Court reasoned that "[w]hen the parties to a class action expect that the reasonableness of the attorneys' fees allowed to class counsel will be judged against the potential rather than actual or at least reasonably foreseeable benefits to the class, class counsel lack any incentive to push back against the defendant's creating a burdensome claims process in order to minimize the number of claims." *Id.* at 783.

What the Seventh Circuit recognizes is that the legal rule must be structured to align class counsel's interests with their clients' to the greatest extent possible. Evaluating the fee award based on the money that class members actually receive puts those incentives in exactly the right place—class counsel will work very hard to get the settlement into their clients' hands, and derive no benefit from a hypothetical valuation that does not actually come to pass. By contrast, when the settlement pie can be filled with "potential rather than actual" benefits, class counsel retains all its problematic incentives with respect to seeking actual payouts to the class. *See Pearson*, 772 F.3d at 783, 787 (quoting *Eubank*, 753 F.3d at 720).

The claim that potential class benefits should be treated as identical to actual class receipts leads to absurd results. A hypothetical makes it even more clear: imagine two possible settlements of the hypothetical class action *Coyote v. Acme Products*:

***Acme* Settlement One**	***Acme* Settlement Two**
Acme Products mails a $100 check to each of one million class members who purchased their mail-order rocket roller skates. A second *pro rata* distribution is made of the amount from any uncashed checks.	One million class members have the right to fill out a twelve-page claim form requesting detailed product and purchase information, with a notarized signature attesting to its accuracy under penalty of perjury. The claim form must be hand-delivered in person between the hours of 8:30 a.m. and 9:30 a.m., on November 28, 2014, at Acme's offices in Walla Walla, Washington or Keokuk, Iowa. Class members with valid claim forms receive $200.

It would be malpractice for a class attorney to refuse Settlement One and insist on Settlement Two. The overwhelming majority of class members, if polled, would prefer Settlement One to Settlement Two. A defendant would clearly prefer Settlement Two to Settlement One as substantially cheaper. But under the district court's legal rule, Settlement Two is worth twice as much as Settlement One, and entitles the class attorneys to twice as much in attorneys' fees. This Court should reject a rule that creates such perverse incentives. *See* Barbara J. Rothstein & Thomas E. Willging, MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES 20 (3d. ed., Federal Judicial Center 2010).

Rather than arguing which claims process is the most fair, the way to judge the validity and fairness of a claims process—and to incentivize class counsel to maximize the result actually obtained by the class—is to rely solely on the amount that the claims process will *actually* pay the class. Attorneys' fee awards should "directly align[] the interests of the class and its counsel." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (quotation omitted). For example, the claim form in this case required class members to attest under penalty of perjury that the class member would not have purchased the olive oil without the "Imported from Italy" label, something Frank could not attest to. ER105. In fact, defendant believed only 2-7% of consumers "consider[ed] country of origin to be of primary importance when purchasing olive oil." Dkt. 162-1 at 5. Frank argued that the claim form was thus designed to throttle claims. ER91-92. Concerns that claims processes are designed to throttle claims are appeased, however, when class counsel's fees are tied to actual relief. Class counsel are motivated to ensure the most effective claims process possible in order to get as much money as possible in the pockets of class members. But, if settlement fairness is calculated and class counsel is entitled to virtually the same payment whether the claims period is thirty days long or ninety days long, whether the claims process requires nothing more than a name or address or whether it demands burdensome information about the claim, or whether notice actually communicates class members' rights, class counsel has little incentive to make the settlement more beneficial to the class when a defendant attempts to minimize its liability.

When incentives are aligned and class counsel's fee is tied to what the class actually receives, class counsel is motivated to deliver actual relief to the class. For example, in *Baby Products*, the settling parties unsuccessfully attempted to defend a settlement with a claims process that paid less than $3 million of its $35.5 million settlement fund to the class, arguing as here that it was too difficult to get money to class members without fraud. 708 F.3d at 169-70. On remand, the restructured settlement identified hundreds of thousands of class members who could be issued checks so that there would no longer be a multi-million dollar remainder. *McDonough v. Toys "R" Us*, 80 F. Supp. 3d 626 (E.D. Pa. 2015). The remand of *Pearson* after the Seventh Circuit reversed settlement approval also resulted in a new settlement with millions of dollars more in payments to class members. *Pearson v. Target Corp.*, No. 1:11-cv-07972, Dkt. 288 (N.D. Ill. Aug. 25, 2016); *see also In re Bayer Corp. Combination Aspirin Products Mktg. and Sales Practices Litig.*, No. 09-md-2023, 2013 WL 4735641 (E.D.N.Y. Sep. 3, 2013) (parties voluntarily found a way to increase payments from about $0.5 million to over $5 million after Frank objected on *Baby Products* grounds).

It is therefore not appropriate to determine the fee proportionality that settlement fairness requires based in whole or part on a speculative, maximized estimate of potential claims. If settlement fairness is based on "potential" benefits, class counsel has the incentive to inflate the hypothetical number of claims as much as possible so as to ensure itself the maximum baseline from which to draw its fee; absent class members can only be protected if class counsel is incentivized to negotiate for a process that maximizes payment to the class. (While it is bad enough that crediting amounts made available makes class counsel indifferent as to whether class members file claims; it is still worse here when the termination provision of the settlement actually gave class counsel an affirmative disincentive to maximize claims).

Rather than following *Allen's* command to focus on the "economic reality" of actual claims in assessing proportionality of fees, the district court relied on the inapposite *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997). The district court quoted *Williams* that the "district court abused its discretion by basing the fee on the class members' claims against the fund rather than on a percentage of the entire fund or on the lodestar." ER9 (quoting *Williams*, 129 F.3d at 1027). But *Williams* was not a case adjudicating settlement fairness under Rule 23(e).

Williams was a securities fraud class action that settled for $4.5 million in cash. 129 F.3d at 1027. The Ninth Circuit held that it was an abuse of discretion for the district court to determine fees based on the $10,000 in claims submitted by class members. *Id.* But the Court's finding was not addressing whether district courts should value settlements based on potential or actual benefits. *Id. Williams* was not a Rule 23(e) fairness inquiry (no class member objected to the settlement), but involved a dispute between defendants and plaintiffs over a fee request. *Id.* While defendants can be held "responsibl[e]" for the terms embodied in the settlement agreement, absent class members cannot. *Id.* If *Williams* stood for the broader proposition that hypothetical recovery dictates settlement fairness, then *Allen* would also have come out differently.

Finally, the district court also suggested that the $982,500 fee award might be appropriate on the basis of lodestar analysis alone. ER9 ("Looking to the lodestar for counsel's hours on the case, the amount sought is both lower than the lodestar and proportionate to the benefit obtained for the class."). But lodestar cannot justify fees disproportionate to the class recovery. "Plaintiffs attorneys don't get paid simply for working; they get paid for obtaining results." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1182 (9th Cir. 2013)); *Redman*, 768 F.3d at 633, 635 ("the reasonableness of a fee cannot be assessed in isolation from what it buys"; "hours can't be given controlling weight in determining what share of the class action settlement pot should go to class counsel"). 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"); *HP Inkjet*, 716 F.3d at 1177 (same with multiplier of .32). The lodestar neither justifies the fee nor the settlement fairness.

This Court should reaffirm its holding in *Allen* that settlement valuation is to be based on fact, not fiction: the amount actually received by the class. Because the district court did otherwise in evaluating settlement fairness and the reasonableness of the fee request, it committed reversible error. As a matter of law, the settlement is unfair under Rule 23(e) and *Allen*.

III. The district court abused its discretion and erred as a matter of law by assigning value to the purported injunctive relief.

In approving the Settlement, the district court erred by accepting Kumar's assertion that the injunctive relief set forth in the Settlement should be valued at millions of dollars. The injunction simply requires Salov to use the same labeling terminology that it adopted 16 months *prior* to Settlement: Salov may not use words to the effect of "Imported from Italy" for three years. *See* ER161. As the district court observed, revised labels that deleted the offending expression already had "started to appear on shelves in 'mid-2015.'" ER200. Under binding Ninth Circuit law, injunctive relief that does not obligate defendant "to do anything it was not already doing" has no real settlement value. *Koby*, 846 F.3d at 1079. The district court erred as a matter of law by failing to follow *Koby's* prohibition of assigning value to duplicative injunctive relief. Independently, even if it was not legal error to assign value to duplicative relief, the district court abused its discretion by failing to accurately quantify the injunctive relief. Only injunctive relief that can be accurately quantified may be included as part of the value of a common fund for determining fees. *See Staton*, 327 F.3d at 974. Here, the court relied on Kumar's expert who valued the injunctive relief based on forecasted sales data even though *actual* sales data was available—the only empirical analysis of that actual sales data showed no effect from the labeling change and thus no benefit to purchasers.

A. The district court failed to apply *Koby*.

In *Koby*, this Court reversed approval of a settlement like this one, where the district court erroneously assumed value to duplicative injunctive relief the defendant voluntarily undertook before the settlement. 846 F.3d at 1080. Yet the district court here did not cite or discuss *Koby*, even though Frank argued the case extensively. *See* ER87-88. In *Koby*, the parties settled an FDCPA class action relating to misleading voicemail messages sent by a debt collection company. 846 F.3d at 1074. The settlement included no cash relief for class members, only a *cy pres* award to a third party and an injunction requiring defendant "ARS to continue using, for a period of two years, the new voicemail message it had already adopted voluntarily back in August 2011." *Id.* at 1075. As in this Settlement, the defendant in *Koby* changed its practices *after* the suit was filed against it, but this chronology did not make the injunction any more valuable to class members. The injunctive relief was worthless because, among other things, it "d[id] not obligate ARS to do anything it was not already doing." *Id.* at 1080. This Court concluded that the defendant already "took that step for its own business reasons (presumably to avoid further litigation risk), not because of any court-or settlement-imposed obligation." *Id.* For this reason, the defendant was "unlikely to revert back to its old ways regardless of whether the settlement contained the stipulated injunction." *Id.* (citing *Crawford v. Equifax Payment Services, Inc.*, 201 F.3d 877, 882 (7th Cir. 2000)).

Disregarding *Koby*, the district court instead relied on Kumar's *non sequitur* response that "the Ninth Circuit continues to recognize a catalyst theory for entitlement to fees." ER9. In doing so, the district court elided the distinction between a prevailing party's entitlement to fees in fee-shifting actions, and the reasonableness of a class action settlement under Rule 23(e). The relevant question is not whether class counsel could hypothetically seek statutory fees (which is doubtful),[8] but whether the settlement is fair under Rule 23(e).

The district court's citations concerning catalyst theory do not imply that a class action settlement providing no new relief is fair, reasonable, or adequate. None of the cases involve settlements, let alone class actions settlements, which waive the rights of absent class members and therefore require judicial scrutiny. *See Graham v. DaimlerChrysler Corp.*, 101 P.3d 140, 156 (Cal. 2004) (allowing contested fee award where defendant's action rendered underlying complaint moot); *Klein v. City of Laguna Beach*, 810 F.3d 693, 695-96 (9th Cir. 2016) (finding activist plaintiff entitled to attorneys' fees as the "prevailing party" under 42 U.S.C. § 1988(b) in spite of winning only nominal damages); *Tipton-Whittingham v. City of Los Angeles*, 316 F.3d 1058, 1060 (9th Cir. 2003) (certifying question to California Supreme Court regarding sex discrimination plaintiffs' entitlement to fees for catalyzing a change in a defendant's behavior); *Mason v. City of Hoboken*, 951 A.2d 1017, 1033-34 (N.J. 2008) (declining to extend catalyst theory where litigation lacked a causal nexus with fulfillment of plaintiff's public records requests). The potential conflict between representatives, counsel, and absent class members simply does not exist in non-class civil rights litigation because absent parties are not required to waive their rights. Settlements that waive class damages claims are especially dissimilar to remediation won by public interest plaintiffs against uncooperative defendants. *Cf. Klein*, 810 F.3d 693.

[8] There is no record evidence that Kumar "engaged in a reasonable attempt to settle [her] dispute with the defendant prior to litigation," as is required to receive attorneys' fees under California catalyst theory. *Graham*, 101 P.3d at 144.

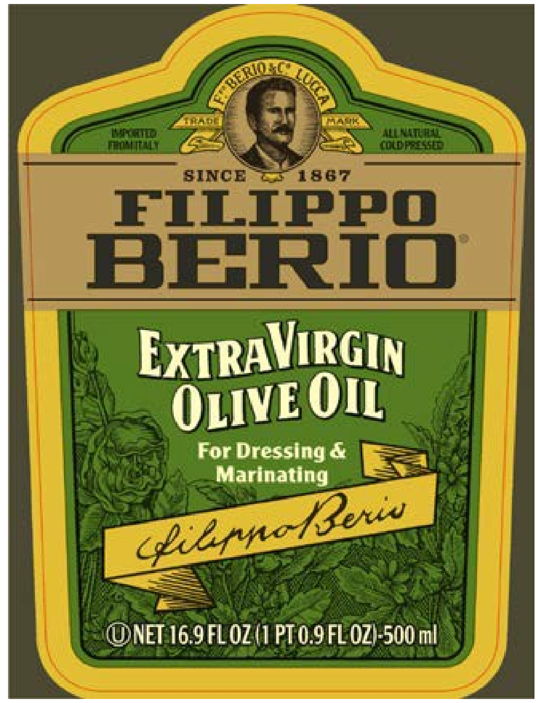
These holdings have no bearing on the question of whether a *class action settlement* binding absent class members is fair, reasonable, or adequate under Rule 23. Illusory and duplicative "relief" cannot provide fair consideration for the waiver of class members' claims. Even low-value claims for which class members are unlikely to file their own actions have litigation value in the class action context—as evidenced by the fact here that Salov settled them for about $1.2 million, of which class counsel took over four-fifths. "The fact that class members were required to give up anything at all in exchange for worthless injunctive relief precluded approval of the settlement as fair, reasonable, and adequate under Rule 23(e)(2)." *Koby*, 846 F.3d at 1081. *Koby* is not alone; courts routinely hold that voluntary pre-settlement changes, later duplicated in settlement do not count as a compensable class benefit. *In re Subway Footlong Sandwich Mkt'g and Sales Practices Litig.*, 869 F.3d 551, 556 (7th Cir. 2017) (comparing "state of affairs before and after the settlement" to find relief "utterly worthless"); *Pampers*, 724 F.3d at 719; *Staton*, 327 F.3d at 961. It is only the "*incremental* benefits" that count, not ones that preceded settlement. *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 286 (7th Cir. 2002) (emphasis in original).

The district court erred by holding that the injunction was valuable simply because the label change "occurred after this litigation was initiated, and that the old labeling could be revived absent Salov's agreement not to do so." Dkt. 173 at 8 (citing *Lane v. Facebook, Inc.*, 696 F.3d 811, 825 (9th Cir. 2012) and quoting in a parenthetical, "Even assuming Objectors' premise that Beacon was already effectively terminated, absent a judicially-enforceable agreement, Facebook would be free to revive the program whenever it wanted. It is thus false to say that Facebook's promise never to do so was illusory."). The settlement in *Lane* was affirmed by a divided panel on the basis of substantial $9.5 million *cy pres* relief such that the value of the injunction was "of little moment." *Lane*, 696 F.3d at 825. No such value to the class exists in this Settlement, where a paltry $210,985 reaches class members compared to over *four times* as much in attorneys' fees. *See Koby*, 846 F.3d at 1080 (reversing approval of settlement with $35,000 *cy pres* payment and $67,500 attorneys' fees that did not obligate defendant "to do anything it was not already doing"). Furthermore, the district court's analysis is based on a false premise: the injunction in *Lane* actually changed defendant's conduct because the injunction terminated Facebook's "opt-in" version of the disputed service. 696 F.3d at 828.

In contrast, the defendant here voluntarily changed its label over a year *prior* to settlement. ER200. Under similar facts, this Court concluded that the defendant already "took that step for its own business reasons (presumably to avoid further litigation risk), not because of any court- or settlement-imposed obligation." *Koby*, 846 F.3d at 1080. For this reason, Salov was "unlikely to revert back to its old ways regardless of whether the settlement contained the stipulated injunction." *Id.* (citing *Crawford*, 201 F.3d at 882).

The conclusion is especially justified here where the CEO for Salov swore that he "***decided to remove the phrase 'Imported from Italy' prior to this lawsuit*** because of a lawsuit filed against one of [Salov's] smaller 'mom and pop' retailers in the Superior Court of D.C. … I did not want [Salov] or retailers of Filippo Berio to face the risk of any additional spurious lawsuits for a phrase that served no discernible purpose." ER334 (emphasis added). As he explained, the words "from Italy" were virtually illegible anyway and did not help "distinguish our product from other olive oils on store shelves." *Id.*; *see also* last version of label that used "Imported From Italy" (right), reproduced from ER332. There is no evidence in the record disputing this assertion.

The district court erred by finding that the duplicative injunction was worth millions of dollars in spite of *Koby* and common sense.



B. The court erred in assigning any value to the injunctive relief because Kumar's expert's methodology predicted a price reduction based on his own forecasting when actual sales data showed no price drop, and, if anything, there was a slight increase.

The injunction merely duplicates voluntary, pre-settlement action by the defendant and is therefore valueless as a matter of law under *Koby*. Even if one assumes that the removal of two words from Berio labels was a direct product of the Settlement, however, it was error to assign *any* value to the injunctive relief, much less millions of dollars of value.

Courts appropriately exercise skepticism concerning the value of injunctive relief in class-action settlements. *See, e.g., Staton*, 327 F.3d at 974. This is because the settling parties have powerful incentives to exaggerate the value of injunctive relief. Through settlement, defendants hope to obtain global peace at the lowest possible price. The "economic reality is that a settling defendant is concerned only with its total liability." *Pampers*, 724 F.3d at 717 (cleaned up); *accord Staton*, 327 F.3d at 964. Meanwhile, class counsel is in the position of negotiating on behalf of themselves *and* the class. Thus, defendants may gladly capitulate to a meaningless injunction to avoid paying damages, while class counsel has an incentive to exaggerate the value of this relief in order to secure attorneys' fees.

Due to the diverging interests of class and counsel, this Court requires that the relief be proportional to attorneys' fees. *See Allen*, 787 F.3d at 1224 n.4 (zeroing in on the "economic reality" of payment to class under settlement). Class counsel is entitled to fees only in proportion to the actual relief created by the settlement. *See Reynolds*, 288 F.3d at 286 ("class counsel's compensation must be proportioned to the *incremental* benefits they confer on the class, not the total benefits.") (emphasis in original). And because the parties can easily manipulate the value of the injunctive relief, this Court permits district courts to include injunctive relief in the common fund for purposes of calculating fees "only in the unusual instance where the value to individual class members of benefits deriving from injunctive relief can be accurately ascertained." *Staton*, 327 F.3d at 974.

The district court here never quantified the injunctive relief, but only speculated that the injunction was worth "some value" based on the declaration of Colin B. Weir, Kumar's expert. ER15. The district court hedged: "For example, if the valuation of the injunctive relief were decreased to only 20% of the estimate provided by Kumar's expert, … [t]he fee award would represent of 16.9%." ER15.[9] But assigning *any* value to the injunctive relief would have been error based on the record.

Weir, Kumar's expert, hypothesized that removal of the words "Imported from Italy" would cause retail prices of Berio to drop even though wholesale prices remain unchanged. *See* ER136; ER42. Weir predicted that consumers would pay $19.91 million less than what they would have paid in the absence of the changes. ER42. There are numerous faults with this declaration, the chief being that **there was no need for Weir to *predict* a price reduction because Weir possessed actual sales data**. Through third-party discovery, the settling parties obtained actual retail prices for Berio and other olive oils sold by California grocery stores through February 21, 2016—six months *after* Salov removed "Imported from Italy" from Berio's label. *See* ER277. Kumar declined to disclose this data to the class, and at counsel's direction, Weir did not analyze it. *See* ER358. Rather than analyzing actual sales prices, Weir's valuation instead uses a regression of numerous olive oil brands through May 2015 to supposedly *predict* a price premium associated with the words "Imported from Italy," then multiplies future sales by the hypothetical price premium, **without checking his predictions against *actual* data available to him**. ER50.

Because Weir refused to test his hypothesis with actual data, the injunctive relief should not have been assigned any value. In *Pearson*, the Seventh Circuit affirmed the district court's finding that the injunctive relief—labeling changes on glucosamine

[9] The district court also found that if the injunctive relief was worth $0, fees would be under 25%. ER15. But using the district court's equation, fees would remain an excessive 59.7%. *See supra* at 28.

supplements—had no value. 772 F.3d at 785, 786. The "expert's estimate was a wild guess as to how much Rexall would have to cut the price of its pills in order to hold on to consumers." *Id.* at 786. The court criticized the expert report as an "arbitrary forecast" because the expert "did not attempt **to test the effect of labeling changes**, similar to those required by the settlement, on consumers." *Id.* (emphasis added). Similarly, the Third Circuit reversed a jury verdict where an expert's testimony was "based on prior predictions of sales for a given period when actual performance data for that same time span [was] available." *Advent Sys. Ltd. v. Unisys Corp.,* 925 F.2d 670, 682 (3d Cir. 1991). "There is hardly anything, not palpably absurd on its face, that cannot now be proved by some so-called 'experts.'" *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 382 (7th Cir. 1986) (reversing jury award where expert's testimony predicting lost profits bore no relation "to economic reality").

Moreover, the only analysis on the record of the actual sales data shows that there was *no price drop*, as Weir's methodology predicted, but if anything there was a slight price *increase*. ER341. Salov's expert, Dr. Keith R. Ugone, criticized Weir's failure to examine any sales data after the label change. *See* ER300-03. Weir could easily prove his "price premium" hypothesis by analyzing whether the price to consumers actually dropped after September 2015. *See* ER301. Dr. Ugone conducted this analysis and determined that retail prices for Berio did *not* decline after the change. ER303. Thus, the only expert to analyze actual sales data after the label change found that it provides *no savings* to consumers and the value of the injunction to class members is $0.

Weir's criticism of Dr. Ugone only undermines Weir's own analysis. Weir complained that Dr. Ugone's "before and after" analysis did not include adequate controls including, *inter alia*, advertising. ER231. But Weir's analysis also failed to control for advertising and therefore was defective under Weir's own standards. ER323 (Ugone criticizing Weir's analysis for failure to control for advertising expenses). More important, Weir admitted that a "before-and-after" comparison of the actual data *could* be properly controlled. ER47-48.[10] One should draw the adverse inference: Weir did not submit the before-and-after comparison because his predicted price premium cannot be verified with actual sales data. "[C]ourts have consistently excluded expert testimony that 'cherry-picks' relevant data." *E.E.O.C. v. Freeman*, 778 F.3d 463, 469 (4th Cir. 2015).

Weir excuses the inconsistency by arguing that if overall market prices were rising, "even if the shelf price remained constant, it may have been higher absent the label change." ER51-52. But this speculation was not supported by his methodology or his model; again, Weir failed to test his explanation with the actual data available to him: did other olive oil prices rise faster than Salov's? Simply propounding a hypothesis without testing it is not scientific. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593 (1993) ("Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry.") (cleaned up).

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[10] Weir argues that the "factors that need to be controlled for in a 'Before-and-After' analysis differ from those in a hedonic regression, as these are distinct methodologies with different mechanisms and data requirements." ER48 n.21. Weir offers no scientific authority or explanation for this conclusory statement.

The district court did not address any of Frank's arguments regarding Kumar's self-serving expert report, nor even demonstrate awareness of Frank's argument. ER10. Failure to exercise discretion over a non-frivolous objection is itself an abuse of discretion, and the district court should be reversed for this independent reason. *See Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012) ("To survive appellate review, the district court . . . must give 'a reasoned response' to all non-frivolous objections") (internal quotation marks omitted); *cf. In re American Medical Sys.*, 75 F.3d 1069, 1087 (6th Cir. 1996) (granting writ of mandamus to decertify class because, *inter alia*, district court failed "to make any genuine findings on any of the elements of Rule 23" and "failed to exercise properly his broad discretion within the framework of Rule 23").

The district court abused its discretion in assigning any value to the injunctive relief based on the untested, unfalsifiable predictions of Kumar's expert without considering Frank's objection and the empirical work of Dr. Ugone, which shows the label change was valueless. Further, Weir's report and valuation were premised on ignoring *Koby* and assumed value to the class despite *Koby's* prohibition of valuing duplicative injunctive relief. 846 F.3d at 1079; *see also Staton*, 327 F.3d at 973 (finding error for valuing injunctive relief that included steps defendant took prior to settlement). Without the false premise, there is no basis for Weir's conclusion, and no basis for the district court to rely upon it at all—or even to discount it 80% rather than 100%. These errors independently require reversal, though this Court need not reach it given the combination of *Koby* and *Allen*.

Conclusion

This settlement should not have been approved under *Allen, Pearson*, and *Koby*. Settlement approval must be reversed, and the parties must renegotiate with a settlement that does not pay class counsel four times what the class will receive.

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Respectfully submitted,

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Statement of Related Cases
Under Circuit Rule 28-2.6

In re EasySaver Rewards Litigation, No. 16-56307, raises the similar issue of whether class action settlements should be valued based on actual class benefits.

Executed on November 20, 2017. *<u>/s/Melissa A. Holyoak</u>*
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Certificate of Compliance
Pursuant to 9th Circuit Rule 32-1 for Case Number 17-16405

I certify that: This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 12,209 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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I hereby certify that on November 20, 2017, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

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