No. 14-13882-FF
Multi-Appeal Nos. 14-14165-FF, 14-14170-FF, 14-14221-FF and 14-14272-FF

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CHRISTOPHER BATMAN, *et al.*,

Appellants,

v.

THE GILLETTE CO. *et al.*,

Appellees.

On Appeal from the United States District Court
For the Middle District of Florida, No. 6:12-cv-00803

Reply Brief of Appellants Theodore H. Frank, Robert Falkner, and Christopher Batman

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Table of Contents

Table of Contents i

Table of Authorities iii

Reply Statement of Subject Matter and Appellate Jurisdiction x

I. Appellees do not dispute that this settlement provides preferential treatment to class counsel 1

II. All rationalizations for the settlement's misallocation fall short 5

A. The low value, rigidly-capped claims process was not the only feasible way to remit settlement value to class members. 9

B. Illusory injunctive relief does not justify the disproportion. 13

C. As a matter of law, a windfall in a settlement compromise depends on the allegations of the complaint, not the parties' *ex post* rationalizations for the settlement amount. 15

III. The *cy pres* provision is invalid and requires reversal. 19

IV. Clear-sailing and fee-segregation are objective red flags of an inequitable deal. 23

Conclusion 26

Certificate of Compliance with 11th Cir. R. 28-1(m) 28

Proof of Service 29

Table of Authorities

Cases

In re Aqua Dots Prods. Liab. Litig.,

654 F.3d 748 (7th Cir. 2011) 8

AT&T Mobility, LLC, v. NASCAR, Inc.,

494 F.3d 1356 (11th Cir. 2007)..xi

In re Baby Prods. Antitrust Litig.,

708 F.3d 163 (3d Cir. 2013) 6, 11, 15

In re BankAmerica Corp. Sec. Litig.,

__F.3d__, 2015 U.S. App. LEXIS 306 (8th Cir. Jan. 8, 2015) 17, 19-20, 21

In re Bayer Corp. Combination Aspirin Prods. Mktg. and Sales Practices Litig.,

No. 09-md-2023, 2012 U.S. Dist. LEXIS 143955

(E.D.N.Y. Oct. 2, 2012) 9-11

Bennett v. Behring Corp.,

737 F.2d 982 (11th Cir. 1984)... 1, 5

In re Bluetooth Headset Prods. Liab. Litig.,

654 F.3d 935 (9th Cir. 2011)...4, 17, 23

Boeing v. Van Gemert,

444 U.S. 472 (1980) 4-5

Buckhannon Bd. & Care Home v. W. Va. Dep't of Health and Human Res.,

532 U.S. 598 (2001) 13

Churchill Vill., LL.C. v. Gen. Elec.,

361 F.3d 566 (9th Cir. 2004) x

Crawford v. Equifax Payment Services, Inc.

201 F.3d 877 (7th Cir. 2000) ....xii, 16-17

In re Currency Conversion Fee Antitrust Litig., 264 F.R.D. 100 (S.D.N.Y. 2010) 15

Day v. Persels & Assocs., LLC,

729 F.3d 1309 (11th Cir. 2013) x

In re Deepwater Horizon,

744 F.3d 370 (5th Cir. 2014) 18

Dennis v. Kellogg,

697 F.3d 858 (9th Cir. 2012) 21

Devlin v. Scardelletti,

536 U.S. 1 (2002) .... x-xii

In re Diet Drugs Prods. Liab. Litig.,

582 F.3d 524 (3d Cir. 2009) 15

In re Domestic Air Transp. Antitrust Litig.,

1:90-cv-2485, 1994 U.S. Dist. LEXIS 20451 (N.D. Ga. Nov. 2, 1994) 15

**In re Dry Max Pampers Litig.*,

724 F.3d 713 (6th Cir. 2013) .... *passim*

Eubank v. Pella Corp.,

753 F.3d 718 (7th Cir. 2014) .... x, 16

Fidel v. Farley,

534 F.3d 508 (6th Cir. 2008) x

In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.,

55 F.3d 768 (3d Cir. 1995) 15-16, 17

In re Integra Realty Res., Inc.,

354 F.3d 1246 (10th Cir. 2004) x

Klier v. Elf Atochem N. Am., Inc.,

658 F.3d 468 (5th Cir. 2011) 19

Leverso v. Southtrust Bank,

18 F.3d 1527 (11th Cir. 1994) 1

In re Linerboard Antitrust Litig.,

321 F. Supp. 2d 619 (E.D. Pa. 2004) 15

McDonough v. Toys "R" Us, Inc.,

No. 06-cv-00242, 2015 U.S. Dist. LEXIS 7510 (E.D. Pa., Jan. 21, 2015) 6, 12

McNair v. Synapse Group Inc.,

672 F.3d 213 (3d Cir. 2012) 8

Murray v. GMAC Mortg. Co.,

434 F.3d 948 (7th Cir. 2006) 7

Nachshin v. AOL, LLC.,

663 F.3d 1034 (9th Cir. 2011) 22

Nelson v. Mead Johnson & Johnson Co.,

484 Fed. Appx. 429 (11th Cir. 2012) 24

Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund,

582 F.3d 30 (1st Cir. 2009)...x

**Pearson v. NBTY, Inc.*,

772 F.3d 778 (7th Cir. 2014) ....*passim*

Perdue v. Kenny A.,

559 U.S. 542, 130 S. Ct. 1662 (2010) 7

Piambino v. Bailey.,

610 F.2d 1306 (5th Cir. 1980) xii

**Piambino v. Bailey*,

757 F.2d 1112 (11th Cir. 1985) 3, 8, 11

Redman v. RadioShack Corp.,

768 F.3d 622 (7th Cir. 2014) 3, 23

Stewart v. Rubin,

948 F. Supp. 1077 (D.D.C. 1996) 15

True v. Am. Honda Motor Co.,

749 F. Supp. 2d 1052 (C.D. Cal. 2010) 14

United States v. Rivera,

944 F.2d 1563 (11th Cir. 1991) 12

Vought v. Bank of Am.,

901 F. Supp. 2d 1071 (C.D Ill. 2012) 25

Waters v. Int'l Precious Metals Corp.,

190 F.3d 1291 (11th Cir. 1999) 4-5

Rules and Statutes

15 U.S.C. § 77z-1(a)6) 5-6

28 U.S.C. § 1712(a) 6

Fed. R. Civ. P. 11 18

Fed. R. Civ. P. 23(a) 2

Fed. R. Civ. P. 23(b)(1) xi

Fed. R. Civ. P. 23(b)(3) .... x, xi

Fed. R. Civ. P. 23(e) ....*passim*

Fed. R. Civ. P. 23(g) 2

Other Authorities

American Law Institute,

Principles of the Law of Aggregate Litig. § 3.07 (2010).. 19

Frank, Theodore H.,

Cy Pres Settlements, CLASS ACTION WATCH (Mar. 2008) 22

Frank, Theodore H.,

Statement before the House Judiciary Committee Subcommittee on the Constitution and Civil Justice, *Examination of Litigation Abuse* (Mar. 13, 2013) 22

Frankel, Allison,

Legal Activist Ted Frank Cries Conflict of Interest, Forces O'Melveny and Grant & Eisenhofer to Modify Apple Securities Class Action Deal,

AMERICAN LAWYER LITIGATION DAILY (Nov. 30, 2010) 22

Issacharoff, Samuel,

Class Action Conflicts,

30 U.C. DAVIS L. REV. 805 (1997) 16

Koppel, Nathan,

Proposed Facebook Settlement Comes Under Fire,

WALL STREET JOURNAL (Mar. 2, 2010) 22

Liptak, Adam,

Doling Out Other People's Money,

N.Y. TIMES (Nov. 26, 2007) 22

Perino, Michael A.,

Did the Private Securities Litigation Reform Act Work?,

2003 U. ILL. L. REV. 913 (2003) 6

Sale, Hillary A.,

Judges Who Settle, 89 WASH. U. L. REV. 377 (2011) 16

Reply Statement of Subject Matter and Appellate Jurisdiction

P&G argues that *Devlin v. Scardelletti*[1] applies only to mandatory class settlements, and not to Rule 23(b)(3) class action settlements with opt-out rights, and thus appellants are not "parties" with a right to appeal in the absence of formal intervention. DB3-5.[2] Every federal court of appeals to explicitly consider and rule on the question has held otherwise. *Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund*, 582 F.3d 30, 39-40 (1st Cir. 2009); *Fidel v. Farley*, 534 F.3d 508, 512-13 (6th Cir. 2008); *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 572-73 (9th Cir. 2004); *In re Integra Realty Res., Inc.*, 354 F.3d 1246, 1257 (10th Cir. 2004). These decisions are correct: "*Devlin*, after all, is about party status and one who could cease to be a party is still a party until opting out." *Nat'l Ass'n of Chain Drug Stores*, 582 F.3d at 40. Thus *Eubank v. Pella Corp.* called a standing argument in a (b)(3) appeal "frivolous," disposing of it without discussion. 753 F.3d 718, 729 (7th Cir. 2014).

As P&G acknowledges, this Court has entertained appeals in other (b)(3) cases from non-intervening objecting class members. *E.g., Day v. Persels & Assocs., LLC*, 729 F.3d 1309 (11th Cir. 2013). But contrary to P&G's assertion that "those decisions carry no weight on this issue because the Court did not address the standing issue," *Day* dealt with the scope of *Devlin* at length in the course of resolving a challenge to the jurisdiction of a magistrate judge to bind absent class members. 729 F.3d at 1319-

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[1] 536 U.S. 1, 122 S. Ct. 2005 (2002).

[2] OB, PB, and DB refer to Appellants' Opening Brief, Plaintiffs' Brief, and Defendants' Brief respectively.

21. And even in such cases where this Court did not explicitly address standing, this Court's responsibility to supervise its own jurisdiction entails a sub silentio ruling that carries weight. *E.g., AT&T Mobility, LLC v. NASCAR, Inc.*, 494 F.3d 1356, 1359-60 (11th Cir. 2007).

While *Devlin* mentioned the lack of an opt out in a (b)(1) as a "particular[]" reason to permit appellate standing, that was only one of several reasons given by the Court for its ruling, and the others are equally applicable to (b)(3) actions. *Devlin*, 536 U.S. at 11, 6-14, 122 S. Ct. at 2009-13. The animating principle undergirding *Devlin* is that absent class members have a justiciable stake by virtue of having their claims released as part of the settlement. *Id.*, 536 U.S. at 6-7, 122 S. Ct. at 2009. Regardless of whether class members are given the opportunity to opt out, releases in mandatory and non-mandatory settlements operate the same way, binding class members, extinguishing their rights of action. Releasing such claims notwithstanding a class member's disapproval, as expressed through objection, constitutes an injury-in-fact. "It is this feature of class action litigation that requires that class members be allowed to appeal the approval of a settlement when they have objected at the fairness hearing." *Devlin*, 536 U.S. at 10, 122 S. Ct. at 2011. "Just as class action procedure allows nonnamed class members to object to a settlement at the fairness hearing without first intervening, it should similarly allow them to appeal the District Court's decision to disregard their objections." *Devlin*, 536 U.S. at 14, 122 S. Ct. at 2013 (internal citation omitted).

Defendants' reading of *Devlin* is unnaturally cramped, would create a previously non-existent circuit split with five sister circuits, and would lead to the "additional layer of complexity" that *Devlin* explicitly rejected. *Id.* Ironically, the Supreme Court granted review in *Devlin* to resolve an identical such split, involving mostly (b)(3) decisions. 536 U.S. at 6, 122 S. Ct. at 2009 (cataloguing cases). Appellants have standing to prosecute an appeal of a settlement that paid class counsel $5,680,000 but only $344,850 to seven million class members without a superfluous motion to intervene that the district court would have been obligated to grant as a matter of law. *E.g., Crawford v. Equifax Payment Services, Inc.,* 201 F.3d 877, 881 (7th Cir. 2000); *cf. also Piambino v. Bailey*, 610 F.2d 1306, 1324-27 (5th Cir. 1980).

I. Appellees do not dispute that this settlement provides preferential treatment to class counsel.

Frank's appeal poses a simple question: is it permissible under Rule 23(e) for class counsel to negotiate a settlement that provides "preferential treatment" for class counsel relative to the class? OB9-10; OB13-24. The appellees do not dispute that this settlement—which pays $5,680,000 to class counsel, but $344,850 to the class—provides "preferential treatment" to class counsel; indeed, the words "preferential treatment" never appear in their briefs. Such an allocation is *per se* unfair under *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014) and *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013) ("*Pampers*").

While plaintiffs assert that allocational fairness is the "heart of the *Bennett* test" (PB11),[3] this is simply false: not a single one of the six factors in the *Bennett* test has a district court questions the allocation of the settlement between class counsel and the class. The six factors simply ask whether the total settlement is adequate. And nothing in *Bennett* implies that its six factors are the only ones a court should consider. Adequacy is certainly *necessary* for a settlement to be approved, but it is not sufficient.[4]

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[3] *Bennett v. Behring Corp.*, 737 F.2d 982 (11th Cir. 1984).

[4] Plaintiffs invent a straw man when they assert that objectors argue reliance on the *Bennett* factors requires reversal. PB10. The error is not relying on *Bennett,* it was *solely* relying on *Bennett* to the exclusion of other factors. OB23-24. *Leverso v. Southtrust Bank* is just one instantiation of the principle that there are reasons beyond the *Bennett* factors for rejecting a settlement. 18 F.3d 1527, 1530-31 (11th Cir. 1994). *Piambino v. Bailey* is another example, reversing a settlement approval without even mentioning *Bennett*. 757 F.2d 1112 (11th Cir. 1985). No appellate court views its multi-factor test

Rule 23(e) requires a settlement to be not just adequate, but also fair. Those are two separate questions. Appellees attempt to conflate the two by devoting thousands of words to the question of settlement adequacy—even though Frank expressly stated that this appeal does not challenge class counsel's entitlement to settle for $12 million total value. The issue here is that Rule 23(e)'s fairness requirement and the Rule 23(a) and (g) adequacy requirements do not permit class counsel to structure a $12 million settlement so that they receive "preferential treatment" of $5,680,000 in fees while less than 3% of the settlement benefit ($344,850) goes to class members, and it is this issue that the appellees try to sidestep.

For example, appellees argue that settlement approval should be affirmed because the settlement "fully" compensated the class. *E.g.*, DB2; DB19; DB23; PB12-13 ("reasonable approximation of their estimated damages"). But the premise is false: the settlement paid seven million class members $344,850, or about $0.05 a class member, with over 99% of the class receiving nothing. OB6. That the small percentage of the class that made claims may receive adequate or even "full" payments does not make a settlement fair. *Pampers* offered full cash refunds to class members;[5] the average claimant in *Pearson* received an augmented average award of

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for adequacy as the exclusive means of evaluating a settlement, and appellees cite no authority otherwise.

[5] Appellees both affirmatively misrepresent this case, and claim it was a coupon case, when in fact every *Pampers* class member was entitled to a full cash refund upon satisfying the claims-made process. *Compare* DB24 *and* PB13 *with* 724 F.3d at 716.

over $28;[6] and *Redman v. RadioShack Corp.* reversed for disproportionate unfairness even though the court expressly rejected another objector's argument that the settlement amount was too low. 768 F.3d 622, 632, 639 (7th Cir. 2014). Neither appellee even mentions *Redman*.

Plaintiffs complain that Frank cites these thoroughly reasoned out-of-circuit authorities "but do[es] not cite any Eleventh Circuit cases adopting or echoing their reasoning or analysis." PB24-25. Not so: the Sixth and Seventh Circuit's prohibition on "preferential treatment" for class counsel is a natural extension of *Piambino v. Bailey*, which warned against the "sharp professional practice" of attorneys "us[ing] the class action procedure for their personal aggrandizement." 757 F.2d 1112, 1144 (11th Cir. 1985) (internal quotations and citation omitted); *see also* OB10 (citing other cases). *Piambino* criticized class counsel for breaching its fiduciary duty by leaving a minority of the class in the cold; here, class counsel left over 99% of the class uncompensated. Frank's brief cited and quoted *Piambino* repeatedly, but appellees do not mention it once in over 25,000 words. And appellees do not cite any Eleventh Circuit (or indeed

[6] 772 F.3d at 780 ($865,264 / 30,245 class members = $28.60). Again, plaintiffs misrepresent *Pearson*, and incorrectly argue it was distinguishable because it "provid[ed] $3 per bottle of glucosamine supplements although product retailed for up to seven times that amount." PB13. $3 was the minimum claim only if more than 666,666 class members made claims, rather than the 30,245 who did. *Pearson* reversed not because of the $3 payment, but because the fee award amounted to 69% of the net settlement, and if granted as requested, would have amounted to 84% of it. 772 F.3d at 781; *see also id.* at 784 (suggesting alternative possibility of direct payments of $3 to ascertainable class members). In all respects, that is a superior settlement to the 95% ratio here.

any published appellate) cases **rejecting** *Pearson* or *Pampers* or *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011): nor can they, as this is a case of first impression in this Circuit.

As Frank predicted in his opening brief (OB17-19), plaintiffs rely on *Boeing v. Van Gemert*[7] and *Waters v. Int'l Precious Metals Corp.*[8] But they never address the problem that those cases are solely about an attorneys' fees dispute between class counsel and defendants, while Frank is an objecting class member challenging allocational fairness between attorneys and the class under Rule 23(e). Plaintiffs do not identify a single published appellate decision that extends *Boeing* and *Waters* to a Rule 23(e) challenge where class counsel receives more than ten times as much as the plaintiffs. If plaintiffs' interpretation of *Boeing* was correct, then *Pampers* (where tens of millions of dollars of cash refunds were "available" to the class) and *Pearson* (where $14.2 million was "available" if 4.7 million class members with individualized notice each made a claim) were wrongly decided. *Pearson* expressly rejected the application of *Boeing* to a Rule 23(e) fairness inquiry, 772 F.3d at 782, and this Court should, too.

In his opening brief, Frank demonstrated that appellees' proposed application of *Boeing* and *Waters* leads to absurd results. OB20-22. P&G does not dispute, or even mention, this argument. Plaintiffs do: they concede that the hypothetical Acme settlement is not fair by any stretch of the imagination. PB15-16. But plaintiffs do not

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[7] 444 U.S. 472, 100 S. Ct. 745 (1980).

[8] 190 F.3d 1291 (11th Cir. 1999), *cert. denied*, 530 U.S. 1223, 120 S. Ct. 1237 (2000).

provide any reason for rejecting the settlement that is consistent with their arguments for affirming this abusive settlement. The hypothetical Acme settlement satisfies all six *Bennett* factors; under plaintiffs' interpretation of *Boeing* and *Waters*, the fact that there is $200 million "available" to the class under the hypothetical Acme settlement makes it adequate, fully compensates the claimant class members, and should end the inquiry. Plaintiffs' concession that a court should not approve the hypothetical Acme settlement is a concession that the *actual* payments to the class matter, not just the six *Bennett* adequacy factors and the total hypothetical amount available. That concession is fatal to the settlement approval.

II. All rationalizations for the settlement's misallocation fall short.

Appellees resort to the assertion that it was impossible to pay the class more than $344,850, and it was this settlement or nothing. PB14-15; DB40.

Plaintiffs suggest that they would not be able to bring a class action if they actually had to ensure their clients received benefits and they must be permitted a 1647% contingency fee to ensure that class members receive the value of "deterrence." PB9; PB18-19. But their only support for this is the *ipse dixit* of a law-review comment that itself presents no empirical data or evidence. As plaintiffs note, "a law-review article is not law" (PB37), and a student note is certainly not evidence.

There are multiple reasons to believe that the plaintiffs' policy argument is wrong. *First*, the PSLRA (Private Securities Litigation Reform Act) provides a case study. Passed in 1995, the Act, among other things, limited "total attorneys' fees and expenses" to "a reasonable percentage of the amount of any damages and prejudgment interest *actually* paid to the class." 15 U.S.C. § 77z-1(a)(6) (emphasis added). This statute abrogated *Boeing* for calculation of fees. If plaintiffs' theory were correct, then this statute should have eradicated securities class actions as we know them. But it did no such thing; they are thriving now more than ever. Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. ILL. L. REV. 913 (2003). Too, the Class Action Fairness Act of 2005's requirement that fees for coupon settlements be awarded based on the value of coupons redeemed rather than available, 28 U.S.C. § 1712(a), has not ended the consumer class action.

Similarly, if plaintiffs were correct that Frank's demand that the "preferential treatment" rule be enforced would preclude class actions, class counsel would have slunk away after the Third Circuit overturned the settlement approval in *In re Baby Products Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013) on the exact grounds Frank complains about here. Instead, they did what appellees claim is impossible here: ascertained class members to provide direct payment, increasing class recovery to more than another million class members by nearly $15 million. *McDonough v. Toys "R" US, Inc.*, No. 06-cv-00242, 2015 U.S. Dist. LEXIS 7510, at *112, *136 (E.D. Pa. Jan. 21, 2015).

Second, when plaintiffs win a litigated victory, any number of state and federal substantive statutes would entitle them to fee shifting and a full measure of attorneys' fees. A ruling that fee stipulations at settlement must be commensurate with actual benefit to class members will simply push plaintiffs attorneys to fight harder for their clients. If defendants will not agree to valuable relief for class members, then plaintiffs' attorneys will be incentivized to actually litigate the case—if the case is meritorious.

And if the case is not meritorious, it is hardly a social cost if courts give class counsel the incentive to prefer to bring class actions that are meritorious over those that are unlikely to succeed at trial and must be settled for a tiny fraction of their claimed damages. Here, class members receive $0.05 on average in compromise of their claims, while class counsel compromises not at all and receives a multiple of their lodestar, without anything resembling "extraordinary" results. *Cf. Perdue v. Kenny A.*, 559 U.S. 542, 130 S. Ct. 1662 (2010); *cf. also Murray v. GMAC Mortg. Co.*, 434 F.3d 948, 952 (7th Cir. 2006) (settlement for a penny on the dollar suggests either class counsel is selling out the class or brought a frivolous suit that should have been dismissed). Why would any class counsel bother to fully prosecute a meritorious case if they can get more than fully paid no matter how meager the actual results to the class? The incentive then is to go after deep pockets rather than wrongdoers, and that *reduces* deterrence, rather than increases it.

As happened in *Pearson* (772 F.3d at 782-83), class counsel may not *want* to provide recovery to class members: after all, if P&G only values the risk of this litigation at $12 million, then actually paying the class a proportional share of the proceeds would preclude class counsel from receiving the $5,680,000 they wish to pay themselves. Plaintiffs' public-policy argument relies upon Professor Brian Fitzpatrick's assertion that the only beneficiaries of class actions should be the attorneys (PB49-50), but this contradicts the Eleventh Circuit's recognition that under Rule 23, class counsel "voluntarily accepted a fiduciary obligation towards the members of the putative class they undertook to represent." *Piambino*, 757 F.2d at 1144 (brackets, quotation, and citation omitted). Class counsel's complaint is with their ethical duty to their clients, not with Frank's seeking to enforce that duty.

Moreover, plaintiffs' argument proves too much. *All* consumers, not just class members, have an interest in "deterrence," even if one assumes that bringing low-merit cases that settle for a tiny fraction of damages improves rather than damages deterrence. Yet a random consumer could not bring an action against P&G over misrepresentations in the absence of redressable injury from the misrepresentation: such remote benefits of Rule 23 class actions do not override the constitutional requirements of Article III standing. *McNair v. Synapse Group Inc.*, 672 F.3d 213 (3d Cir. 2012). And it is further questionable that even a class representative with injury has any right under Rule 23(a) to bring a class action that has no chance of benefiting the class. *In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011); OB24 n.10. Rule 23 is a procedural joinder device with real *clients*, not a substantive expansion of law deputizing attorneys to act as bounty hunters for their own personal benefit without regard for their duties to the class. OB45.

In any event, this Court need not concern itself with plaintiffs' parade of horrors. The argument relies on the premise that it is not "practical" to actually pay class members in this case, but that premise is contradicted by the only record evidence on the subject and by the experience of class actions in other "ubiquitous" consumer products such as Bayer aspirin.

A. The low value, rigidly-capped claims process was not the only feasible way to remit settlement value to class members.

The district court found that it was not "practical" to make individualized payments other than through a claims-made process; this was clear error. OB24-31. Appellees do not dispute that they introduced no record evidence in support of this proposition. (Plaintiffs, in their statement of facts, assert that there was "no evidence" that any identification was possible. PB8. Their only record citation for this, Dkt. 181 at 36, shows exactly the opposite.) Appellees do not dispute that other class action settlements have successfully ascertained class members. Indeed, appellees each attempt to distinguish *Pearson* by arguing that case involved "burdensome notice" that showed an attempt to "minimize the number of claims." DB23; PB54. But *Pearson* had *better* notice than the settlement here: the *Pearson* parties did what the parties here claim was impossible, and obtained the identities of 4.7 million class members from third-party vendors, and then provided them with individualized postcard notice. 772 F.3d at 784 (defendant obtained data on class members from "pharmacy loyalty programs and the like").

P&G concedes that there was not any evidence to support the district court's finding, but argues that there was "no dispute that retailers for Duracell batteries are ubiquitous around the country, and that any attempt to subpoena records from these retailers would be enormously expensive." DB40. But there is a dispute. Below and here, Frank relied upon *In re Bayer Corp. Combination Aspirin Prods. Mktg. and Sales Practices Litig.*, No. 09-md-2023, 2012 U.S. Dist. LEXIS 143955 (E.D.N.Y. Oct. 2, 2012), which involved inexpensive Bayer aspirin, but the parties were able to obtain ascertainable consumer information to make direct payments to the class. There is no record evidence that Duracell batteries are more ubiquitous than Bayer aspirin, or that it would be more expensive or impractical for Florida attorneys to obtain this information than for New York attorneys to do so—and the attorneys' fee request in *Bayer* was lower than the fee request here.

P&G erects another straw man when it describes objector's supplemental outreach proposal to require "an enormous, protracted, uncertain, expensive" and "gargantuan" effort of "scouring the country" and "issuing subpoenas to…hundreds or thousands of retailers." DB34, 36, 39. No one has asked the settling parties to seek out class member information from hundreds or thousands of retailers. Rather, a targeted request of only big-box retailers who maintain customer purchase records would work. In *Bayer*, the closest comparator case, the parties obtained class-member purchase information from only four retailers: CVS, Wal-Mart/Sam's Club, BJ's Wholesale, and Safeway. All said, that enabled the settling parties to identify nearly 600,000 class members, constituting nearly 1 million purchases. *See* Declaration of Tricia M. Solorzano Regarding Purchase Records, No. 09-md-2023 (E.D.N.Y.), Dkt. 227-1. Before the *Bayer* settling parties had converted the settlement from a pure claims-made arrangement into a mixed claims/direct distribution one, less than 20,000 class members had submitted claims. *See* Declaration of Tricia M. Solorzano on Behalf of Settlement Administrator Regarding Notice and Administration, No. 09-md-2023 (E.D.N.Y.), Dkt. 195.

Plaintiffs do not even mention *Bayer*. P&G mentions it only once, but then only to say that *Bayer* did not mandate giving class members individual notice. DB35.

But this, like several other appellee responses, is a straw man. Frank is not arguing for mandated individual notice on this appeal. Frank does not "take an uncompromising position against all claims-made Settlements." *Contra* PB15. Nor has he argued that the claims-made aspect of the settlement should subject it to a "strong presumption of invalidity." *Contra* DB 46-48.[9] Nor has he argued that the unit caps "somehow make[] the settlement *per se* unreasonable." *Contra* PB12 n.4. Frank argues *only* that a settlement must be valued at the actual recovery to the class, and that settling parties intend the foreseeable consequences of their notice and claims process. If the parties agreed that the litigation value of the settlement was only $0.45 million, and employed a claims-made process that throttled class recovery to $0.35 million, so be it as long as class counsel is willing to settle for fees of $100,000. We can then be confident that class counsel did not sacrifice the interests of the class for its own benefit. But given that P&G was willing to settle the case for $6 million in cash and $6 million in product, class counsel has a "heavy fiduciary responsibility" under *Piambino*, 757 F.2d at 1139, to prioritize "direct recovery to the class." *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 178 (3d Cir. 2013). Frank merely offers the retailer outreach and direct payment suggestions as one of the more obvious ways of resolving the defect

[9] Rather, it is the segregation of the fee fund that begets the "strong presumption of invalidity." OB38 (quoting *Pearson*, 772 F.3d at 787); *see also* §IV below.

of class counsel self-dealing at the expense of the class if the parties are unwilling to augment the recovery of claimants. *E.g., McDonough*, 2015 U.S. Dist. LEXIS 7510, at *112 (class members receiving benefit increased from 24,000 to 1.1 million). If on remand, the parties conceive of other ways that would recalibrate the settlement proceeds fairly between the class and class counsel, Frank has no objection to this aspect of the settlement.

But it is no excuse that the parties do not *currently* have possession of class members' identities. Neither appellee declares that *Pearson* or *Pampers* is wrongly decided; they concede that burdening the claims process to minimize the number of claims can be a grounds for rejecting a settlement no matter how much is hypothetically made available to the class. DB23; PB54. Taking an ostrich attitude towards ascertaining class members and providing them direct notice is every bit a means of reducing the number of claims (and selfishly maximizing attorneys' fees at the expense of the class) as a difficult claims process. *Cf. United States v. Rivera*, 944 F.2d 1563, 1570 (11th Cir. 1991) (jury may find criminal defendant acted "knowingly" when he acts with "deliberate ignorance"). There is no principled distinction between minimizing payments with a burdensome claims form and minimizing payments by instituting rigid claims caps and failing to directly pay ascertainable class members—especially when the *Pearson* settling parties made successful efforts to ascertain 4.7 million class members from "pharmacy loyalty programs and the like." 772 F.3d at 784. The district court's settlement approval is premised on the reversible error of accepting the settling parties' *ipse dixit* over the contradictory experience of other courts and the unrebutted record evidence presented by Frank.

B. Illusory injunctive relief does not justify the disproportion.

Frank noted in his opening brief that the district court misunderstood the scope of the injunction. OB32. Neither appellee gainsays this argument. Appellees' repeated assertions that the district court did not abuse its discretion in finding that the injunction was a substantial benefit (PB28-35; DB27-28) cannot be credited given the forfeited defense of the district court's faulty premise. At a minimum, remand is required.

But the Court can go further and hold as a matter of law that the settling parties failed to meet their burden that the injunctive relief created benefit for the class.

Plaintiffs argue that *Pearson* and *Pampers* stand only for the "unremarkable proposition that temporary and merely cosmetic labeling changes provide limited or no value to consumers." PB31. But this is to concede that the mere fact of an injunction is insufficient by itself to generate settlement benefit; the injunction must be a "*material* alteration in the relationship of the parties." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.,* 532 U.S. 598, 604 (2001) (emphasis added) (cited at PB30-31). The parties cite to no record evidence that the injunction makes any material difference here. There was no evidence that P&G intended to reintroduce a discontinued product. There is nothing more illusory, nothing more "cosmetic" or "temporary" than labeling changes on a product that is no longer being sold and will not be reintroduced; the labeling "changes" here make no more difference to the class than labeling changes on a Ford Edsel or a can of New Coke.

If P&G agreed to an injunction not to create a death ray to destroy Atlanta, the parties could not claim that this was a substantial benefit to the class in the absence of evidence that the injunction was not superfluous because P&G had no plans to build a death ray. The same is true for an injunction on a discontinued product that was not going to be reintroduced.

It is accurate that the advertising changes in *True v. Am. Honda Motor Co.*[10] involved a big ticket item. It is equally accurate that the advertising changes in *Pampers* and *Pearson* did not. Similarly, P&G argues buying batteries is not a discrete activity that only occurs once. DB28. True enough; then again, no class members will again purchase Ultra batteries because they are no longer being sold. Buying diapers or glucosamine supplements is not a discrete activity, either. Finally, P&G intimates that the settlement value should include voluntary pre-settlement concessions. DB28. They cite no authority for this assertion and have not addressed the contradictory case law cited in objectors' opening brief. OB33.

The injunctive relief was illusory, and does not justify the settlement.

[10] 749 F. Supp. 2d 1052, 1077 (C.D. Cal. 2010).

C. As a matter of law, a windfall in a settlement compromise depends on the allegations of the complaint, not the parties' *ex post* rationalizations for the settlement amount.

Given the low claims rate and the tremendous imbalance between class counsel recovery and class recovery, augmentation of payments to claiming class members would likely not be by itself enough to prevent settlement unfairness. But Frank nevertheless takes issue with appellees' arguments that the $3 payment "fully compensates" class members and paying class members more would be an unwarranted "windfall." PB7, 12-13; DB2, 18-19, 21-25, 32-34.

As an initial matter, P&G concedes that certain class members are not fully compensated because of the two-unit and four-unit limitations on claims that are built into the settlement, but argues that these caps were necessary to prevent fraud. DB 29-32. But there are less onerous ways to protect a settlement fund from fraud. One such method was already used in this case: a jurat under penalty of perjury. Dkt. 122-1, Ex. B; *but see Pearson,* 772 F.3d at 783 (criticizing this step). Another readily-available possibility was assigning audit rights on some or all claims.[11] As the Third Circuit decided in *Baby Products*, fraud-proofing a settlement should not take precedence over remitting benefit to class members. 708 F.3d at 175 (3d Cir. 2013) (rejecting requirement of proof of purchase as an anti-fraud mechanism); *In re Gen. Motors Corp.*

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[11] *E.g.*, *In re Diet Drugs Prods. Liab. Litig.*, 582 F.3d 524, 531 (3d Cir. 2009); *In re Linerboard Antitrust Litig.*, 321 F. Supp. 2d 619, 626 n.6 (E.D. Pa. 2004); *In re Currency Conversion Fee Antitrust Litig.*, 264 F.R.D. 100, 117 (S.D.N.Y. 2010); *Stewart v. Rubin*, 948 F. Supp. 1077, 1097 (D.D.C. 1996); *In re Domestic Air Transp. Antitrust Litig.*, 1:90-cv-2485, 1994 U.S. Dist. LEXIS 20451, at *26-30 (N.D. Ga. Nov. 2, 1994).

Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 755, 809 (3d Cir. 1995) ("*GM Trucks*"), (rejecting barriers to recovery that were rationalized as "necessary to prevent fraud").

Defendants rely on numerous district courts upholding settlements where the response was low due to the small amounts at issue. *Compare* Dkt. 150 nn.7 & 8, *with* DB32 n.11 (now omitting *Redman* and *Pearson* because those settlements were reversed on appeal). (Appellees repeatedly rely upon series of district-court decisions to defend red-flag provisions of the settlements. *E.g.,* DB25-28; PB22-24 (calling district-court decisions "this Circuit's well-settled law"). But courts of appeal bind inferior district courts, not the other way around.) Frank does not claim to defend the decisions of every district court around the country; he concedes that, while some have agreed with him, many others have made similar errors of law. District courts are faced with an inherent "disadvantage in evaluating the fairness of the settlement to the class" because of lack of substantive adversarial presentation. *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014); *see also* Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 829 (1997) ("No matter how virtuous the judge, the fact remains that courts are overworked, they have limited access to quality information, and they have an overwhelming incentive to clear their docket. They cannot reliably police the day-to-day interests of absent class members."); Hillary A. Sale, *Judges Who Settle*, 89 WASH. U. L. REV. 377, 411 (2011) ("Busy judges will then face their own personal and professional conflicts with resisting and scrutinizing settlements"). When lower courts approve unworthy settlements, correction is imperative. *Crawford*, 201 F.3d at 881 (7th

Cir. 2000) ("appellate correction of a district court's errors is a benefit to the class"). That many district courts have, in often conclusory opinions, contradicted *Pearson* and other appellate cases directly addressing the problem of allocational fairness, means only that a clear statement of law is needed in this case to encourage the district courts of this circuit to do a better job of protecting absent class members.

Both settling parties maintain that the "payments offered to class members [under the current agreement] already effectively equaled or exceeded the amount of their alleged loss." DB2. Factually, the parties err. By excluding all measures of alleged damages other than recovery of the difference in price between ultra batteries and regular copper tops, they overwrite the class complaint with the terms of settlement. *See* OB48-49. But the settlement does not resolve questions of liability, much less the proper measure of damages. Dkt. 113-1 at ¶78. Even if the settling parties had attempted to resolve this question, they have no authority to divert money away from class members simply "by declaring…that all class members are submitting claims have been satisfied in full." *In re BankAmerica Corp. Sec. Litig.*, – F.3d –, 2015 U.S. App. LEXIS 306, at *11 (8th Cir. Jan. 8, 2015). If nothing else, the conflict of interest in making such self-serving declarations should accord them little weight.

A legitimate adversarial complaint is a proper yardstick for use in determining whether there is full compensation. *See Bluetooth,* 654 F.3d at 945 n.8; *GM Trucks*, 55 F.3d at 810. This is certainly ***not*** to say that a settlement need satisfy each demand of the complaint to be adequate, but it is to say that the parties' justification for a disproportionate settlement doesn't hold water. "[T]he notion that class members were fully compensated by the settlement is speculative, at best." *BankAmerica*, 2015 U.S. App. LEXIS 306, at *12.

P&G faults Frank for not showing "that plaintiff had any realistic prospect of recovering [on any theory other than differential damages]." DB32. But either class counsel made colorable good-faith claims for damages in their complaint that have some settlement value, or they violated Fed. R. Civ. P. 11.[12] Neither appellee suggests the latter alternative.

In any event, such an inquiry is irrelevant to the question of settlement allocation or enforcement. *E.g., In re Deepwater Horizon*, 744 F.3d 370 (5th Cir. 2014) (defendant cannot complain that settlement terms results in payment to claimants who have no realistic prospect of proving causation). Perhaps the entire lawsuit is meritless, and a single peppercorn would have been adequate compensation for all of the claims against P&G, and P&G is overpaying the class. But P&G chose to settle for $12 million in cash and product, and if that means there is a windfall, that windfall should be proportionally allocated between the class and the attorneys, rather than selfishly swept up by the attorneys. In *Pampers*, for example, both American and Canadian authorities exculpated P&G, reducing the litigation value of the claims to virtually nil. 724 F.3d at 715-16; *id.* at 723 (Cole, J. dissenting) ("Nobody disputes that the class's claims in this case had little to no merit."). The *Pampers* problem was not that the refund program and the other potpourri of injunctive relief failed to approximate the *litigation value* of the claims. Rather, the settlement flunked because

[12] After all, these claims are being released.

nearly the entire *settlement value* was consumed by the fees. The same is true here. If P&G is willing to pay $12 million to settle the case, they have no basis to argue to this Court that it is unjust to pay the class a proportionate share of that amount; at best, their complaint is with their defense counsel.

Appellees do not cite a single appellate decision that ratifies the proposition that Rule 23(e) permits fear of windfall compensation to justify depriving class members of 95% of the constructive common fund. The idea is misguided: "[t]he settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members." *Klier v. Elf Atochem*, 658 F.3d 468, 474 (5th Cir. 2011); *accord BankAmerica*, 2015 U.S. App. LEXIS 306, at *7-*8 (quoting *Klier*).

III. The *cy pres* provision is invalid and requires reversal.

In January, the Eighth Circuit provided more authority for Frank's position that resort to *cy pres* was impermissible. *BankAmerica Corp. Secs. Litig.*, __F.3d__, 2015 U.S. App. LEXIS 306 (8th Cir. Jan. 8, 2015), considers the propriety of disposing of residual settlement funds through use of *cy pres*. Adopting in full §3.07 of the *ALI Principles*, and noting "the substantial history of district courts ignoring and resisting circuit court *cy pres* concerns," the Eighth Circuit held as follows. "Because the settlement funds are the property of the class, a *cy pres* distribution to a third party of unclaimed settlement funds is permissible '*only* when it is not feasible to make further distributions to class members' except where an additional distribution would provide a windfall to class members with *liquidated*-damages claims that were 100 percent satisfied by the initial distribution." *Id.* at *7 (internal quotation omitted) (emphasis in original). *Compare* OB43-49.

The Eighth Circuit first denied class counsel's suggestion—and the district court's finding—that it would be "so costly and difficult as to preclude a further distribution." *Id.* at *8; *compare* Dkt. 168 at 5. Second, the *BankAmerica* court dismisses an argument also raised here—that claimant class members were fully compensated, such that further distributions to them would be an undue windfall. *Id.* at *11. "It is not true that class members with unliquidated damage claims in the underlying litigation are 'fully compensated' by payment of the amounts allocated to their claims in the settlement." *Id.* (citing cases and commentary). A settlement provision that employs *cy pres* in contravention of the *ALI Principles* is "void *ab initio*." *Id.* at *13.

Here, the settling parties' further rationalization that the *cy pres* was not meant to substitute for or displace actual payments to class members (DB26; PB37), is just faulty economics. It is the release of class members' claims that generates the entire settlement pie, the entire constructive common fund. Giving away $6 million (retail value) of that pie to non-class members is unsustainable, regardless of the intent of the settling parties.

Plaintiffs cleverly attempt now to assert that the charitable recipients of those in-kind donations are actually just "particularly high volume Class Members." PB37. Nowhere on the record is it stipulated that the undesignated charitable recipients will be class members, as the defendant honestly concedes in its brief. DB26-27. This is why the court below found the *cy pres* donation to be an "indirect" benefit, and not a "direct" one. Dkt. 168 at 5.

Plaintiffs express a concern that allowing the *cy pres* set aside to instead flow to identified settlement class members may disadvantage unidentified settlement class members. It is unclear why this is more objectionable than the settlement that was approved, which advantaged literate class members who pay close attention to class notices and have the cognitive ability to make claims over poorer and more poorly educated class members. In any event, as with the attorneys' fee excess, Frank does not insist on any particular arrangement for remitting this value to class members. The parties can augment existing claimant recoveries with product or additional cash ***and/or*** they can seek to identify currently unidentified class members and make direct distributions ***and/or*** they can implement a supplemental notice and claims period with terms that encourage more claims ***and/or*** they can use their imagination to invent a new method of getting money in class members' hands.

The district court decisions appellees rely upon do not consider the *ALI Principles* or the appellate decisions such as *Pearson* and *BankAmerica*.

One question *BankAmerica* did not reach was whether Rule 23 requires the parities to notice the class of specific recipients. 2015 U.S. App. LEXIS 306, at *14-*15. The settling parties would have it that designating types of organizations is enough PB39-40; DB27; *contra Dennis v. Kellogg Co.,* 697 F.3d 858 (9th Cir. 2012) ("charities that fee the indigent" is too vague). The answer to P&G's question (why a more specific provision would be materially important to class members?) is provided in Frank's opening brief: "Class members must have notice and a fair opportunity to vet specific recipients for potential infirmities: conflicts of interest, geographic clustering, lack of fit, and so on." OB51.

This is not merely a hypothetical problem. Conflict of interest issues are pervasive in the *cy pres* realm. For just a few examples, in *Nachshin v. AOL, LLC*, the parties proposed an ex ante *cy pres* award to a local charities including one where the judge's husband served as a board member, and another where the named plaintiff worked as an associate director of development; the Ninth Circuit reversed on other grounds. 663 F.3d 1034 (9th Cir. 2011). In another case, class counsel directed *cy pres* to its own *alma mater*. Alison Frankel, *Legal Activist Ted Frank Cries Conflict of Interest, Forces O'Melveny and Grant & Eisenhofer to Modify Apple Securities Class Action Deal*, AMERICAN LAWYER LITIGATION DAILY (Nov. 30, 2010). *See generally* Adam Liptak, *Doling Out Other People's Money*, N.Y. TIMES (Nov. 26, 2007); Nathan Koppel, *Proposed Facebook Settlement Comes Under Fire*, WALL STREET JOURNAL (Mar. 2, 2010); Theodore H. Frank, Statement before the House Judiciary Committee Subcommittee on the Constitution and Civil Justice, *Examination of Litigation Abuse* (Mar. 13, 2013); Theodore H. Frank, *Cy Pres Settlements*, CLASS ACTION WATCH (Mar. 2008).

These types of cases are precisely why settling parties must be required to designate specific recipients, disclose any conflicts of interest, and allow interested class members to investigate on their own. Appellees rely on district-court cases that ignore these appellate precedents, and provide no reason for this Court to create a circuit split.

IV. Clear-sailing and fee-segregation are objective red flags of an inequitable deal.

Frank's argument in no way depends on demonstrating collusion, because, as multiple courts hold, tacit inclination for both class counsel and defendant to act in their own self-interest at the expense of the class is all that is needed to make a settlement illegally unfair. OB11-12 (citing cases). Thus, it is a diversion when appellees continue to protest that there was no collusion. PB20-28, DB42-43.

Fee segregation and clear-sailing are problematic not because they reveal subjective bad faith, but because they are "subtle signs" that objectively the class is not getting as good of a deal as it could have if class counsel was not self-dealing. *Bluetooth*, 654 F.3d at 947. The recent torrent of appellate courts reversing unfair deals is not a result of those courts reweighing the factual findings of the district court and concluding that there was collusion afoot. Rather, it's a result of looking at the objective outcome of the negotiations—no matter how legitimately-contentious those negotiations were—and concluding that the skewed result cannot stand.[13]

Plaintiffs misconstrue objectors' argument to be that separate <u>negotiation</u> of class relief and attorneys' fees "corrupts the process." PB22. Frank's point is simply that separate negotiations don't change the economic reality that the defendant has an all-in reservation price. *Redman*, 768 F.3d at 629. This circuit recognizes this. *Contrast*

[13] Plaintiffs falsely state that *Pearson* relied on a finding of collusion. PB54. The word "collusion" never appears in *Pearson*, which found only that class counsel and the defendant had a mutual "selfish" interest in an abusive settlement that paid class members nearly three times as much as this one did. 772 F.3d at 787.

Piambino, 757 F.2d at 1143, *with* PB22 (citing district court decisions as "this Circuit's well-settled law.").

The negotiation timing on fees vis-à-vis class relief is not as important as how the settlement is structured, and whether the excess agreed-upon fees are permitted to revert to class members. That is the "kicker"/reversion/fee segregation/constructive common fund structure that objectors complain of. Plaintiffs cite *Camden I*, *Waters*, and *Nelson v. Mead Johnson & Johnson Co.*[14] as supposedly approving of this arrangement but the published cases didn't address settlement fairness questions at all, and *Nelson* did not consider an objection to the constructive common fund structure.

Nor do the objectors call for a *per se* prohibition on segregated fee funds, although *Pearson* does refer to them as presumptively invalid. 772 F.3d at 786-87. The segregation only presents a problem where the attorney award is also disproportionate, for then the class loses out on the overage that should have gone to them in the first place. P&G contends that the segregated fee structure can prevent overcompensation to class members. But the class's fair compensation should be judged in relation to the amount of money that the defendant's are willing to put on the table. The $5.68 million attorney award was a "concrete and indisputable" part of the sum that P&G was willing to part with here. *Pampers*, 724 F.3d at 721. It is a rare day when an unopposed fee award is not granted in full by a district court, especially when the reduction will only benefit the defendant.

[14] 484 F. Appx. 429 (11th Cir. 2012) (unpublished).

Clear sailing provisions are certainly commonplace, but that doesn't legitimize them. Clear sailing clauses are similar to how *Pampers* describes incentive awards: "like dandelions on an unmowed lawn—[permitted] more by inattention than by design." 724 F.3d at 722. As detailed in Frank's opening brief (OB35-37), clear sailing has a number of pernicious consequences. P&G suggests no harm, no foul here because, after the objectors complained about the impropriety of not being allowed to object to the actual fee motion, the district court postponed the due date for objections until after the fee motion was filed.[15]

Had objectors not appeared (as is the case in about half of settlements),[16] the clear sailing agreement means there would have been no adversarial presentation at all, and it is probable that the lower court would not even have been apprised of the number of class member claims made before approving the settlement and fee award. Public interest organizations cannot be omnipresent to protect the interests of all class members and the integrity of the system. Appellate rules must be set to discourage settling parties from reaching unfair fee arrangements and sweeping those arrangements under the rug and out of public sight.

Appellants submit that this Court avoid a circuit split and should flag fee-segregation and clear-sailing as two signals of an unfair deal.

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[15] Of course, this still did not resolve the deficiency of the fee motion itself. *See* OB36.

[16] *Vought v. Bank of Am.*, 901 F. Supp. 2d 1071, 1093 (C.D. Ill. 2012).

CONCLUSION

It is undisputed that the settlement gives "preferential treatment" to class counsel and is rife with red flags of self-dealing that subordinate the class's interests. The district court's reasons for justifying attorneys being paid 14 times as much as the class rested on clearly erroneous factual findings unsupported by the record and contradicted by the experience of courts dealing with similar settlements and classes. The allocational unfairness requires reversal of the settlement approval.

In any event, the *cy pres* provisions of the settlement impermissibly put the interests of third parties ahead of the class.

Appellees' request for affirmance would create new circuit splits on each of these independent issues for reversal. This court should reverse the settlement approval.

Dated: February 18, 2015

Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because this brief contains 6,995 words, excluding the parts of the brief exempted by 11th Cir. R. 32-4, as counted by Microsoft Word 2010.

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Executed on February 18, 2015.

/s/ Adam E. Schulman
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Proof of Service

I hereby certify that on February 18, 2015, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system, which will provide notification of such filing to all registered ECF filers.

Dated: February 18, 2015

/s/ Adam E. Schulman
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