IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE: MOTOR FUEL TEMPERATURE SALES PRACTICES LITIGATION	)))	MDL No: 1840
(This Document Relates to All Cases)	))	No: 07-md-1840-KHV-JPO

OBJECTION TO PROPOSED SETTLEMENTS

Theodore H. Frank, Melissa Holyoak, and Adam Schulman ("Objectors"), members of the putative classes, to object to the proposed settlement between Plaintiffs and Defendants BP, Chevron, Citgo, ConocoPhillips, ExxonMobil, Shell, Sinclair, Sunoco, and Valero and give notice that they intend to appear at any Fairness Hearing through their counsel, Theodore H. Frank.

Objectors provide the following memorandum and authorities in support of their objection.

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INTRODUCTION

Theodore H. Frank, Melissa Holyoak, and Adam Schulman (collectively "Objectors") object to the nine settlements[1] in which they are putative class members. Frank has represented two class members objecting to the Costco settlement that this Court approved in April 2012. *See* Dkts. 1578 (Objection of Amy Alkon and Nicolas Martin), 1783 (Alkon Objectors' Opposition to Approval of Amended Settlement), 1869 (Alkon Objectors' Renewed Opposition to Motion for Attorneys' Fees), 3737 (Alkon Objectors' Objection to Amended Settlement), and their accompanying declarations. Because the now-pending settlements share many defects outlined in those objections, Objectors incorporate those objections into this objection by reference. Objectors also join by reference the objection of objection by QuikTrip Corporation, 7-eleven Inc., Circle K Stores, Inc., Kum & Go, L.C., Marathon Petroleum Company LP, Murphy Oil USA, Inc., Pilot Travel Centers, LLC, Flying J, Inc, PTCAA Texas, LP, Racetrac Petroleum, Inc., Sheetz, Inc, Speedway LLC, The Pantry, Inc., and Wawa, Inc., to be filed on or about March 23, 2015, and any other objection not inconsistent with this one. In addition to the problems identified in the Alkon Objectors' objections, the Objectors submit additional argument against both certification of the settlement class and approval of these settlement, which gives the putative class nothing while rewarding the attorneys with over $15 million.

The twenty-eight pending settlements before this Court are of three different types. Four settlements, including the Valero settlement, offer prospective injunctive relief in the form of ATC conversions and/or sticker disclosures. Six of the settlements (BP, Chevron, ConocoPhillips, ExxonMobil, Shell, and Sinclair) establish funds to be parceled out to retail gas stations and to state weights and measures agencies to subsidize ATC transition. Finally, the

[1] The nine settlements are BP, Chevron, Citgo, ConocoPhillips, ExxonMobil, Shell, Sinclair, Sunoco, and Valero.

remaining eighteen settlements (including the Citgo and Sunoco settlements) establish funds to be parceled out just to state agencies. All three types of settlements incur costs (attorneys' fees and administrative costs) without generating concrete benefits for anyone beyond class counsel and the named representatives. Past purchasers of gasoline (*i.e.* the class members) receive nothing. Future purchasers of gasoline receive a "remedy" that has been rejected as non-beneficial by expert administrators and regulators across the country in *every* single jurisdiction in the United States. On any view, these settlements amounts to picking "winners" and "losers." On the most accurate view, the only "winners" are class counsel and the named representatives; the entire class waives their claims for a recovery of zero. If the underlying claims have merit, then the zero-dollar recovery is problematic by itself. But in a competitive marketplace, as documented by the declaration of David Henderson, the injunctive relief is just shifting money from the pockets of cold-weather purchasers to hot-weather purchasers.

For these reasons, in addition to the reasons given in the Alkon Objectors' earlier objections to the Costco deal, it would be reversible error to certify the class and approve the settlements. Numerous court decisions decided since this Court approved the Costco settlement support the Objectors' position here.

I. Objectors are class members and intend to appear through Frank at the fairness hearing.

As their accompanying declarations demonstrate, Objectors are members of at least nine of the twenty-eight settlements pending before this Court. Frank, founder and president of the non-profit Center for Class Action Fairness ("CCAF") has been admitted to practice in this MDL *pro hac vice*, and will appear at the Fairness Hearing, currently scheduled for June 9, 2015. He reserves the right to cross-examine any witnesses put forward in support of the settlement. Objectors object to any provisions of the settlements purporting to limit appellate rights of class members or creating new burdens beyond those imposed upon appellants in Fed. R. App. Proc. 7 or Fed. R. App. Proc. 8.

CCAF, established in 2009, represents class members *pro bono* in class actions where class counsel employs unfair class action procedures to benefit themselves at the expense of the class. *See e.g., Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (observing that CCAF "flagged fatal weaknesses in the proposed settlement" and demonstrated "why objectors play an essential role in judicial review of proposed settlements of class actions"); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 716-17 (6th Cir. 2013) ("*Pampers*") (describing CCAF's client's objections as "numerous, detailed, and substantive.") (reversing settlement approval and certification); *Richardson v. L'Oreal USA, Inc.*, 991 F. Supp. 2d 181, 205 (D.D.C. 2013) (describing CCAF's client's objection as "comprehensive and sophisticated" and noting that "[o]ne good objector may be worth many frivolous objectors in ascertaining the fairness of a settlement.") (rejecting settlement approval and certification); Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 13, 2013, at A12 (calling Frank "[t]he leading critic of abusive class-action settlements").

CCAF has won millions of dollars for class members. *See, e.g., In re Classmates.com Consol. Litig.*, No. 09-cv-0045-RAJ, 2012 U.S. Dist. LEXIS 83480, at *29 (W.D. Wash. Jun. 15, 2012) (noting that CCAF's client "was relentless in his identification of the numerous ways in which the proposed settlements would have rewarded class counsel … at the expense of class members" and "significantly influenced the court's decision to reject the first settlement and to insist on improvements to the second").

Because it has been CCAF's experience that class action attorneys often employ *ad hominem* attacks in attempting to discredit objections, it is perhaps relevant to distinguish CCAF's mission from the agenda of those who are often styled "professional objectors." A "professional objector" is a specific legal term referring to for-profit attorneys who attempt or threaten to disrupt a settlement unless plaintiffs' attorneys buy them off with a share of the attorneys' fees. Some courts presume that such objectors' legal arguments are not made in good faith. Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 437 n.150 (2003). This is not CCAF's *modus operandi*. Paul Karlsgodt & Raj Chohan, *Class Action Settlement Objectors: Minor Nuisance or Serious Threat to Approval*, BNA: CLASS ACTION LITIG. REPORT (Aug. 12, 2011) (distinguishing CCAF from professional objectors). CCAF refuses to engage in *quid pro quo* settlements and does not extort attorneys; and has never withdrawn an objection in exchange for payment. Instead, it is funded entirely through charitable donations and court-awarded attorneys' fees.

Nonetheless, to preempt any possibility of a false and unjustifiable accusation of objecting in bad faith and seeking to extort class counsel, Objectors are willing to stipulate to an injunction prohibiting themselves from accepting compensation in exchange for the settlement of this objection. *See* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623 (2009) (suggesting inalienability of objections as solution to objector blackmail problem). Objectors bring this objection through CCAF in good faith to protect the interests of the class.

II. The settlement classes cannot be certified.

"Class-action settlements are different from other settlements." *Pampers*, 724 F.3d at 715. "[I]n class-action settlements the district court cannot rely on the adversarial process to protect the interests of the persons most affected by the litigation—namely, the class. Instead, the law relies upon the fiduciary obligations of the class representatives and, especially, class counsel, to protect those interests. And that means the courts must carefully scrutinize whether those fiduciary obligations have been met." *Id.* at 718. (internal quotation omitted). Thus, through its oversight responsibility, the court itself assumes a derivative fiduciary obligation to the class. *McNeil v. Guthrie*, 945 F.2d 1163, 1167 (10th Cir. 1991); *Gottlieb v. Barry*, 43 F.3d 474, 490 (10th Cir. 1994) ("[T]he importance of safeguarding the class' interests cannot be underestimated.").

This judicial duty to vouchsafe the rights of the absent plaintiffs extends to the decision to grant class certification, obliging district courts to conduct a "rigorous analysis" to ensure compliance with the Rule 23 certification prerequisites. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). A proponent of class certification "must affirmatively demonstrate his compliance with the Rule." *Id*. Aside from trial manageability concerns, that burden is no lighter when the Court is confronted with a settlement-only class certification. In fact, the specifications of rules Rule 23(a) and (b)(3) are "designed to protect absentees by blocking unwarranted or overbroad class definition" and "demand undiluted, even heightened, attention in the settlement context." *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 620 (1997); *see also Pampers*, 724 F.3d at 721 ("These requirements are scrutinized more closely, not less, in cases involving a settlement class"); *Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 380 (3d Cir. 2013) (the "policy in favor of voluntary settlement does not alter the 'rigorous analysis' needed to ensure that the Rule 23 requirements are satisfied."). Put another way, "it is not the mission of Rule 23(e) to supply the cohesion that legitimizes a settlement-only class action." *Gunnells v. Healthplan Servs.*, 348 F.3d 417, 451 (4th Cir. 2003) (Niemeyer, J., concurring in part and dissenting in part).

Fed. R. Civ. P. 23(b)(3) allows a class action to be maintained if 23(a)(1)-(4) are satisfied, "questions of law or fact common to class members predominate over any questions affecting only individual members," and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The burden of proving these prerequisites resides with the proponents of certification. *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213, 1218 (10th Cir. 2013). The proposed classes fall short:

- Rule 23(a)(4) forbids intra-class conflicts that benefit certain class members while simultaneously harming others. Even assuming against all evidence that ATC conversion is a collective class benefit, it remains true that gasoline purchasers who regularly purchase gas in the early morning or late evening at temperatures below the average in their geographic area will be harmed by implementation of ATC fuel. *See* Declaration of David R. Henderson (Dkt. 1783-1).
- Rule 23(b)(3) requires the parties to demonstrate the superiority of the class action device for adjudication of class members' claims. As discussed below, where it is impracticable or impossible for class members to attain any compensatory benefit from the class action, 23(b)(3) superiority is not satisfied. This Court has found that "individual distributions to class members are not feasible" because class members "cannot be identified through reasonable effort," "individual damages would be if not impossible to calculate" and "individual distributions would be too small to be economically viable." Dkt. 4464 at 12. This finding precludes class certification.

A. ATC fuel implementation and promotion betrays the interests of a subset of class members.

There is a fundamental intra-class conflict that prevents the named plaintiffs from adequately representing the many class members who, like objector Frank, purchase gas at temperatures below the average temperature in the region. To the extent volumetric sales make a material difference, these millions of class members are benefited from the defendants' decisions to use ordinary volumetric gallon measurements and have an interest in the continuation of that activity. When there is an intra-class conflict of this kind, Fed. R. Civ. P. 23(a)(4) is not satisfied, and the class cannot be certified. Class certification requires a commonality of interests: regulation through litigation that redistributes wealth across class members is impermissible, even if one assumes *arguendo* that ATC conversion is a collective benefit to the class.

1. Cold-weather purchasers are economically harmed by ATC conversion.

"It is axiomatic that a putative representative cannot adequately protect the class if the representative's interests are antagonistic to or in conflict with the objectives of those being represented." 7A Wright & Miller, *Federal Practice and Procedure* § 1768 (3d ed. 2012). "A fundamental conflict exists where some [class] members claim to have been harmed by the same conduct that benefitted other members of the class." *Dewey v. Volkswagen AG*, 681 F.3d 170, 184 (3d Cir. 2012) (quoting *Valley Drug Co. v. Geneva Pharm. Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003)); *see also Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 315 (5th Cir. 2007) (finding incurable intraclass conflict where named plaintiffs sought to dissolve an investment option that was favored by some absent class members); *Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1280 (11th Cir. 2000) ("a class cannot be certified…when it consists of members who benefit from the same acts alleged to be harmful to other members of the class"); *Retired Chi. Police Ass'n v. City of Chi.*, 7 F.3d 584, 598 (7th Cir. 1993) (no adequate representation where the proposed class included class members who had benefitted from the city's health care plan and stood to lose those benefits if the class action succeeded); *Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331, 337 (4th Cir. 1998) ("The first obstacle to class treatment of this suit is a conflict of interest between different groups of franchisees with respect to the appropriate relief."); *Phillips v. Klassen*, 502 F.2d 362, 367 (D.C. Cir. 1974) (where the challenged conduct "may be taken as conferring economic benefits or working economic harm, depending on the circumstances of the individual [class member], the foundations of maintenance of a class action are undermined."); *In re Photochromic Lens Antitrust Litig.*, 2014 U.S. Dist. LEXIS 46107, at *45 (M.D. Fla. Apr. 3, 2014) ("a class cannot be certified when some members of the class benefitted from the alleged wrongful conduct, such that the proposed class consists of winners and losers.");[2] *Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Grp.*, L.P., 247 F.R.D. 156, 177 (C.D. Cal. 2007) (rejecting class certification where some class members benefited from pricing scheme challenged by lead plaintiffs). This long line of cases dates back to the Supreme Court's watershed decision in *Hansberry v. Lee*, 311 U.S. 32 (1940). There, the Supreme Court refused to allow plaintiffs who were seeking to enforce a racially-restrictive covenant to represent individuals who did not want the covenant enforced.

Case law in the Tenth Circuit is in conformity. *E.g., Albertson's, Inc. v. Amalgamated Sugar Co.*, 503 F.2d 459, 463 (10th Cir. 1974). In another Tenth Circuit decision, perhaps not previously brought to the Court's attention, tenants in a low-rent housing project brought an action challenging a provision in new leases that all tenants be required to pay a security deposit. In *Peterson v. Okla. City Hous. Auth*, 545 F.2d 1270 (10th Cir. 1976), the Tenth Circuit affirmed the district court's finding that the named plaintiffs had failed to demonstrate that they could fairly and adequately protect the interests of residents who had accepted the deposit requirement as beneficial to them. The interest of these would be antagonistic to the interests of the plaintiffs-appellants. *Id*. at 1273. The intraclass conflict here does not arise merely from the fact that putative class members "hold differing opinions as to whether requiring ATC at retail would benefit the class as a whole"[3] although that is assuredly true and gives rise to its own set of problems (*see infra* § II.A.2). Rather, the conflict is because it's an economic zero-sum game. Routine cold-weather purchasers, whether they live in places in settlement states where the

[2] A best characterization of these settlements is that the class members are all "losers" and that class counsel are the prime "winners." *See infra* § I.B, II. However, even if one credits the argument the approximately 50% of class members who purchase fuel at a temperature on average below the average temperature of fuel purchases in their area are an inadequately represented cross-section of the putative classes.

[3] *In re Motor Fuel Temp. Sales Practices Litig.*, 271 F.R.D. 221, 233 (D. Kan. 2010).

average temperature is well under 60 degrees or whether they just prefer to purchase gas early in the morning,[4] will suffer a monetary loss if ATC is implemented.

Addressing this objection with respect to the Costco settlement, the Court noted that the the class definition there excluded persons who exclusively purchased sub-60 degree gas, and that "any such class members… remain free to purchase fuel from vendors who do not adjust for temperature." Dkt. 4248 at 34. The definitions in the current settlements do not limit class membership to those who purchased fuel at a temperature above 60 degrees. *See, e.g.,* Dkt. 4424 at 22 (quoting definition of putative Valero class).[5] What is more, if everything goes according to the class counsel's plan, then there will be no remaining option to purchase non-ATC fuel. These settlements cover the majority of branded gas stations in the states at issue; there is no way for cold-weather purchasers to avoid the harm inflicted upon them.[6] Finally, the Costco analysis misunderstands the underlying economics. In a competitive marketplace, consumers are already compensated *ex ante* for the average effects of volumetric sales; the 50% of consumers who buy gasoline at a below-average temperature realize a slight benefit while the 50% of consumers who buy gasoline at an above-average temperature realize a slight cost. This is true whether the average temperature across all purchases at a particular station is 60 degrees or 40 degrees or 80 degrees. (Indeed, the vast majority of gasoline retailers sell gasoline very near cost, and make

[4] *See* Dkt. 3737 at 3 n.1 (describing one purchaser's early morning purchasing preference).

[5] That said, Objectors do not believe that such a limitation ameliorates the intraclass conflict. Individuals who routinely purchase fuel at less than 60 degree temperatures still incur economic harm from the class action even if they have purchased fuel on one or several occasions when the temperature exceeded 60 degrees.

[6] Another lens through which to view the intraclass split is Rule 23(b)(3) predominance. Class members acquainted with the laws of physics were not deceived by the alleged fraud that the defendants perpetrated. To the extent that such class members cared about the variation in gas volume, they would purchase gas at colder times. Where reliance and deception varies from person to person, class treatment of fraud claims is not appropriate. *See, e.g.*, *In re St. Jude Med., Inc*., 522 F.3d 836, 838 (8th Cir. 2008); *Langendorf v. Skinnygirl Cocktails, LLC*, 2014 U.S. Dist. LEXIS 154444, at *15-*19 (N.D. Ill. Oct. 30, 2014).

their profit through the sale of goods at the convenience stores attached to gasoline stations. *E.g.,* Mary Ellen Blery, *Why Gas Station Owners May Be Smiling*, Forbes.com (Dec. 1, 2014) (net profit margins on gasoline retails sales averaged between 0.9% and 1.6% between 2008 and 2012; "Retailers know consumers will go somewhere else to save a few pennies a gallon, so they keep the difference between the selling price and their fuel costs as low as possible… Many gas station owners try to make up for the thin gasoline margins through sales of other products, such as snacks and drinks").

2. Political contributions on the class's behalf constitute compelled speech that contravenes the First Amendment.

The current political process playing out before duly elected and appointed officials is ready evidence of the non-ATC adherents. Not only would these settlements—to the extent they are successful in inducing ATC conversion—culminate in a system that would inflict economic harm on certain class members, worse yet they would do so by manipulating the political process in two ways. First, the Valero settlement prohibits Valero from lobbying with respect to ATC, thus squelching a voice supported by many class members. Valero Settlement § 4.10 (Dkt. 4472-4 at 17). Second, in the twenty-four pending settlements that establish monetary funds, part or all of those funds will be earmarked for "contributions to the departments of weights and measures, or other agencies… for purposes of defraying some of the States' costs of implementing the use of ATC." *E.g.*, BP Settlement ¶14(e) (Dkt. 4447-4 at 16). This feels uncomfortably close to political bribery, especially for those settlements without stipulations that funds will not be used to "induce any of the weights and measures agencies in the States at Issue to implement ATC." *E.g.,* Sunoco Settlement ¶ 13 (Dkt. 4725-1 at 11).

Regardless of whether a federal court can sanction a two-party settlement agreement that consensually transfers funds to state agencies, it cannot do so where it is compelling absent class members to make political donations in support of that agenda. Previously, this Court has been appropriately skeptical of *cy pres* relief. *See Better v. YRC Worldwide Inc.*, No. 11-cv-2072-KHV, 2013 U.S. Dist. LEXIS 163569, at *19-*21 (D. Kan. Nov. 18, 2013) (rejecting settlement for prematurely resorting to *cy pres*); *In re Motor Fuel Temperature Sales Practices Litig.*, 286 F.R.D. 488, 504 (D. Kan. 2012) (denying approval where *cy pres* beneficiaries were not designated); *see generally In re Thornburg Mortg., Inc. Secs. Litig.*, 885 F. Supp. 2d 1097, 1111 (D.N.M. 2012) (outlining *cy pres*'s defects). The set-asides in these settlements for donations to political bodies to advance class counsel's agenda are just *cy pres* in disguise.

Moreover, because they are nakedly political, they raise additional concerns. Making a political contribution is First Amendment protected expressive and associational activity. *Buckley v. Valeo*, 424 U.S. 1, 21 (1976) (*per curiam*). Concomitantly, individuals have a right to refrain from making such a donation, a right to not be compelled to engage in expressive and associational activity. *See, e.g., Knox v. Service Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012) (the government "may not…compel the endorsement of ideas it approves."). "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001); *Keller v. State Bar of California*, 496 U.S. 1 (1990) (attorney bar dues cannot be used for political or ideological purposes); *Abood v. Detroit Bd. of Educ.,* 431 U.S. 209, 235 (1977) (teacher union dues cannot be used for ideological activities not "germane" to their bargaining representative duties); *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (recognizing the right of an individual to reject a state measure that forces him "as a part of his daily life…to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.").

In articulating this right, the Supreme Court has acknowledged Thomas Jefferson's view that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves[] is sinful and tyrannical." *Abood*, 431 U.S. at 234 n. 31, (quoting I. Brant, *James Madison: The Nationalist* 354 (1948)) (internal quotation marks omitted). *Abood* allowed room for charging dues for uses related to collective bargaining. *Id.* at 232. Last year, however, the Supreme Court cast doubt upon even this exception to the First Amendment right against compelled speech subsidy. *Harris v. Quinn*, 134 S. Ct. 2618, 2632 (2014) ("*Abood* failed to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends"). *Harris* refused to extend *Abood* to regulated occupations that were not "full-fledged public employees." *Id.* at 2638. "[E]xcept perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Id*. at 2644.

These principles render class action third-party awards (at least those awards like this one that will be reserved for lobbying, litigation, or other First Amendment political activity, whether termed "*cy pres*" or not) unconstitutional. Three premises support this conclusion. The first premise is that "[t]he settlement-fund proceeds, generated by the value of the class members' claims, belong solely to the class members." *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011) (citing *ALI Principles of the Law of Aggregate Litigation* § 3.07 cmt. (b)). The second premise is that a third-party donation is an expression of support, association, and endorsement of the third-party's political agenda and activities. *See, e.g.*, *Buckley*, *supra*; *In re Asbestos Sch. Litig*., 46 F.3d 1284, 1294 (3d Cir. 1994) (Alito, J.) ("Joining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection."). And the third and final premise is that absent class members are being compelled into participating in the donations.[7]

[7] The settlements' "opt out" right is not an opportunity to merely abstain from the political donation, it is simply the right to exit the class action entirely. The settling parties are conditioning class members' right to participate in the action on their acceptance of the

50% of class members whose fuel purchases are at below-average fuel temperatures benefit from the *status quo* because they are cross-subsidized by the 50% of class members whose fuel purchases are at above-average fuel temperatures; switching to ATC will make these class members worse off. Henderson Decl. ¶¶ 16-21. The theory of the case, and practical consequences of the settlements, hurt these class members, in violation of 23(a)(4).

B. A class action lacks "superiority" if it is incapable of providing redress to class members.

Combined, the twenty-eight putative settlement classes are gargantuan, including everyone who has purchased gasoline in twenty-seven states, Guam or the Virgin Islands since 2001, even non-U.S. residents. Defendants are willing to put roughly $32 million on the table to settle the cases, counting only settlement funds themselves and agreed-upon fee awards. This Court has concluded that making distributions to actual class members is infeasible. *See* Dkt.

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compelled donation, tantamount to telling union members or regulated professionals that their dues are not mandatory because they are always free to quit and find a new profession. This is a Hobson's choice, not a true opt-out. *See Keller*, 496 U.S. at 10 ("Claimants cannot be required by government action to relinquish First Amendment rights as a condition of retaining employment."); *Wash. Legal Found. v. Mass. Bar Found.*, 993 F.2d 962, 978 (1st Cir. 1993), *superseded on other grounds by Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) (where the burden to avoid is "more than an inconvenience" a rule requiring monetary contribution should be viewed as compulsory). The above discussion presumes that a non-coercive opt-out scheme would satisfy the First Amendment concerns, but recent jurisprudence has suggested that even an actual opt-out scheme may be too burdensome and that an opt-in scheme may be required by the First Amendment. *Knox v. SEIU*, 132 S. Ct. 2277, 2290-96 (2012). Because silence does not equate to consent, "[a]n opt-out system creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree." *Id.* at 2290; *see generally* Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 73 (2007) ("Silence may be a function of ignorance about the settlement terms or may reflect an insufficient amount of time to object. But most likely, silence is a rational response to any proposed settlement even if that settlement is inadequate. For individual class members, objecting does not appear to be cost-beneficial. Objecting entails costs, and the stakes for individual class members are often low.").

4464 at 12. There is empirical evidence that funds of smaller size than the $32 million here can be distributed to a class of over 100 million members via a low-value claims process. *See Fraley v. Facebook, Inc.*, 966 F. Supp. 2d. 939 (N.D. Cal. 2013). Nonetheless, Objectors work from an assumption that this Court's finding of infeasibility was correct.

It does not follow, however, that the Court is now at liberty to approve a settlement which purports to benefit the general public through fluid recovery rather than targeting class members themselves. Rather, if a non-compensatory settlement is necessary because it would be infeasible to distribute settlement funds to individual class members, then a class action is not an efficient and superior means of adjudicating this controversy and the class should not be certified. *See, e.g., Supler v. FKAACS, Inc.*, No. 5-11-CV-00229-FL, 2012 U.S. Dist. LEXIS 159210, at *10-*11 (E.D.N.C. Nov. 6, 2012) (holding that, because "benefits to putative class members" from *cy pres* payments "are attenuated and insignificant…, class certification does not…promote judicial efficiency.") (internal quotations, ellipses, and citations omitted); *see also Quinn v. Nationwide Ins. Co.*, 281 Fed. Appx. 771, 777 (10th Cir. 2008) (affirming finding of non-superiority where defendant "would have to engage in a significant amount of work simply to identify the purported class members."); *Smith v. Georgia Energy USA, LLC*, 2014 U.S. Dist. LEXIS 166367, at *7 (S.D. Ga. Dec. 1, 2014) (decertifying class where defendants' financial insolvency made clear no benefit could inure to class members); *Ballard v. Branch Banking & Trust Co.*, 284 F.R.D. 9, 15-16 (D.D.C. 2012) (denying certification where identification and notification of individual consumer ATM users was impracticable). The Ninth Circuit reached a similar conclusion in *In re Hotel Tel. Charges*, 500 F.2d 86 (9th Cir. 1974). There, the court reasoned that "[w]henever the principal, if not the only, beneficiaries to the class action are…not the individual class members, a costly and time-consuming class action is hardly the superior method for resolving the dispute," and that, "[w]hen, as here, there is no realistic possibility that the class members will in fact receive compensation, then monolithic class actions raising mindboggling manageability problems should be rejected." *Id*. at 91-92. In this case, the proposed settlements fall into that category. They provide at most an indirect and attenuated benefit to the class, justified on the grounds that individual distributions would be too costly because of the size of the class.

Due to the impracticality of class member redress, these claims should proceed as individual actions if at all. Under state consumer protection laws, certain class members can seek statutory damages of up to $2,000. Ryan P. O'Quinn & Thomas Watterson, *Fair is Fair: Reshaping Alaska's Unfair Trade Practices and Consumer Protection Act*, 28 ALASKA L. REV. 295, 305-06 (2011) ("Twenty states set a minimum damages award for successful plaintiffs to encourage litigation of harms normally too insignificant to litigate. The minimum damages award varies from as low as $25 to as high as $2000, and the plaintiff is awarded the higher of the actual or statutory damages."). No matter how slim the possibility of attaining such damages, that possibility is superior to releasing those claims for no compensation. *See Brown v. Wells Fargo & Co*., No. 11-1362 (JRT/JJG), 2013 U.S. Dist. LEXIS 181262, at *16-*17 (D. Minn. Dec. 30, 2013) (concluding that superiority was not satisfied where individuals would be "entitled to between $100 and $1,000 dollars in statutory damages" in successful individual litigation, but only $55 as a class member); *Sonmore v. CheckRite Recovery Servs.*, 206 F.R.D. 257, 265-66 (D. Minn. 2001) (holding that the discrepancy between the $25 that class members could recover and the $1000 in statutory damages they could recover individually meant that a class action was not superior); *cf. also Wilcox v. Commerce Bank of Kansas City*, 474 F.2d 336 (10th Cir. 1973) (affirming finding of non-superiority where individual statutory damages claims were available; overruling the objection that the district court had failed to consider the non-exhaustive factors listed in (b)(3)(A)-(D).

Superiority must be contemplated from the perspective of putative absent class members, among other angles. *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 713 (9th Cir. 2010) (quoting *Kamm v. California City Development Co.*, 509 F.2d 205, 212 (9th Cir. 1975)). What is best for them? This settlement intends to release their rights in exchange for no compensatory relief. From the perspective of a class member, that cannot be a superior method of adjudicating this controversy. *Cf. Daniels v. Aeropostale West*, No. C 12-05755 WHA, 2014 U.S. Dist. LEXIS 74081, at *8 (N.D. Cal. May 29, 2014) ("No one should have to give a release and covenant not to sue in exchange for zero (or virtually zero) dollars..."). If it is not possible to discern class members from non-class members, and remit compensation to class members, then a class action is not be superior in either fairness or efficiency to other methods of adjudication.

C. Separation of powers concerns counsels against certification.

"Regulation through litigation occurs when enterprising plaintiffs' lawyers suggest to courts, via lawsuits, that the judiciary should regulate an industry through the threat of imposing broad liability against entities in that industry, even though the government has chosen not to regulate." Victor E. Schwartz & Christopher E. Appel, *Government Regulation and Private Litigation: The Law Should Enhance Harmony, Not War*, 23 B.U. Pub. Int. L.J. 185, 187 (2014). "[C]ourts are not an appropriate mechanism for establishing industry regulations. First, courts are not politically responsive institutions. The civil judicial system is designed to compensate people who have been wrongfully injured by another's conduct; its purpose is not to supplant the administrative and legislative branches of government through regulation. Those branches have the opportunity to see beyond the merits of an individual case, and assess the impact of a rule on society itself. These impacts may be profound and affect the national economy, the health of American citizens, and people's freedom to choose what goods and services they wish to purchase." *Id*. at 198-99 (internal footnotes omitted).

While these settlements have been pending, the Tenth Circuit has echoed the concerns about regulation through litigation. In *Winzler v. Toyota Motor Sales U.S.A., Inc.*, the plaintiff brought state law product defect claims on behalf of a putative nationwide class of Toyota

Corolla owners. 681 F.3d 1208 (10th Cir. 2012). During the case, Toyota implemented a recall by way of a regulatory process of the National Highway Transportation Safety Administration. *Id.* at 1209.[8] The Tenth Circuit held that this "remedial commitment from our coordinate branches" prudentially mooted the case. *Id.* at 1211. To be sure, the facts of these cases differ in that there is no remedial scheme in place to redress sale of non-ATC fuel. But that's because of a national determination across dozens of jurisdictions that there is nothing to redress, non-ATC sale is the default, and ATC sales are the ones for which additional notice is required. National Institute of Standards and Technology, Handbook 44 § 3.30 ¶UR.3.6.1.2., § 3.31 ¶S.5.6, § 3.31 ¶UR.2.5.3 (2014); *see also In re Motor Fuel Temp. Sales Practices Litig.*, 2013 WL 3795206, 2013 U.S. Dist. LEXIS 101083 (D. Kan. Jul. 19, 2013) (concluding that the Handbook, as well as California regulatory law, provide for sale in volumetric gallons, not ATC-adjusted ones). Separation of powers principles underlie both *Winzler* and this case: "affording a judicial remedy on top of one already promised by a coordinate branch risks needless inter-branch disputes over the execution of the remedial process and the duplicative expenditure of finite public resources. It risks, too, the entirely unwanted consequence of discouraging other branches from seeking to resolve disputes pending in court." 681 F.3d at 1211. Consumer gas sales could be made on a uniformly ATC basis, but state agencies and Congress have resisted that path; "[a]fter all, there are many ways to skin a cat and many ways to provide an effective equitable remedy." *Id.* at 1214. Plaintiffs do not have the right to supplant the national framework with their own preference, through resolution of a case in an Article III court. *See Gutierrez v. Wells Fargo Bank, N.A.*, 704 F.3d 712, 728 (9th Cir. 2012) (holding that national scheme preempted federal

[8] Like *Winzler*, other circuits have reached similar conclusions on differing legal grounds. *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011) (class certification improper where no marginal benefit to class was possible, but on (a)(4) grounds, rather than (b)(3) grounds); *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013) (reaching same conclusion but on basis of ascertainability prerequisite).

court from relying on state law to enjoin bank from using a particular system of posting or requiring the bank to make specific disclosures); *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 677 (S.D.N.Y. 2011) (rejecting settlement where parties sought to use the class action to overwrite Congress's copyright scheme).

Adding to the systemic harm, at least some of the settlements here intend to preclude future claims by class members (perhaps one might consider it fraud that their "gallons" of gas will no longer be volumetric gallons). *E.g.* Valero Settlement § 6.4, Dkt. 4472-4 at 22 (releasing Valero from, *inter alia*, "actions taken by a Valero Releasee that are authorized or required by this Amended Settlement agreement or by the Final Judgment."). Future-conduct releases like this are unlawful. *See Authors Guild*, 770 F. Supp. 2d at 675, 679 (repudiating settlement that insulated a "forward-looking business arrangement" as exceeding the permissible scope of a release); *see generally* James Grimmelmann, *Future Conduct and the Limits of Class Action Settlements*, 91 N.C. L. Rev. 387 (2013). Approving this settlement would require the Court "to ignore the reality that there are nearly always (if not always) some differences between Executive, Legislative and Judicial remedial procedures given how differently the three branches operate: by regulation, legislation, and decree." *Winzler*, 681 F.3d at 1214. Beyond just ignoring coordinate branches' prerogatives, however, endorsing this settlement would require the Court to affirmatively trespass into their domains as a regulator/legislator. *See Beler v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 480 F.3d 470, 474 (7th Cir. 2007) ("[S]uch a [compliance] rule should be adopted (if at all) through the administrative process or a statutory amendment rather than a judicial definition of the phrase 'unfair or unconscionable.' The legislative and administrative processes can take full account of all affected interests in a way that judicial case-by-case decision-making cannot."); *cf. also Amchem Prods.*, 521 U.S. at 623 ("The benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration ….").

D. *Burford* absention is applicable.

Not only does this settlement overwrite national policy, it interferes with state policymakers as well. That is backwards. Under the doctrine of *Burford* absention federal courts should abstain from taking jurisdiction to decide questions that would "be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976) (citing *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)). "[F]ederal courts should exercise their discretionary power to refuse to hear cases within their jurisdiction when to do so would impair 'the independence of state governments in carrying out their domestic policy.'" *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 703 (10th Cir. 1988) (quoting *Burford*, 319 U.S. at 318). While the *Burford* doctrine has been limited in recent years,[9] it is still applicable here. It is not the adjudication of plaintiffs' discrete consumer fraud claims that disrupts the state administrative scheme here. If plaintiffs were merely seeking damages for themselves and absent class members, there would be no problem. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996). Rather, it is the injunctive and *cy pres* settlement relief itself that would impair the independence of state agencies by plying them with settlement funds. It is not even clear that agencies are permitted to solicit or accept contributions in every state at issue under relevant state ethical rules.

"The class action was never designed to serve as a free-standing legal device for the purpose of 'doing justice,' nor [as] a roving policeman of corporate misdeeds." Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 74 (2003). Named plaintiffs and putative

[9] *Oklahoma ex rel. Doak v. Acrisure Bus. Outsourcing Servs., LLC*, 529 Fed. Appx. 886, 897 (10th Cir. 2013).

class counsel wish to use the class action device to rewrite existing regulatory law, not to benefit their real principals—absent class members. That should not be permitted.

III. Even if the class is certifiable, the settlement is not fair.

If the Court disagrees with the above analysis and concludes that the settlement classes are sufficiently cohesive, and that a national class proceeding is a superior method of adjudication, then this Court should still disapprove the settlement as unfair.

A. Prospective implementation of ATC fuel, disclosure stickers, and contributions to state agencies all confer no benefit on the class.

There is a fundamental problem with counting prospective business practice changes as class relief. "The fairness of the settlement must be evaluated primarily on how it *compensates class members*—not on whether it provides relief to other people, much less on whether interferes with defendant's marketing plans." *Pampers*, 724 F.3d at 720 (quoting *Synfuel Tech., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 654 (7th Cir. 2006)). Simply, "[n]o changes to future advertising by [defendants] will benefit those who already were misled." *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1077 (C.D. Cal. 2010). "Future purchasers are not members of the class, defined as it is as consumers who have purchased [the product]." *Pearson*, 772 F.3d at 786; *see also Felix v. Northstar Location Servs.*, 290 F.R.D. 397, 410 (W.D.N.Y. 2013) (prospective injunctive relief promise of no value to class members who only dealt with defendant in past transaction). These cases recognize that a class composed of people who have done discrete business with defendants *in the past* is not served by prospective injunctive relief that can at most only benefit those who do business with defendants *in the future*. Even in the unlikely event that the injunctions impose significant costs on defendants, that is not the measure of compensable value. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 944 (9th Cir. 2011) ("[T]he standard [under Rule 23(e)] is not how much money a company spends on purported benefits, but the value of those benefits to the class.") (quoting *TD Ameritrade Accountholder Litig.*, 266 F.R.D. 418, 423 (N.D. Cal. 2009)).

Objectors are not arguing that a class may never obtain injunctive relief. For example, a 23(b)(2) civil-rights claim may seek to change the future behavior of a governmental body or an employer with respect to a class of individuals who have ongoing relationships with the defendant. A products liability settlement might provide retrospective injunctive relief that repairs or replaces a defective product. *E.g. Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998). Or one could settle a class action on behalf of a class of consumers who plan to purchase gas in the future without waiving their retrospective damages claims. But that is not what happened here. Here, the class members here receive nothing—unless they happen by coincidence to overlap with future purchasers of defendants' gasoline.

But injunctive relief cannot just be free-flowing "good"; the fairness of a settlement is determined by the benefit ***to the class***—the putative clients of class counsel. Perhaps the surest indication that ATC implementation and political contributions are not "class relief" is that opt-outs derive as much benefit from said relief as do those who do not opt out. *See Vought v. Bank of Am., N.A.*, 901 F. Supp. 2d. 1071, 1090 (C.D. Ill. 2012) (remarking on the slender "difference between an individual who opts out of the proposed settlement and an individual who does not opt out" and ultimately disapproving the settlement). As such, it would be inappropriate to count any of the purported relief as a class benefit justifying the release class members are granting to defendants.

A couple of hypothetical consumer fraud class action settlements demonstrate the point. Imagine a settlement of *Seinfeld v. Kramer Non-Fat Yogurt*, where a class sues a shop selling "non-fat yogurt" that turns out to be full of fat. *Cf.* Larry David, "The Non-Fat Yogurt," *Seinfeld* (NBC Nov. 4, 1993). If the parties settled for injunctive relief whereby the defendant agreed to provide non-fat yogurt in the future, that would be of no benefit to the class for their ***previous*** injuries—even if, as here, there happened to be some overlap between the class members and the set of people who purchased non-fat yogurt in the future. The class members only benefit to the extent they make additional purchases from the defendant, and that benefit is presumably reflected in the price they pay for those new purchases.

Another example: imagine the hypothetical consumer fraud class action *Gatsby v. West Egg*, where the class sues over West Egg selling packages of a dozen eggs that only have ten eggs in them. If the parties settled with injunctive relief that required West Egg to include at least twelve eggs in every "dozen eggs" package, that again provides no benefit to the class for their ***previous*** injuries, even if, once again, there happened to be some overlap between the class members and the set of people who purchased West Eggs in the future. The lack of benefit becomes even more apparent if West raises its price for a "dozen" eggs from $2.00 to $2.40.

Note the problem of "leakiness" in both of these settlements that demonstrates the inherent illusoriness of prospective injunctive relief in a consumer class action. A defendant forced to change business practices by prospective injunctive relief can simply choose to pass along those additional costs to its customers: West Egg customers get 20% more eggs than before the settlement, but are paying 20% more for the package. There is no benefit even to future purchasers, much less the class. Similarly, here, the settlement requires defendants to either directly implement ATC or indirectly galvanize ATC conversion. That may mean that future customers get slightly more gasoline per "gallon" on average—but the settlement does not forbid defendants or their affiliates from raising prices to offset the additional marginal costs in its change in its business practices. They need only raise the price of gasoline a penny or three to transfer all of the additional benefit from the class back to itself. Because the settlement does not prohibit such an offsetting price increase (or even a much higher price increase), the prospective injunctive relief in this settlement is inherently illusory to future customers as well as current ones.

As *Pampers* and *Pearson* also demonstrate, an injunction by itself is insufficient to generate settlement benefit; it must effect 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) (internal quotation omitted and emphasis added).[10] As such, even to the extent that benefits to future purchasers can be considered class benefits, there is no demonstration that ATC conversion will translate into actual benefit to consumers in the ever-fluctuating market for the retail fuel. The parties have provided no evidence to the contrary, though the burden is on them to prove the fairness of the settlement. *See Pampers*, 724 F.3d at 718 (compiling cases and authorities); *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 195 (5th Cir. 2010) (proponents must show that the settlement "secures some adequate advantage for the class").[11] As economist David R. Henderson demonstrates, the change in the cost structure will be offset by changes in price; consumers will not be getting free gasoline, and will realize no benefit. Henderson Decl. ¶¶ 14-22.

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[10] Even indulging the fiction that ATC conversion is a wellspring of benefit for class members, twenty-four of the twenty-eight pending settlements only offer contingent benefits. Nothing forces branded retailers or state weights and measures agencies to tap into the available funds to subsidize ATC conversion. There is no assurance that the bulk of the aggregated $24 million will not simply escheat to the states at the end of six years. Nor is even the Valero settlement free from uncertainty. *See* Valero Settlement § 4.5 (Dkt. 4472-4 at 16) (describing the potential hurdle of regulatory approval to convert to ATC pumps).

[11] As always, the Court should be on guard for fictitious valuations. *See Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003) ("Precisely because the value of injunctive relief is difficult to quantify, its value is also easily manipulable by overreaching lawyers seeking to increase the value assigned to a common fund."); *In re Oracle Secs. Litig.*, 132 F.R.D. 538, 544-45 (N.D. Cal. 1990) (Walker., J.) (referring to injunctive relief "expert valued at some fictitious figure" coupled with "arrangements to pay plaintiffs' lawyers their fees" to be the "classic manifestation" of the class-action agency problem). When Objector Alkon noted that "if the parties expect that class members will credibly receive $100 million in benefits, then the resulting 10% contingency fee is eminently fair." (Dkt. 1578 at 24), suddenly class counsel inundated the record with economic quackery of predictions of $100 million value. *See* Declaration of Dr. Andrew Safir (Dkt. 1620-1); Declaration of Professor Klonoff (Dkt. 1820.1).

Precisely for this reason, every single regulatory agency to evaluate the question has concluded that ATC would yield no economic benefit to consumers. The National Conference of Weights and Measures ("NCWM"), a group composed of state and local weights and measures officials, has rejected the use of ATC at retail. At its July 2009 National Conference, an NCWM committee withdrew two proposals that would have allowed or mandated ATC at retail. In reaching its decision, the committee reviewed reports, studies, and received public comments where an "overwhelming majority" were opposed to the measures. NCWM, *Addendum Sheet to the Interim Report of the Laws and Regulations Committee* (Docket No. 1343-18 at 3). The primary reasons for withdrawing the proposals "were conference consensus against ATC, economic cost factors, ***lack of benefit to consumers***, absence of uniformity in the marketplace, and the additional cost to Weights and Measures officials and service companies." *Id* (emphasis added). As part of its reasoning, the NCWM cited a thorough study by the state of California.

California regulators undertook a year-long cost-benefit analysis and concluded that ATC would result in no economic benefit, and that ATC would actually *harm* consumers because they would bear the costs of new equipment. In October 2007, the California legislature directed the California Energy Commission ("CEC"), in partnership with two other agencies, to complete a "comprehensive survey and cost benefit analysis" of temperature correction, including the utility of "[r]equiring the installation of temperature correction or compensation equipment at the pump." Cal. Bus. & Prof. Code. § 13630. On March 11, 2009—5 days after the Costco Settlement Agreement was signed—the five CEC Commissioners unanimously adopted its final 147-page report. The commission found that the "cost-benefit analysis concludes that the results are ***negative or a net cost to society*** under all the options examined." *Fuel Delivery Temperature Study* ("CEC Report")[12] at 1 (emphasis added). "It is also unlikely that there are any plausible

[12] Cal. Energy Comm'n, *Fuel Delivery Temperature Study*, No. CEC-600-2009-002-CMF. Available online at http://www.energy.ca.gov/transportation/fuel_delivery_temperature_study/documents/index.html

circumstances consumers could receive a small net benefit with installed ATC devices at California's retail stations." *Id.*

The commission found that switching to ATC at retail would not result in savings, although the average size of "gallons" dispensed would increase. This is because "retail station owners will in fact raise their fuel prices to compensate for selling fewer units, all other things being equal." *Id.* at 105-6. Because gas retailers will adjust prices to maintain their profitability, "this potential benefit to consumers perceived by some stakeholders is not expected to materialize." *Id.* at 71. The installation and promotion of ATC is therefore economically worthless to the consumers at large. (And even this assumes that there even exists a problem at the consumer level: Consumers Union and Consumer Watchdog, neither any sort of corporate shill, call the "hot fuel" phenomenon an urban legend because underground double-walled tanks are generally insulated against temperature changes, even confirming the absence of difference through empirical testing. Gordon Hard, *Save on gas with morning fill-ups? Don't bet on it*, Consumer Reports News, Aug. 11, 2008.

The proposed settlement is even worse than the CEC report estimates because class members will be forced to absorb the costs of the settlement itself, including attorneys' fees. Self-dealing settlements like those of Putative Class Counsel raise the costs to defendants of selling fuel, and raise prices to class members like Objectors without concomitant benefits. If attorneys' fees are awarded in a suit that makes consumers worse off, it creates the incentive for other attorneys to also engage in socially wasteful class-action litigation that injures consumers.

The proposed settlement makes both class members and future consumers worse off than if the suit had never been brought, and such a settlement cannot imaginably be fair to the class, much less one entitling attorneys to fees. This is an independent reason to reject the settlement. Because class representatives are permitting this to happen, they do not meet the Rule 23(a)(4) standard for adequate representation. *In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748 (7th Cir.

2011). Both the theory underpinning these cases, and the injunctive relief obtained presume that gasoline consumers lack a junior high school level science education on how temperature affects states of matter; the notion "denigrate[s] the intelligence of ordinary consumers." *Pampers*, 724 F.3d at 720.

The prospective injunctive relief cannot, as a matter of law, be considered a benefit to the class even if there were 100% overlap between beneficiaries and class members. This is an independent reason to reject the settlement.

B. The settlements afford preferential treatment to class counsel.

A class action settlement may not confer preferential treatment upon class counsel to the detriment of class members. "Such inequities in treatment make a settlement unfair" for neither class counsel nor the named representatives are entitled to disregard their "fiduciary responsibilities" and enrich themselves while leaving the class behind. *Pampers*, 724 F.3d at 718-21 (reversing settlement where class counsel received $2.73 million and absent class members were offered a money-back refund program with a likely small claims rate, prospective labeling changes, and a *cy pres* donation)).

A recent Seventh Circuit decision explains what constitutes undue preferential treatment. *Pearson,* 772 F.3d 778 (7th Cir. 2014). Like this case*, Pearson* settled consumer fraud and misrepresentation claims. The *Pearson* settlement resembles but outperforms the combined settlements here: a multi-million dollar payday to class counsel, significant sums to non-class third parties, meaningless injunctive relief, yet it managed to remit some recompense to absent class members through a claims process. Without mincing words, *Pearson* nonetheless nixed the "selfish deal" that "disserve[d] the class." *Id.* at 787.

Similarly, the Ninth Circuit in *Bluetooth* identified three warning signs of a class action settlement that is inequitable between class counsel and the class. 654 F.3d at 947 (listing the indications: **(1)** a disproportionate distribution of fees to counsel; **(2)** a "clear sailing agreement" (the defendant's agreement not to oppose a certain sum in attorneys' fees); and **(3)** a "kicker" (a segregated fund for attorneys' fees that reverts any excess fees to the defendant)).

A fair settlement requires a fair allocation of the proceeds; "[t]he ratio that is relevant is the ratio of (1) the fee to (2) the fee plus what the class members received." *Pearson*, 772 F.3d at 781 (quoting *Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014).

The Tenth Circuit has endorsed the Ninth Circuit's "benchmark" of attorney awards of 25% of the recovery. *Gottlieb v. Barry*, 43 F.3d 474, 488 (10th Cir. 1994). A settlement allocation to attorneys that is designed to exceed that range is not what *Pampers* called "commensurate." 724 F.3d at 720. *Dennis v. Kellogg, Co.*, 697 F.3d 858, 868 (9th Cir. 2012) (38.9% "clearly excessive"); *Redman*, 768 F.3d at 630-32 (55%-67% allocation unfair); *Eubank v. Pella Corp.*, 753 F.3d 718, 727 (7th Cir. 2014) (56% allocation unfair). Here, the allocation of the constructive common fund is like that of *Bluetooth* and *Pampers*, the entirety of the settlement funds are earmarked for either class counsel or third-parties. Contraposed against the putative classes's fictive benefits, class counsel's gains are "concrete and indisputable." *Pampers*, 724 F.3d at 721. Aggregated, these settlements permit class counsel to seek fees amounting to roughly $15 million: 30% of the gross settlement funds plus an additional $7.75 million in conjunction with the four settlements for which no fund will be established.

With respect to the four injunctive-relief only settlements, class counsel is seeking, as is permitted under the settlements, the entirety of the constructive common fund. *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 785, 820-21 (3d Cir. 1995) (A severable fee structure "is, for practical purposes, a constructive common fund…[P]rivate agreements to structure artificially separate fee and settlement arrangements cannot transform what is in economic reality a common fund situation into a statutory fee shifting case"). A constructive common fund structure is an inferior settlement structure for one principal reason: the segregation of parts means that the Court cannot remedy any allocation issues by reducing fee awards and/or named representative payments. *See Pearson*, 772 F.3d at 786; *Bluetooth*, 654 F.3d at 949. This constitutes a red flag of a lawyer-driven settlement and begets a "strong presumption of…invalidity." *Pearson*, 772 F.3d at 787; *accord Redman*, 768 F.3d at 637 (kicker is a "defect"); *Eubank*, 753 F.3d at 723 (kicker is a "questionable provision").

In a typical common fund settlement, the district court can reduce the fees requested by plaintiffs' counsel—and when it does so, the class will benefit from the surplus.[13] The class is unambiguously worse off when any reduction in a fee award reverts to the defendant instead of the class. Moreover, a segregated fee fund has the self-serving effect of protecting class counsel by deterring scrutiny of the fee award. A court has less incentive to scrutinize a fee award, because the kicker combined with the clear sailing agreement means that any reversion will only go to the defendant that had already agreed to pay that amount. Charles Silver, *Due Process and the Lodestar Method*, 74 Tulane L. Rev. 1809, 1839 (2000) (such a fee arrangement is "a strategic effort to insulate a fee award from attack").

The fee allotments in the non-monetary settlements are disproportionate. However, when approving the Costco settlement this Court reasoned that such awards do not undermine the fairness of the because the quantum of the fees will ultimately be determined by the Court. Dkt. 4248 at 37 & n.31. The error with this reasoning is that because of Rule 23(h), class counsel can *never* be certain that it will obtain the amount of the award agreed upon under a given settlement. Fees are always contingent upon court approval. Perhaps the Court is correct that because defendants are not prohibited from challenging the fees (*i.e.* there is no formal clear sailing), then class counsel are not getting the full benefit of the agreed-upon number. But it is error to insist that a provision saying "Valero will pay…up to Four Million Dollars ($4,000,000) in attorneys' fees and litigation expenses and/or costs" (Valero Settlement § 4.11) or a provision saying "Class

[13] In the twenty-four settlements that establish funds, if the Court reduces fees, it will augment the net settlement fund, although class members have no access to those funds.

Counsel agree to request, and Sam's has, subject to Court approval, agreed to pay, the amount of Three Million Dollars ($3,000,000.00) to Class Counsel as an Attorneys' Fees Award" (Sam's Club Settlement § 7.1) is no concession to class counsel at all. The number is a negotiated sum, a number the defendants would be okay with parting with. If the number were meaningless, then the Valero settlement negotiated fees would not have dropped from $4.5 million to $4 million when that settlement had to be amended to garner preliminary approval. Yet the fees did drop because they are part of the constructive common fund that the defendant expects to pay. *See Pampers*, 724 F.3d at 717 ("the economic reality is that a settling defendant is concerned only with its total liability") (internal quotation and alteration omitted). Because ATC conversion will be significantly more costly than sticker disclosure, class counsel had to accept a reduction in its fees to offset the increased costs to Valero. This reduction demonstrates the inexorable relationship between class relief and fees, and the descriptive accuracy of the constructive common fund theory generally. Conversely, the Valero reduction undermines class counsel's previous assertions that "because this will be a contested fee application with [defendant] paying only whatever amount the Court may award, there is no established fee fund, and there is simply nothing to "revert" to the Class." Dkt. 1597 at 23.

With respect to the twenty-four *cy pres* settlements, a fee of 30% of the gross settlement is excessive. It would be a bit much even if the net settlement were being dispersed to actual class members. *See, e.g., Walsh v. Popular, Inc.*, 839 F. Supp. 2d 476, 485 (D.P.R. 2012) (reducing fee award from 33.3% requested to 23%); *Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, 685 (D. Md. 2013) (reducing fee award from 30% requested to 25%); *Keirsey v. eBay, Inc.*, 2014 WL 644738, 2014 U.S. Dist. LEXIS 21371 (N.D. Cal. Feb. 18, 2014) (refusing to deviate upward from 25% benchmark to the requested 31% even though that would have only been a .23 multiplier on class counsel's lodestar); *Dickerson v. Cable Commc'ns., Inc.*, 2013 WL

617460, 2013 U.S. Dist. LEXIS 167152 (D. Or. Nov. 25, 2013) (refusing to deviate upward from 25% benchmark to 30% even where 30% was below the accrued lodestar).

But it is completely untenable where the funds will be dispersed to third-party gasoline retail stations and state agencies instead of class members. As a matter of law, class members are simply "not indifferent to whether funds are distributed to them or to *cy pres* recipients, and class counsel should not be either." *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 178 (3d Cir. 2013). When "class counsel has not met its responsibility to seek an award that adequately prioritizes direct benefit to the class," the fee award should reflect that reality. *Id.* at 178-79; *accord* Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. CAL. L. REV. 97, 136-47 (2014) (advocating for "presumptive reduction of attorneys' fees" where settlement includes significant *cy pres* component).

A dollar that goes to *cy pres* is less valuable than a dollar that goes directly to a class member. *E.g., In re Heartland Payment Sys., Inc.*, 851 F. Supp. 2d 1040, 1077 (S.D. Tex. 2012) (discounting *cy pres* by 50% for purposes of awarding fees); *In re Livingsocial Mktg. & Sales Practice Litig.*, 298 F.R.D. 1, 19, 22 (D.D.C. 2013) (cutting fees to 18% in consideration of "proportion of the award that is going to *cy pres*."); *Weeks v. Kellogg Co.*, No. CV 09-08102 (MMM) (RZx), 2011 U.S. Dist. LEXIS 155472, at *111 (C.D. Cal. Nov. 23, 2011) (awarding 16.2% "in light of the fact that almost half of the settlement's value is guaranteed not to directly benefit individual class members."); *Perry v. FleetBoston Fin. Corp.*, 229 F.R.D. 105, 123 n.9 (E.D. Pa. 2005) (excluding *cy pres* and non-economic injunctive relief benefits entirely); *Pearson,* 772 F.3d 778 (same); *see also* 28 U.S.C. § 1712 (forbidding coupon relief going to third parties from counting towards attorneys' fees). The twenty-four settlements that permit class counsel to seek unopposed awards of 30% of the gross settlement are unfairly slanted in favor of class counsel.

If this Court endorses a rule that makes class counsel financially indifferent between a settlement that awards cash directly to class members and a *cy pres* only settlement, the parties will always agree to the *cy pres* arrangement and unnamed class members will be permanently left out in the cold. The parties will incline toward the *cy pres* arrangement because of several reasons: defendants prefer to make payments to third parties to whom they have a preexisting relationship rather than making payments to absent class members. Here, 2/3 of the refiner settlement funds will be used for payments to branded retailers. Donations may engender good will, and often merely replace expenditures that are already in the pipeline, or which the defendant has a habit of making: in the latter case, then the "relief" to the class is even more illusory, because it merely reflects a shift in accounting entries.

The percentage of recovery approach is the prevailing fee methodology because it aligns the incentives of class counsel and the class much better than does the competing lodestar method. *See generally* Charles Silver, *Due Process And The Lodestar Method: You Can't Get There From Here*, 74 TUL. L. REV. 1809 (2000) (observing "solid consensus that the contingent approach minimizes conflicts more efficiently than the lodestar"). To apply the benchmark equally regardless of whether the class actually recovers funds is to undermine its core benefit and to again misalign the interests of class counsel and its clients.

In the ordinary *cy pres* settlement, it is the defendant's preference for third-party donations which drives the *cy pres* disposition. Here, however, putative class counsel benefits from the settlements' *cy pres* structure. If their request to be appointed Settlement Administrator is granted, they will superintend the funds for the seven years after the settlement is approved. Although Horn Aylward & Bandy LLC disclaims any profit motive for this request (*See* Dkt. 4328 at 14), there is no question that the appointment would constitute another benefit for class counsel. The settlement agreements vest the Settlement Administrator with significant discretion to oversee distributions of millions of dollars. *See, e.g.* BP Settlement ¶¶13 (discretion to propose a modification to the presumptive allocation of the Settlement Fund on written notice to the Parties),[14] 14(c) (discretion to approve payment of claims or approve partial payment to branded stations), 14(g) (discretion to approve payment of claims or approve partial payment to state weights and measure programs); 14(g) (discretion to modify the contributing shares of defendants). Discretion over the disposition of nearly $25 million begets power and influence in a realm where class counsel have been active players for many years.

This raises an appearance of impropriety, a conflict of interest between putative class counsel and class members. Whereas absent class members desire a resolution that affords them compensation for the alleged fraud, class counsel's interest is misaligned when they advocate for a *cy pres* settlement that guarantees themselves a position of influence (no matter how directly lucrative or not) for the next seven years. Class counsel's right to seek appointment did not come without a price to the class. As the Court has observed, defendants are less comfortable with a settlement that is administered by class counsel than by a neutral third-party. *See* Dkt. 4464 at 15 (describing ExxonMobil's position). Thus, that the defendants did not insist upon a third-party administrator was a concession obtained by class counsel. Worse still, the class notice is silent, not once mentioning that class counsel is seeking a side-appointment as settlement administrator.

Objectors are not arguing that the settling parties colluded. Although it is *necessary* that a settlement is at "arm's length" without express collusion between the settling parties, it is not *sufficient.* "While the Rule 23(a) adequacy of representation inquiry is designed to foreclose class certification in the face of 'actual fraud, overreaching or collusion,' the Rule 23(e) reasonableness inquiry is designed precisely to capture instances of unfairness not apparent on the face of the negotiations." *Bluetooth*, 654 F.3d at 948 (internal quotation omitted). The Court's oversight role does not end at making sure that the settling parties engaged in properly adversarial arm's-length settlement negotiations. *Redman*, 768 F.3d at 628; *Pampers*, 724 F.3d at

[14] Will class counsel have to send notice to themselves?

717-18. Because "[t]he defendant, and therefore its counsel, is uninterested in what portion of the total payment will go to the class and what percentage will go to the class attorney"[15] it is enough that the settlement evinces "subtle signs that class counsel have allowed pursuit of their own self-interest and that of certain class members to infect the negotiations."[16] "[T]he adversarial process" between the settling parties cannot safeguard "the manner in which that [settlement] amount is *allocated* between the class representatives, class counsel, and unnamed class members," *Pampers*, 724 F.3d at 717 (emphasis in original).

Class members should be the "foremost beneficiaries" of any class settlement. *Baby Prods.*, 708 F.3d at 179. As in *Pampers*, the signs are not particularly subtle here that class counsel—and not the class—is the primary beneficiary. Approval would constitute an abuse of discretion.

C. The Valero settlement cannot be adjudicated fair until the most-favored-nation clause is vacated or mooted.

Section 4.8 of the Valero settlement has a "most-favored-nation" clause that permits Valero to retroactively modify the settlement if another defendant in this litigation agrees to a more favorable deal. Class members must be given notice of any such new deal, and the current deal is illusory until there is no chance that absent class members will be affected by a post-fairness-hearing deal.

IV. The upside-down nature of the litigation precludes class certification.

Class certification is inappropriate under Rule 23(a)(4) because the class attorneys picked the class representatives to approve a settlement, rather than class representatives overseeing the settlement process for the interests of the class. The class representatives are beholden to the

[15] *Piambino v. Bailey*, 757 F.2d 1112, 1143 (11th Cir. 1985) (quoting *Foster v. Boise-Cascade, Inc.*, 420 F. Supp. 674, 686 (S.D. Tex. 1976), *aff'd* 577 F.2d 335 (5th Cir. 1978)).

[16] *Pampers*, 724 F.3d at 718 (internal quotation omitted).

class attorneys (after all, they would not have been chosen as class representatives if they disagreed with the attorneys' strategy), and their incentive payments—infinitely higher than any unnamed class member is receiving—has unfairly motivated them to accept a settlement that benefits themselves and their attorneys, and no one else. *E.g.*, *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013); *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014); *Radcliffe v. Experian Info. Solutions Inc.*, 715 F.3d 1157 (9th Cir. 2013).

Moreover, the Texas subclass representatives, Clinton Davis, Kennedy Kraatz, Michael Warner, Lisa Ann Lee, and Priscilla Craft, share names with Texas attorneys. Do they or their firms have preexisting relationships with class counsel? If so, that would be *per se* grounds for disqualification. *Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014). Investigation is needed into how the class representatives were chosen, and why they support such one-sided settlements.

CONCLUSION

In addition to the reasons given by the other objections, there are seven independent reasons to reject the settlements:

First, if class proceedings are unable to provide compensatory relief to class members, as this Court has previously found, they are by definition not superior means of adjudication, and class certification is inappropriate.

Second, Article III courts are not the appropriate venue for instituting prospective nationwide changes to retail fuel measurements, either as a matter of law or as a matter of public policy. Class counsel is asking this Court to take sides in a regulatory dispute where *every* single regulator (and the only jury to rule on the question) is on the other side of class counsel. They have accomplished this result not through persuasion or evidence, but by extorting defendants with burdensome litigation costs if they do not agree to pay off class counsel.

Third, the settlement provides only prospective relief, which is, as a matter of law, insufficient recompense for releases of consumer fraud claims.

Fourth, according to the only valid economic expert testimony in the case, as well as research by expert regulatory agencies and independent consumer watchdogs, the proposed injunctive relief will not benefit the class, and may actually harm the class by saddling them with costs for an economically useless technology.

Fifth, the proposed settlement harms at least half of the class by increasing the price they pay for gasoline, and forcing them to make monetary contributions against their interest. Because of this, there is not a common interest within the proposed class, and the intraclass conflict of interest makes certification inappropriate.

Sixth, the "kicker" clause, combined with the excessive attorney-fee request, demonstrates impermissible preferential treatment that requires settlement rejection.

Seventh, class certification is inappropriate because the class representatives are inadequate because of their ties to class counsel.

The Valero settlement is independently objectionable because of its most-favored-nation clause.

These are self-serving settlements to benefit attorneys at the expense of class members, and the Court should reject the settlement as failing to comply with the requirements of Rules 23(a)(4), 23(b)(3) and 23(e)(2).

Dated: March 23, 2015

Respectfully submitted,

/s/ Theodore H. Frank
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PROOF OF SERVICE

I declare that:

I am over the age of 18 years and not party to the within action; my office address is 1718 M Street NW, No. 236, Washington DC 20036.

On March 23, 2015, I served the attached:

OBJECTION TO PROPOSED SETTLEMENTS and accompanying declarations of Theodore H. Frank, Melissa Holyoak, and Adam Schulman

_X_ By First Class Mail in that I caused such envelope(s) to be delivered via USPS to the addressee(s) designated.

Robert A. Horn HORN AYLWARD BANDY 2600 Grand Boulevard, Suite 1100 Kansas City, MO 64108	Martin M. Loring Husch Blackwell LLP 4801 Main Street, Suite 1000 Kansas City, MO 64112
Clerk of the Court United States District Court 500 State Ave. 259 U.S. Courthouse Kansas City, KS 66101	Daniel B. Hodes Rouse Hendricks German May PC 1201 Walnut, Suite 2000 Kansas City, MO 64106

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 23, 2015.

*/s/ Theodore H. Frank*_____________________________
Theodore H. Frank