NO. 19-55805

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESSICA LITTLEJOHN, On behalf of herself and all others similarly situated,
Plaintiff-Appellee,

v.

JAMES COPLAND,
Objector-Appellant,

v.

FERRARA CANDY COMPANY,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of California, No. 3:18-cv-00658-AJB-WVG

Reply Brief of Appellant James Copland

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It was reversible error for the district court to approve the settlement under Rule 23(e) because the only settlement benefit—an injunction requiring a conditional change to SweeTARTS packaging until June 17, 2021—has no *marginal* settlement value for class members. The packaging change affects class members, opt outs, and non-class members equally. But if class members receive the same thing whether or not they are part of the settlement, in economic reality they are not receiving any consideration for release of their damages claims. A settlement that waives class members' damages claims for *no consideration* is unfair as a matter of law. Appellees argue that the injunction is "something of value," but do not respond to the argument that the injunction cannot serve as consideration for the release (*i.e.*, it has no *settlement* value). *Compare* OB18 *with* DB20-21, PB15.[1]

Indeed, appellees fail to confront the undeniable fact that every absent class member—millions of them—would be better off opting out of the settlement because they would still enjoy the same dubious settlement benefits available to everyone in the world. A fiduciary for the class would have advised all class members to opt-out and preserve their damages claims. In recommending that class members be bound by a settlement that provides no consideration other than to class counsel and the named

[1] "ER" refers to Copland's Excerpts of Record, "OB" refers to Copland's Opening Brief, "PB" refers to Plaintiff-Appellee's Brief, "DB" refers to Defendant-Appellee's Brief, and "DSER" refers to Defendant-Appellee's Supplemental Excerpts of Record.

representative, class counsel has breached its fiduciary duty, and appellees provide no explanation why certification should not be reversed for this independent reason.

While Ferrara now insists that the case was "all about" injunctive relief (DB1), the gist of the complaint is that class members paid a price premium, an alleged dollars-and-cents retrospective harm. ER120-23. Ferrara evidently believed the damages claims valuable enough to extinguish through a release in settlement, paying higher notice costs to satisfy the stricter notice requirements of a Rule 23(b)(3) damages class. The economic reality of the settlement is this: defendant bargained for the broadest possible release, including damages claims in every state and even purportedly claims under the laws "of any jurisdiction outside the United States." ER91. Class counsel assented to this broad release without consideration for class members' damages claims, while negotiating a clear-sailing provision where defendants would not challenge class counsel's fee request of $275,000. ER101-102. This is wrong: class members should be the foremost beneficiaries of settlement, not the attorneys who agree to waive damages claims for no consideration. *E.g.*, *Koby v. ARS Nat'l Servs.*, 846 F.3d 1071 (9th Cir. 2017).

But even if the injunction could serve as consideration for the damages claims, the district court erred by failing to even "attempt to approximate the value of injunctive relief and use that valuation in an assessment of disproportionality." *Campbell v. Facebook, Inc.*, No. 17-16873, -- F.3d --, 2020 U.S. App. LEXIS 6643, at *41 (9th Cir. Mar. 3, 2020). As there was zero evidence that the injunction had *any* value, the settlement cannot pass this assessment. Appellees argue that Ferrara had introduced "evidence related to the value of the injunctive relief," to wit: (1) that SweeTARTS buyers are repeat buyers; and (2) that Ferrara began the "redesign process" of their packaging.

DB8-9; PB15 n.4. But beginning a redesign process and having repeat customers prove nothing about the *value* to class members of the redesigned package. That some class members are repeat customers means that prospective injunctive relief *could* benefit a portion of the class. Yet, "possibility" of benefit "is not actuality or even probability." *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 724 (7th Cir. 2016). When relief is immaterial, however, implementing it early is also immaterial; "zero plus zero equals zero." *In re Subway Footlong Sandwich Mktg. & Sales Pracs. Litig.*, 869 F.3d 551, 557 (7th Cir. 2017).

Plaintiffs spend much of their brief attempting to justify the lack of direct relief for the class members, arguing that class actions cannot possibly return money to consumers of low-cost items. Class counsel know better than anyone else that this is false. In fact, plaintiffs' counsel litigated and settled a similar case involving malic acid claims, and successfully established a $5.4 million settlement fund from which class members could claim monetary relief. *Hilsley v. Ocean Spray Cranberries, Inc.*, No. 3:17-CV-2335-GPC-MDD, 2020 WL 520616, 2020 U.S. Dist. LEXIS 16195, at *17 (S.D. Cal. Jan. 31, 2020). Real settlements often take more work—and require sharing the benefits of settlement with clients, meaning this work is sometimes not as handsomely compensated as the 1.489 multiplier that class counsel negotiated for itself in this $0 settlement.[2]

[2] For example, in *Graves v. United Indus. Corp.*, the same class counsel's fair share of a $2.5 million settlement fund amounted to only a 1.16 multiplier. No. 2:17-cv-06983-CAS-SKx, 2020 U.S. Dist. LEXIS 33781, at *24 (C.D. Cal. Feb. 24, 2020).

If this Court were to affirm approval of this hollow settlement—waiving damages claims for no consideration, but securing outsized attorneys' fees with clear sailing—it will provide powerful incentives for class counsel to sell out class claims to pad their own fees, as appears to have occurred here. A sellout must not be more lucrative than a successful recovery to class members.

I. Appellees do not and cannot dispute most of Copland's arguments: the injunction is not consideration for waiver of damages claims, class members would be better off opting out, and the settlement has the same abusive characteristics as *Bluetooth*.

The settlement flunks fairness because the sole relief—an injunction to change SweeTARTS packaging—is not consideration for release of class members' damages claims. OB18. The settlement only provides *prospective* injunctive relief; it does not compensate class members for their past injuries, but only changes the customer experience for future purchasers of SweeTARTS. OB23. Class members can enjoy that injunctive relief with the rest of the non-class-member world regardless of whether they participate in the settlement or opt out. Because anyone in the world receives the injunctive relief without having to take part in the settlement, there is no marginal benefit to being a class member: the settlement provides no consideration for release of class members' damages claims. "No one should have to give a release and covenant not to sue in exchange for zero (or virtually zero) dollars." *Daniels v. Aeropostale West*, No. C 12-05755 WHA, 2014 WL 2215708, at *3 (N.D. Cal. May 29, 2014).

Appellees do not dispute that a court must evaluate a settlement on how it *compensates* class members for their injuries. OB21 (quoting *Pampers* and *Synfuel*). Nor do

appellees deny that purported injunctive relief is "easily manipulable by overreaching lawyers." OB17 (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003)). And appellees provide *no response* to Copland's argument that the injunction cannot be consideration for release of class members' damages claims. Instead, appellees simply argue that the injunction has value based on the district court's remarks at the fairness hearing that the injunction will supposedly give class members "the comfort of knowing that they are going to get something other than natural ingredients" so they are "fully informed." DB19 (quoting ER23). Not only were these findings unsupported by the record, they were unmoored from any "informed economic judgment" that must be brought to bear in assessing injunctive relief settlement value. *Merola v. Atlantic Richfield Co.*, 515 F.2d 165, 172 (3d Cir. 1975); *see also Jane Roes 1-2 v. SFBSC Management, LLC,* 944 F.3d 1035, 1055 (9th Cir. 2019) (cautioning of "the danger that parties will overestimate the value of injunctive relief in order to inflate fees."). While there is *no evidence* that the redesigned package has *any* value at all, *see* Section II.B below, even if the redesigned package had some actual value, the injunction has no *settlement* value because it is not consideration for release of the class's damages claims.

Indeed, neither appellee can deny that each and every class member would be better off opting out of the settlement because they would receive the injunctive "relief" but maintain their damages claims. OB18, OB22, OB42. In negotiating and then recommending a settlement which every class member should have rationally opted out of, class counsel breached their fiduciary duty to the class in violation of Rule 23(g)(4). OB41-43. "If the class settlement does not provide 'effectual relief' to the class and its 'principal effect' is to 'induce the defendants to pay the class's lawyers enough to make

them go away,' then the class representatives have failed in their duty under Rule 23[(a)(4)] to 'fairly and adequately protect the interests of the class.'" *Subway*, 869 F.3d at 556. Neither appellee addresses the breach of fiduciary duty (neither even uses the word "fiduciary"), because no credible defense for the breach exists.

Further, appellees also cannot deny that *Bluetooth* requires especially close scrutiny because the settlement was approved before certification—before the complaint was even answered!—and because the claims were expanded to release much broader claims than pleaded. OB28; *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) ("*Bluetooth*"). Indeed, this Court recently reaffirmed the significance of this heightened pre-certification scrutiny. *Roes*, 944 F.3d at 1060 (reversing for failure to apply the necessary rigor). Defendant quotes *Bluetooth* (DB25), but goes on to argue that the district court's approval (of an unmodified proposed order) finding no collusion suffices. As explained in Section III and in *Roes*, it does not. Similarly, the parties do not dispute that those clear-sailing and kicker clauses have the self-serving effect of protecting the fee award from scrutiny. OB29-30.

Finally, appellees cannot deny and *do not even address* the fact that the district court purported to distinguish *Bluetooth* with characteristics that are identical to the settlement at issue in *Bluetooth*. OB25. The district court quoted the three *Bluetooth* warning signs (disproportionate fees, clear sailing, and kicker), without acknowledging that they exist here. ER9. The district court then found "no collusion," citing the presence of a mediator (ER7, ER28) and that the parties had "agreed to the terms of the Settlement before discussing attorneys' fees." ER9. But Copland's objection specified that these *exact* features existed in *Bluetooth* as well. 654 F.3d at 948; OB25. The district court's

wholesale adoption of the proposed order incorporating these undisputedly fallacious distinctions calls to question all of the court's findings, and at least confirms that the court did not provide the scrutiny required by *Bluetooth* and *Roes*. For this independent reason alone, this Court should not affirm final approval of the settlement.

II. The district court's conclusory findings that the injunction has "value" do not withstand scrutiny nor distinguish this case from controlling authority.

None of the statements by the court cited by appellees prove that the injunction has any value to class members, let alone settlement value sufficient to justify the waiver of millions of class members' damages claims.

A. There is no evidence that the injunction has any value.

Even if the injunction could serve as consideration for release of the class's damages claims (which it cannot, *see* Section I above), the district court erred because there was no evidence that the injunction had any value, as *Koby* requires. Appellees argue that the district court found the injunction had value because future consumers would be "fully informed" and "would have the "comfort of knowing that they are going to get ***something other than natural ingredients or flavors*** in the product." DB10 (quoting ER23), PB15. The district court also asserted this would enable class members to make "a learned judgment" regarding their purchase. DB15 (quoting ER28), PB15.

To begin, the injunction doesn't "fully inform" class members about artificial flavors because the injunction does not require defendant to disclose "artificial flavors" on the package. ER93. SweeTARTS did not previously claim to contain only natural

ingredients—just no artificial *flavors*. *E.g.*, ER113. Defendant's position remains that the "no artificial flavors" label was legally appropriate because DL-malic acid is not a *flavor*. DB8 n.2. While plaintiffs sought an injunction requiring defendant to disclose "the existence of artificial flavoring" (ER127 (complaint)) and "notice sufficient to allow California customers to understand [SweeTARTS] contained artificial flavoring" (DB4 (quoting ER118)), the settlement failed to achieve that and instead, the injunction only prohibits the label from stating "no artificial flavors," without prohibiting the words "natural flavors." ER93. *See Pearson v. NBTY, Inc.*, 772 F.3d 778, 785 (7th Cir. 2014) (finding analogous injunction on certain semantic phrasings to be "substantively empty"). In fact, redesigned SweeTARTS packages continue to say, for example, "tangy strawberry flavor with other natural flavors," just as they did before this litigation began.[3] Thus, contrary to the district court's findings, rather than being informed of artificial flavors, future customers would instead simply conclude that the products remain flavored with "natural flavors."

Further, the district court's conclusory remarks of value lack any evidentiary support and fall short as a matter of law of the scrutiny demanded by *Koby* and *Bluetooth*. As the defendant admits (DB18-19) the proponents of a settlement must bear "the burden of demonstrating that class members would benefit from the settlement's injunctive relief." *Koby*, 846 F.3d at 1079. Yet appellees try to shift the burden to Copland, asserting that he has not proved the injunction worthless. PB14; DB15. But an objector need not affirmatively prove the injunction is worthless to class members

[3] *See* https://www.sweetartscandy.com/products.html (last accessed March 11, 2020).

(although it is), he need only prove that appellees failed to carry their admitted burden to show that class members would benefit.

Similarly, Copland does not ask this court to "substitute" its judgment for the district court's. *Contra* DB 2, 14, 16. He asks only that the Court hold settling parties to their burden of proof when the district court refuses to do so. This Court, and other Courts of Appeals, have done so repeatedly in past cases. *E.g., Roes, Koby*, *Subway*, *Bluetooth*, and *Pampers*.[4] Courts will not allow class members to be harmed by conclusions that defy common sense or economic reality.

Both appellees quibble with Copland's characterization of the evidence presented to the district court, but neither answers Copland's actual argument.[5] Copland means exactly what he said: "There was no evidence in the record that the class valued the injunction, or that the difference between D-malic acid, DL-malic acid, and L-malic acid has any effect on consumers' perception of a product." OB11. The parties provided no evidence that this purported relief provides any benefit over the current SweeTARTS packaging, let alone sufficient value to class members in exchange for their release.

The *sole* evidence presented and cited by appellees in this appeal is: (1) that "a 'significant percentage' of SweeTARTS buyers are 'repeat buyers who have purchased

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[4] *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013) ("*Pampers*").

[5] The parties mischaracterized Copland's position with similar language. *See* PB2 ("Copland's main contention is that the Parties submitted no evidence to the district court regarding the value to class members of the injunctive relief being provided."); DB2 ("Most egregiously, he pretends that the parties submitted no evidence to the district court regarding the value to class members of the injunctive relief").

SweeTARTS products before,' which means that consumers who purchased such products in the past are likely to be future purchasers as well." DB19; PB12.[6] And (2) that the injunction was not *illusory* because Ferrara had "already begun" redesigning packaging and promotional materials. DB9.. But it does not follow from the cited evidence that class members will "derive a benefit" from the labeling changes. DB19.[7] Ferrara has simply averred that many SweeTARTS purchasers are repeat buyers, but this is true of most consumer products and says nothing of actual value.. It provides no evidence that *any* class members—whether religious weekly purchasers or consumers who bought Halloween candy once in 2014—would derive benefit from the conditional injunction. And that the redesign process has started is not evidence that the eventual redesign has any value.

Appellees incorrectly argue that the common phenomenon of brand loyalty distinguishes this case from *Koby*. PB12, DB19. It does not. The parties in *Koby* tried to advance the same unpersuasive arguments as appellees here. As a reminder, *Koby* involved a settlement of FDCPA claims, where the collection agency defendant agreed to continue using a new voice message for a period of two years. OB19-20. As here, the parties in *Koby* argued that class members—who defendant had attempted to collect from in the past—would enjoy benefits from this injunction. In fact, the defendant reported that many class members were *still* in collections, so "the injunction provides

[6] Appellees consistently referred to a two-year injunction, but in fact Ferrara only must maintain its new packaging from December 31, 2019 until two years from the final approval order—a period of less than 18 months. ER9.

[7] To be clear, the words "derive a benefit" are not anywhere in the record; they are instead a quote from *Koby*. 846 F.3d at 1080.

them with relief." *Koby v. ARS Nat'l Servs.*, No. 09cv0780 JAH (JMA), 2013 WL 12191097, 2013 U.S. Dist. LEXIS 205110, at *11 (S.D. Cal. Oct. 21, 2013). Moreover, even among class members who paid their prior debt, "given [Class Members'] troubled financial histories," they would likely find themselves in collections again and have "**peace of mind**" knowing that defendant would not resume its practices. *Id.* (emphasis added). The *Koby* district court agreed with the parties, finding: "the Settlement provides for injunctive relief which benefits past, present, and future parties receiving collections calls from defendant." *Id.* at *27.

As in *Koby*, the lower court here accepted the parties' excuses for extinguishing class damages claims for $0. The district court here adopted the same argument that the parties in *Koby* advanced: "going forward, they have **the comfort of knowing** that they are going to get something other than natural ingredients or flavors …." ER23 (emphasis added). But this Court rightly rejected the argument in *Koby* because in spite of the overlap between class members and future "beneficiaries" of the injunction, "there is an obvious mismatch between the injunctive relief provided and the definition of the proposed class." *Koby*, 846 F.3d at 1079. Appellees had the burden of proving the injunction's value, and simply alleging an overlap between past and future purchasers as appellees falls "short of carrying that burden." *Id.* Ferrara's declaration that an undisclosed "significant percentage" of SweeTARTS buyers are repeat buyers over an undisclosed timeframe (DSER36) cannot constitute the "empirical data of some sort [that] would be necessary to substantiate" a benefit. *Koby*, 846 F.3d at 1080.

Even if appellees had shown that most class members would review see the revised packaging of SweeTARTS, this *still* does not prove that the packaging is

beneficial. *Koby* cited several indicia showing the injunction there to be worthless. First, the putative beneficiaries of the injunction were mismatched from the class, despite alleged overlap, as discussed above. But "[e]ven for class members who might become targets of collection efforts by ARS in the future, the settlement's injunctive relief is of no real value." *Id. Koby* had no trouble reaching this conclusion because the defendant had already discontinued using the voice message at issue. *Id.* Appellees both suggest *Koby* does not control because Ferrara did not revise SweeTARTS labelling prior to settlement (DB20, PB12), but nothing in *Koby* limits the general principle that the moving parties bear the burden of demonstrating value. 846 F.3d at 1079.

In fact, *Koby* itself lists a third indicia that the injunction was worthless: that defendant was unlikely to resume its old practices, and that "the settlement contained an escape clause that allowed ARS to seek dissolution of the injunction 'at any time if there is a change in the law.'" *Id.* at 1080. The likelihood of recurrence is similarly unlikely in this settlement, especially given that nearly half of the effective 18-month injunction will have already run by the time this appeal is heard. And finally, the injunction is entirely contingent on SweeTARTS continued use of DL-malic acid. Should the ingredients change to use another acidity adjuster or naturally-derived malic acid, the injunction requires nothing from Ferrara in exchange for the release of class damages claims. Appellees never carried their burden under *Koby* and nowhere do they contradict Copland's actual argument that "no evidence in the record [shows] that the class valued the injunction, or that the difference between D-malic acid, DL-malic acid, and L-malic acid has any effect on consumers' perception of a product." OB11.

Moreover, even if it were true *most* class members would purchase SweeTARTS within the eighteen-month span of the injunction's practical effect—which the evidence emphatically does not show—it puts the cart before the horse because nothing suggests this label change has value to class members. If the injunction required the SweeTARTS logo to be red and green rather than pink and blue, it would be equally true that some class members are repeat purchasers of SweeTARTS, so the unremarkable phenomenon of brand loyalty in no way demonstrates the injunction has value—much less sufficient value to waive the damages claims of millions of class members.

Finally, the district court erred because it did not even "attempt to approximate the value of injunctive relief and use that valuation in an assessment of disproportionality." *Campbell*, 2020 U.S. App. LEXIS 6643, at *41. In *Campbell,* the Ninth Circuit excused the district court's failure to approximate the injunctive relief specifically because it was not a Rule 23(b)(3) damages certification and the release did not include damages claims. *Id.* at *41-43. The district court here does not have that same justification. Nor can it be neglected because, as plaintiffs argue, the injunctive relief is "not easily monetized." PB25. They provide no explanation how different packaging could in any way "compensate class members" for their past damages, which is the benchmark for evaluating relief. *Pampers*, 724 F.3d at 720. But the theory of plaintiff's complaint is that the "labels deceived consumers into paying a price premium for an artificially-flavored product." ER121. Plaintiffs now insist that any price premium would have been *de minimis*. PB15. This is because if plaintiff argues that the revised label caused a real measurable financial benefit for class members, they would be simultaneously admitting to have releasing valuable class claims in exchange for

nothing. This presents a paradox: if the injunction is valuable, it proves the settlement waived valuable claims for no consideration, but if it was valueless or *de minimis*, attorneys have taken all of the settlement value for themselves.

B. The allegedly *de minimis* value of damages does not make the injunction valuable—just the opposite.

While appellees now minimize the extent to which plaintiffs sought damages, they do not and cannot deny that plaintiff's complaint explicitly sought damages, disgorgement, and restitution. ER137. Plaintiff's prayer for "[a]n order enjoining Defendant's deceptive and unfair practices" was enumerated *after* damages. *Id.* The complaint further pleads counts of breach of express warranty and breach of implied warranty—causes of action that require damages as an indispensable element. ER134-35.

Plaintiffs now denigrate the value of damages (PB15), and Ferrara quotes the district court's remark that an injunction is what the suit was "all about" (DB10), but if damages were really worthless, then the settlement need not release them. *Compare Campbell*, 2020 U.S. App. LEXIS 6643, at *35-*36. More importantly, the district court's characterization of the action did not transform the case into a Rule 23(b)(2) class action, nor did it narrow the broad release of damages claims; the settlement remains very much about maximizing the release of damages claims on behalf of the defendant. *Id.*

The waiver of damages claims here is even less defensible than the waiver in *Koby*, which did not waive class members' ability to sue the defendant debt collector for their *individual* damages. *Koby* waived only "the right to seek damages in future class actions."

846 F.3d at 1081. Here, the settlement purposefully and completely waives all damages claims brought by individuals or as a class. The district court committed legal error by failing to consider the mismatch between the settlement and the complaint—and mismatch between the settlement benefits and the waiver it prescribes for monetary claims.[8]

Defendant purports to distinguish the precedents Copland relies on—*Koby*, *Pampers*, and *Subway*—by asserting that in all of these cases "the court found on the specific facts of the case that the injunctive relief afforded by the settlement did not have value to the class." DB25-26. But it was the *appellate* courts that held that the injunctions had no value, reversing the district court's findings.[9] All four district courts were reversed, just as this case should be.

Contrary to appellees' framing, *Koby* and *Bluetooth* are not limited to cases where the defendant has already changed its practices. DB20, PB12. Nothing in these opinions so limits their applicability to settlements extending defendant's current practices. In fact, the key "holding in *Koby* was that the settlement was invalid because it gave the class nothing *and yet required the class to give up something*." *Campbell*, 2020 U.S. App. LEXIS

[8] Defendant quibbles with the centrality of Copland's *Koby* objection (DB22), but the very first sentence of his objection faults the settlement for leaving "only a sour taste in the mouth for class members who get **$0 in exchange for waiving their monetary claims.**" ER52 (emphasis added). The district court not only failed to discuss *Koby*, it entirely ignored Copland's central argument (buttressed by *Koby*) that the settlement **waives *monetary* damages** for no direct relief.

[9] *Koby*, 846 F.3d at 1080; *Pampers*, 724 F.3d at 720; *Subway*, 869 F.3d at 556.

6643, at *33 (emphasis in original). Settlements can dress up "nothing" in innumerable ways. Exactly so here.[10]

Plaintiff bizarrely asserts that "[t]he value of the injunctive relief in this case is particularly great given the *de minimis* amount of monetary damages that would be available at trial assuming Plaintiff were to prevail." PB15. Plaintiff provides no citation for this proposition, which defies reason. Contingent injunctions do not become more valuable when the supposed damages are low, and certainly not simply because class counsel agreed to release damages claims for $0.

Plaintiffs are also mistaken that monetary relief cannot be delivered; their counsel is doing it in a strikingly similar "malic acid" case, *Hilsley v. Ocean Spray Cranberries, Inc.*, which they don't address. OB35. Since Copland's opening brief, the district court has preliminarily approved the *Ocean Spray* settlement, which provides a non-reversionary $5.4 million fund from which class members can file claims up to $1 per bottle purchased (an amount that will be reduced *pro rata* if many claims are filed). *Hilsley v. Ocean Spray Cranberries, Inc.*, No. 3:17-CV-2335-GPC-MDD, 2020 U.S. Dist. LEXIS 16195, at *17 (S.D. Cal. Jan. 31, 2020). The *Ocean Spray* proposed settlement is by no means unusual. *See Graves v. United Indus. Corp.*, No. 2:17-cv-06983-CAS-SKx, 2020 U.S. Dist. LEXIS 33781, at *24 (C.D. Cal. Feb. 24, 2020) (same class counsel negotiated a $2.5 million settlement fund benefiting tens of thousands of class members). Rule 23(b)(3) *exists* so that small-dollar claims against wrongdoers can be aggregated and

[10] Plaintiff block quotes a district court order predating *Koby* for the proposition that weak damages claims may be released for $0. PB20-21. But this holding is contrary to the reasoning of *Bluetooth, Koby*, and now *Campbell*, and cannot supersede them.

vindicated. If this Court were to affirm plaintiffs' ludicrous suggestion that recovery is infeasible in this case, it will act as an invitation for other plaintiffs to request all-fee settlements and extinguish damages claims for dubious injunctive relief, exactly what *Koby* warns against.

This settlement highlights the principal-agent risk inherent to class actions. Class members own the claims against defendant, and they rely on loyal counsel to win the best possible terms. But there is a perverse incentive for counsel to earn a higher multiplier—higher hourly wages—by settling quickly and with little effort, selling the class short, and ensuring they extract the entire settlement value for themselves instead of having to share with the class. This is possible because "a defendant is interested only in disposing of the total claim asserted against it, and the allocation between the class payment and the attorneys' fees is of little or no interest to the defense." *Bluetooth*, 654 F.3d at 949 (internal quotations omitted). "The absence of any supervision by clients has long been recognized as a source of the agency problem in class actions." *In re Oracle Sec. Litig.*, 132 F.R.D. 538, 544 (N.D. Cal. 1990) (Walker, J.). An injunctive-relief settlement coupled with "arrangements to pay plaintiffs' lawyers their fees" is the "classic manifestation" of this problem. *Id.* "The defendants thus get off cheaply, the plaintiffs' (and defendants') lawyers get the only real money that changes hands and the court, which approves the settlement, clears its docket of troublesome litigation." *Id.* at 544-45.

"When further litigation may result in substantial monetary relief to class members, the failure to include meaningful monetary relief in a settlement might be (but is not necessarily) a subtle sign that class counsel bargained away something

valuable to benefit themselves." *Campbell*, 2020 U.S. App. LEXIS 6643, at *42. This is particularly true where class counsel not only fails to pursue damages claims, but prohibits class members "from trying again to obtain such damages" by releasing class claims. *Id.* "In such settlements, in order to show that nothing was unfairly bargained away by counsel, it may be necessary for settling parties to show why their nonmonetary settlement is at least as good for the class as any monetary figure that would approximate what they could expect from further litigation." *Id.* Plaintiff did not make this showing, and the multi-million dollar recovery in *Ocean Spray* strongly suggests that class claims have been sold short and purposefully forfeited to achieve a quick and easy payday. "The signs [of self-dealing] are not particularly subtle here." *Pampers*, 724 F.3d at 718.

This Court should not encourage abandoning the class by crediting plaintiff's self-serving narrative that damages were "infeasible." If damages claims were really worthless, defendant would not have bargained for their release and plaintiff should not have agreed to their release. But this court need not decide whether the class damages claims were particularly valuable. "It is enough to conclude that the waiver of the right to seek damages in future class actions has *some* value, and it plainly does." *Koby*, 846 F.3d at 1081. Therefore, "[t]he fact that class members were required to give up anything at all in exchange for worthless injunctive relief precluded approval of the settlement as fair, reasonable, and adequate under Rule 23(e)(2)." *Id.*

III. Neither the settlement nor the fee award comply with *Bluetooth*.

Appellees do not deny that at least two of the *Bluetooth* red flags for self-dealing exist in their settlement—clear sailing and kicker. OB24. Nor can appellees deny that the district court purported to distinguish their settlement from *Bluetooth* by citing features identical to *Bluetooth*. OB25. Instead, the appellees quarrel with the third red flag of self-dealing: disproportionate benefits to counsel.

Defendant incorrectly asserts that the settlement does not disproportionately favor class counsel because the injunction is valuable. DB22-23. As explained above, the injunction *is* worthless, but even it had some scintilla of value, *Bluetooth* and *Campbell* require the district court to weigh the value of the benefit against the attorneys' fee request to determine whether "counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded." *Bluetooth*, 654 F.3d at 947 (internal quotation omitted). *Bluetooth* thus requires at least a rough estimate of whether attorneys' fees are proportional to benefits. Independently, the 2018 amendments to Rule 23 require district courts to consider whether the settlement relief is adequate in relation to "the terms of any proposed award of attorney's fees." Rule 23(e)(2)(C)(iii). Appellees do not deny this, nor even cite the rule, which Copland discussed as one of his two questions presented. OB3, OB34. Because the district court did not even attempt this analysis, it abused its discretion. *See Allen v. Bedolla*, 787 F.3d 1218, 1222 (9th Cir. 2015) (failure to apply correct legal standard is an abuse of discretion).

This Court recently confirmed that *Bluetooth* requires a comparison of fees to benefits to approve an injunction-only settlement. "[W]here the class primarily receives

non-monetary relief, but class counsel obtain millions of dollars, it may be an abuse of discretion not to at least attempt to approximate the value of injunctive relief and use that valuation in an assessment of disproportionality." *Campbell*, 2020 U.S. App. LEXIS 6643, at *41. *Campbell* found that the district court in that case had not erred only because of three unusual circumstances not present here: "the district court had already declined to certify a damages class. … damages were also not part of the class release … [and] the district court was well-positioned to recognize [potential self-dealing], based on its years-long oversight of this litigation." *Id.* at *41-*43. Moreover, *Campbell* held the settlement to a lower standard of scrutiny than "when parties settle a case before the district court has formally certified a litigation class." *Id.* at *29 (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)). Plaintiffs in *Campbell* were unsuccessful in certifying a damages class and dropped the damages claims only when the certification order *blocked their path*—and even then the settlement did not require the release of the claims for $0. Here, by contrast, plaintiff abandoned recovery for class damages claims before the complaint had even been answered, which may be "a subtle sign that class counsel bargained away something valuable to benefit themselves." *Id.* at *42. Approval of an injunction-only settlement without assessing the value of the injunction was therefore an abuse of discretion.

Plaintiff does not address the disproportion argument at all and instead argues against a strawman: that it is not an abuse of discretion to award fees based on lodestar. PB21. Copland never said otherwise! If a settlement is fair, reasonable and adequate, it may be approved, and the district court may award fees using either lodestar or percentage-of-fund methodology. Instead, Copland contends the settlement was unfair,

unreasonable, and inadequate because class counsel self-dealt all benefits of the settlement to themselves while directing absolutely no relief to absent class members. OB33-34. As plaintiff correctly observes, "benefit obtained for the class" is the "[f]oremost" consideration in setting a fee award. PB21; *Bluetooth*, 654 F.3d at 942. While fees above 25% may be appropriate in small cases (PB28), a fee award of 100% is unconscionable. To the extent that plaintiff asserts that courts need not evaluate the value of relief provided in actions brought under fee-shifting statutes (PB22), this is flatly false. *Bluetooth* rejected this same argument, 654 F.3d at 943, and *Koby* also settled under a fee-shifting statute. 846 F.3d at 1074 (settling claims under Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq*.).

Defendant also incorrectly asserts that the district court's conclusory finding of "no collusion" satisfied *Bluetooth*. But *Bluetooth* does not merely require the court to ensure "class counsel [did not] collude with the defendants" (DB25), it also requires courts to look "for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *Bluetooth*, 654 F.3d at 947. Ferrara in particular refuses to understand the distinction, pretending as if the district court's finding of "no collusion" was a satisfactory answer to Copland's objection, which discussed the signs of "self-dealing." DB25 n.5. Once again, these are different behaviors. Class counsel self-deal when they agree to receive disproportionate attorneys' fees for themselves; no collusion between the parties is necessary for this to occur. *Roes*, 944 F.3d at 1060 (noting "risk that self-interest, even if not purposeful collusion, will seep into the settlement terms"). *Bluetooth* required the

district court to scrutinize the settlement for *self-dealing*, and the district court's failure to do so constitutes legal error.

This principle makes the district court's lodestar multiplier particularly inappropriate. *Any* fee award would be disproportionate given the dismal results. "Plaintiffs attorneys don't get paid simply for working; they get paid for obtaining results." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1182 (9th Cir. 2013). Even if the settlement could be approved, and even if any fee award would not be disproportionate to class relief, the district court inappropriately awarded class counsel a lodestar multiplier. The excessive fee award under Rule 23(h) is an independent error from failing to compare the settlement value to fees as *Bluetooth* and Rule 23(e)(2)(C)(iii) require. OB19. *Campbell*, 2020 U.S. App. LEXIS 6643, at *38 n.14.

Plaintiffs rapidly resolved the case with virtually no risk, and the resulting settlement makes class members worse off than non-class members and opt outs who receive the same purported relief—because class members bear the entire burden of surrendering the settlement value of their claims for the benefit of non-class members. Unenhanced lodestar is a presumptively reasonable fee. OB32 (discussing *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 553 (2011)). Appellees do not cite or distinguish *Perdue*, and plaintiff admits lodestar is "presumptively reasonable." PB22. Plaintiff instead argues that courts "routinely enhance[] the lodestar to reflect the risk of nonpayment by paying them a premium over their normal hourly rates for winning contingency cases." PB33 (quoting *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002)).

Because lodestar is presumptively reasonable, the court must explain any enhancement. Here, the district court provided only boilerplate from the unmodified

proposed order that it rubber-stamped. "A multiplier of 1.489 is justified here, based on the excellent results obtained, the experience and skill of Counsel, the complexity of issues, the risk of non-payment and preclusion of other work, and the reaction of the Class. The fee award requested is also reasonable in light of similar lodestar awards, as set forth in the Fee Motion." ER12. None of these reasons withstand scrutiny.

As for "exceptional results," plaintiff does not respond to Copland's argument that when a settlement "do[es] little more than turn [defendant's] settlement with [named plaintiffs] into a general release of liability from all similarly situated plaintiffs at minimal extra cost while furthering a cottage industry among enterprising lawyers," class certification is not superior. *Gallego v. Northland Group.*, 102 F. Supp. 3d 506, 511 (S.D.N.Y. 2015), *aff'd in relevant part* 814 F.3d 123 (2d Cir. 2016). OB40-41.

That other courts have awarded more does not excuse the district court from articulating why *this case* deserves such an enhancement. *See In re Sears*, 867 F.3d 791, 793 (7th Cir. 2017) (reducing fee award to exactly lodestar where the fee award dwarfed class benefits even though the multiplier was lower than the average multiplier awarded in the circuit). As to risk, this particular settlement—reached before defendant had even answered the complaint—imposed virtually no risk for plaintiff's counsel. We know this because plaintiff sought to rationalize the settlement's forfeiture of damages claims by claiming it would be difficult to win damages because "Ferrara agreed to provide the relief here extremely promptly" and "sat down almost immediately." ER27.

Finally, plaintiff devotes two pages to arguing in favor of the named plaintiff's $3,000 incentive award, but entirely misses the problem with the payment. PB35-36. Copland agrees that a modest service award may be reasonable when a named plaintiff

works for the ultimate benefit of absent class members, especially when plaintiffs go through uncomfortable document discovery or a deposition. But service awards also necessarily cause named plaintiff's interests diverge from those of the class. The divergence is extreme here where *only* the named plaintiff gets *any* targeted relief from the settlement. OB41. Here, the incentive award provides *infinitely* more relief to the named plaintiff, and this disparity "fatally alter[ed] the calculus for the class representatives, pushing them to be 'more concerned with maximizing [their own gain] than with judging the adequacy of the settlement as it applies to class members at large.'" *Radcliffe v. Experian Info. Sols.*, 715 F.3d 1157, 1165 (9th Cir. 2013) (quoting *Staton*, 327 F.3d at 977).

Conclusion

For these reasons, settlement approval must be reversed, and the parties must renegotiate a settlement that makes class members the primary beneficiary.

Dated: March 12, 2020

Respectfully submitted,

/s/ Theodore H. Frank

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Pursuant to 9th Circuit Rule 32-1 for Case Number 19-55805

I certify that: This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 6,385 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Executed on March 12, 2020.

/s/ Theodore H. Frank
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I hereby certify that on March 12, 2020, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

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