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

Opening Brief of Appellant James Copland

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Corporate Disclosure Statement (FRAP 26.1)

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

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Statement of Subject Matter and Appellate Jurisdiction

The district court has jurisdiction under 28 U.S.C. § 1332(d)(2) because plaintiff's class-action complaint alleges claims that exceed $5,000,000 exclusive of interest and costs, there are millions of class members, most of which are citizens of states other than defendant's state of citizenship. For example, named plaintiff Jessica Littlejohn is a citizen of the State of California, while defendant Ferrara Candy Company, Inc. ("Ferrara") is an Illinois corporation with its principal place of business in Illinois. *See* Amended Complaint, ER114-15.[1]

This Court has jurisdiction under 28 U.S.C. § 1291. The district court ordered final approval of the settlement and an award of attorneys' fees and costs on June 17, 2019, and the order indicated it was meant to be a final judgment. ER1. Though final judgment was not issued on a separate document as Fed. R. Civ. Proc. 58(a) requires, it suffices to create appellate jurisdiction. Fed. R. Civ. Proc. 58(c)(2)(B). Objector James Copland, the appellant in this case, filed a notice of appeal on July 11, 2019, appealing the judgment and all opinions and orders that merged therein. ER42. The notice of appeal was timely under Fed. R. App. Proc. 4(a)(1)(A), Fed. R. App. Proc. 4(a)(2), and Fed. R. App. Proc. 4(a)(7)(A)(ii) & (B). Copland, as a class member who objected to settlement approval and class counsel's fee request below, has standing to appeal a final approval of a class action settlement and accompanying

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

attorneys' fee award without the need to intervene formally in the case. *Devlin v. Scardelletti*, 536 U.S. 1 (2002); *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000).

Statement of the Issues

1. The underlying Settlement requires absent class members to forfeit monetary claims for no monetary consideration, but its only relief is an injunction to conditionally revise SweeTARTS packaging that is equally applicable to class members and non-class members. The proponents of a settlement must bear "the burden of demonstrating that class members would benefit from the settlement's injunctive relief." *Koby v. ARS Nat'l Servs.*, 846 F.3d 1071, 1079 (9th Cir. 2017). Did the district court err by failing to consider that Rule 23(e) forbids requiring class members to waive their monetary claims without compensation for their alleged past injuries, "even if [their released claims] might be worth relatively little." *Koby*, 846 F.3d at 1081. (Raised at ER68; ruled on at ER14.)

2. The 2018 amendments to Rule 23 direct courts to consider, *inter alia*, whether the settlement relief is adequate in relation to "the terms of any proposed award of attorney's fees." Fed. R. Civ. P. 23(e)(2)(C)(iii). If the negotiated fees are outsized in relation to the value of the class benefit, the settlement should be rejected as unfairly affording "preferential treatment" to class counsel. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011) ("*Bluetooth*"); *accord In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013) ("*Pampers*"); *In re Subway Footlong Sandwich Mkt'g and Sales Practices Litig.*, 869 F.3d 551, 556-57 (7th Cir. 2017) ("*Subway*"). Rule 23 further requires the district court to investigate the "economic reality" of the settlement relief provided to class members in a class action settlement. *Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015). Did the lower court err by approving a settlement that allowed class counsel to obtain a disproportionate fee relative to the

class relief consisting solely of injunctive relief with no proven value? (Raised at ER64-65; ruled on at ER14.)

Standard of Review for all Questions: A district court's approval of a class action settlement and award of fees and costs to class counsel is reviewed for an abuse of discretion. *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 940 (9th Cir. 2011).

"'A court abuses its discretion when it fails to apply the correct legal standard or bases its decision on unreasonable findings of fact.'" *Allen v. Bedolla*, 787 F.3d 1218, 1222 (9th Cir. 2015) (quoting *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011)). "[A]ny element of legal analysis that figures into the district court's [fee] decision is reviewed de novo." *Yamada v. Snipes*, 786 F.3d 1182, 1207 (9th Cir. 2015). A court's failure to "give a 'reasoned response' to all non-frivolous objections" is likewise an abuse of discretion. *See Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012). So too is a failure to explain why the district court exercised its discretion in a particular way. *Traxler v. Multnomah Cty.*, 596 F.3d 1007, 1015-16 (9th Cir. 2010). Questions of law are reviewed *de novo*. *Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000).

Statutes and Rules

Federal Rule of Civil Procedure 23. Class Actions.

(a) Prerequisites.

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

…

(4) the representative parties will fairly and adequately protect the interests of the class.

(e) Settlement, Voluntary Dismissal, or Compromise.

…

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

…

(C) the relief provided for the class is adequate, taking into account:

…

(iii) the terms of any proposed award of attorney's fees, including timing of payment; …

(g) Class counsel.

…

(4) Duty of Class Counsel. Class counsel must fairly and adequate represent the interests of the class.

Preliminary Statement

Attorneys with the Center for Class Action Fairness ("CCAF"), part of the non-profit Hamilton Lincoln Law Institute, bring Objector-Appellant James Copland's objection and appeal. CCAF's mission is to litigate on behalf of class members against unfair class-action procedures and settlements, and it has won hundreds of millions of dollars for class members. *See, e.g.*, Andrea Estes, *Critics hit law firms' bills after class-action lawsuits,* BOSTON GLOBE (Dec. 17, 2016) ("over $100 million"); *see also, e.g.*, Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 13, 2013, at A12 (calling CCAF attorney Theodore H. Frank "the leading critic of abusive class action settlements"); Ashby Jones, *A Litigator Fights Class-Action Suits*, WALL ST. J. (Oct. 31, 2011); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (praising the CCAF's work); *In re Classmates.com Consol. Litig.*, No. 09-cv-0045-RAJ, 2012 WL 3854501, at *11 (W.D. Wash. Jun. 15, 2012) (same). This appeal is brought in good faith both to vindicate Copland's interests as a prejudiced class member and to protect class members in this and future class actions against unfair and abusive settlements and overreaching fee requests.

Statement of the Case

A. Littlejohn brings a putative class action seeking damages for alleged misrepresentation of SweeTARTS candies and mediates a settlement before defendant answers without any formal discovery.

SweeTARTS is a small sugary sweet-tart candy, which plaintiffs claim is given its "tart, fruit-like flavor" by malic acid. ER116. "Malic acid is . . . available as the racemic DL-malic acid and the two . . . pure isomers, D-malic acid and L-malic acid."

Technical Advisory Panel Review: Malic Acid (April 2003), United States Department of Agriculture.[2] An isomer is a specific three-dimensional configuration of a molecule, and many organic compounds have a naturally-occurring form and a mirror image molecule not produced by living organisms. "L-malic acid is the naturally occurring form." *Id.* While DL-malic acid, a mixture of D-malic acid and L-malic acid, is commercially synthesized from other chemicals, L-malic acid is also commercially available; it is purified from biological sources such as through the fermentation of carbohydrates by microorganisms. *Id.* Malic acid is also used to balance pH and to reduce the amount of flavoring needed in a product because it increases the impact of certain other flavors. *Id.*

On April 2, 2018, Plaintiff Jessica Littlejohn filed a putative class action complaint against Nestle USA, Inc., alleging that the company manufactures SweeTARTS candies and that the defendant violates federal and state law by labeling these candies as containing "no artificial flavors" because they contain DL-malic acid rather than L-malic acid, arguing that the former was an artificial flavor. Dkt. 1 at 5.

In fact, the complaint named the wrong defendant. Nestle USA, Inc. had sold its US confectionary businesses, including SweeTARTS, to Ferrara Candy Company ("Ferrera") in a $2.8 billion deal that had been announced on January 16, 2018. Dkt. 10. The parties jointly moved to substitute Ferrara on June 6, 2018, which the district court granted the next day. *Id*; Dkt. 11. Plaintiff Littlejohn filed an amended complaint against Ferrara on July 6, 2018. ER111-38.

[2] Available online at: https://www.ams.usda.gov/sites/default/files/media/L-Malic%20Acid%20TR.pdf.

The amended complaint, like the original, described a putative class of *California* purchasers:

> All California citizens who purchased the Products in California on or after January 1, 2012 until the date notice to the Class is disseminated in this action, excluding Defendant and Defendant's officers, directors, employees, agents and affiliates, and the Court and its staff.

ER124.

While the complaint generally alleged violation of federal labelling law, each of the eight counts pleaded were based on specifically-cited California law. Littlejohn alleged fraud by omission, negligent misrepresentation, violation of Consumers Legal Remedies Act, California Civil Code § 1750, *et seq.*; Unfair and Unlawful Trade Practices, Business and Professions Code § 17200, *et seq.*; False Advertising, California Business and Professions Code § 17500, *et seq.*; and Breach of Express and Implied Warranties California Comm. Code § 2313 & 2314. ER127-36.

The complaints sought injunctive and declaratory relief—but also restitution, damages, and disgorgement of benefits received by defendant for their alleged unjust enrichment. The complaints asserted "The Products were worth less than what Plaintiff and the Class paid for them, and Class members would not have paid as much as they have for the Products absent Defendant's false and misleading statements and omissions." ER123. Plaintiff prayed for damages, restitution, and disgorgement of this alleged price premium. *Id.*; ER137.

On July 23, the parties jointly moved to extend the time for Ferrara to answer. Dkt. 13. The parties jointly moved for an extension again on August 20, advising that

they had scheduled a mediation. Dkt. 15. And on October 30, the parties again moved to stay, advising that they had reached an agreement in principle. Dkt. 18.

B. The parties seek approval of a nationwide class action settlement that provides $0 to absent class members.

On December 21, 2018, the parties entered into a settlement agreement ("Settlement") to settle not only the California class that had been pleaded by the plaintiff, but a nationwide class of "[a]ll United States consumers who purchased SweeTARTS® Products . . . for household or personal use and not for resale, from January 1, 2012 until the Class is certified." Dkt. 23 at 2. The Settlement broadly released "any claims . . . arising under federal statutory or common law, state statutory or common law, local statutory or common law, or any law, rule or regulation, including the law of any jurisdiction outside the United States, that relate to claims arising out of the allegations of misleading statements or misrepresentations concerning the SweeTARTS Products involving a common factual predicate that is asserted in the Litigation." ER91.

The parties sought certification of the class under Rule 23(b)(2) and (b)(3). ER97.

While the release is much broader than Littlejohn's complaint—even purporting to release claims under other nations' laws—Ferrara's financial liability under the Settlement is limited to payment of attorneys' fees, an incentive award to Littlejohn, administration costs, and oddly, the reimbursement of any payment to objectors plaintiffs might be ordered to pay. ER101-02. Ferrara agreed to "clear sailing": it would not challenge Littlejohn's request for attorneys' fees, costs, and

incentive award totaling $275,000. *Id.* Should the court award less than $275,000, the money remains with Ferrara—what this Circuit calls a "kicker" provision. *Id.*; *In re Bluetooth Prod. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011). The Settlement required Ferrara for a period of two years to remove the words "all natural" from SweeTARTS labels if the company continued to use DL-malic acid. ER93.

The district court granted preliminary approval of the Settlement on February 28, 2019. ER31.

C. Copland objects to the Settlement and class certification.

Class member and appellant James Copland objected to the Settlement and attorneys' fee award. ER45. He is represented *pro bono* by attorneys at the non-profit Center for Class Action Fairness ("CCAF"), and brought his objection in good faith to prevent approval of an unfair settlement and ratification of an improper class certification. ER54, ER75. Copland is a class member because he purchased SweeTARTS products several times during the class period (between January 1, 2012 and February 28, 2019), including in New York state. ER75.

Copland objected to the disproportionate attorney fee request, which constitutes the entirety of the pecuniary benefit from the settlement. He argued that under Ninth Circuit law, the Settlement must be valued based on what the class *actually* receives. ER55 (citing *Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015)). Copland argued that the Settlement contains other warning signs of class counsel's self-dealing such as the "clear-sailing" and "kicker" provisions. ER58-60 (citing *Bluetooth*).

Copland also argued that the Settlement's purported injunctive relief of removing the words "all natural" from SweeTARTS labels provides no incremental value to the class because it is directed at *future* purchasers and because Littlejohn had failed to prove that the injunctive relief had *any* value at all. ER66-68 (citing *Koby v. ARS Nat'l Servs.*, 846 F.3d 1071 (9th Cir. 2017)).

D. The court overrules Copland's objection and approves the Settlement and requested fee award.

The district court held a fairness hearing on June 14, 2019. Dkt. 46. Copland appeared at the hearing through counsel. At the hearing, plaintiff distinguished *Bluetooth* as a case that had a monetary component—a $100,000 *cy pres* award—whereas this Settlement could be distinguished because it did not even provide *cy pres* relief for class members. ER26. The defendant argued the settlement ought to be approved because it was a "particularly weak damages case," but did not explain why the settlement should release damages claims in exchange for only dubious injunctive relief. ER27. 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.

The district court found both the settlement and the fee request reasonable, and asked plaintiff to resubmit her proposed order. ER29.

On June 17, 2019 the district court granted final approval of the Settlement and awarded attorneys' fees and costs of $272,000. ER1-19. The court's order was virtually identical to plaintiffs' proposed order—even retaining an unfilled blank. *Compare* ER9 *with* Dkt. 38-4 at 8. Overruling Copland's objections, the district court held that

"Defendant's agreement to modify the Products' label and packaging, which adequately addresses the very claims raised in Plaintiff's Complaint, provides value to the Class." ER14. The district court did not even note the waiver of damages claims, much less explain why such waiver was appropriate. The district court did not cite *Koby* or *Allen* at all, much less verify that parties carried their burden in demonstrating the injunction would be valuable to the class members.

As for attorneys' fees and *Bluetooth*'s red flags, the rubber-stamped final approval order dealt with Copland's arguments using *non sequitur*. It found "no evidence of collusion" (although Copland did not allege collusion). ER9. The court then asserted without elaboration that it had considered the *Bluetooth* factors:

> Further, the Court has evaluated the factors set forth by the Ninth Circuit and determined that there was no collusion. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011) (the three factors are: "(1) when counsel receive a disproportionate distribution of the settlement, … (2) when the parties negotiate a 'clear sailing' arrangement providing for the payment of attorneys' fees separate and apart from class funds, … and (3) when the parties arrange for fees not awarded to revert to defendants …"). Defendant has agreed to pay Class Counsel $272,000, which represents their lodestar plus a modest ___ [sic] multiplier, well within the range courts have allowed in the Ninth Circuit.

Id.

While the district court recited *Bluetooth*, it did not acknowledge that all three warning signs were present in the Settlement. The district court did not provide "a

clear explanation of why the disproportionate fee is justified and does not betray the class's interests." *Bluetooth*, 654 F.3d at 949.

Though no separate Rule 58(a) judgment issued, this order constituted final judgment under Rule 58(c)(2) once 150 days passed. ER143. Copland timely appealed. ER42.

Summary of Argument

The Settlement waived claims for all past purchasers of SweeTARTS, but left only a sour taste in the mouth for class members who get $0 in exchange for waiving their monetary claims. Class counsel already received $272,000 in fees and costs under the settlement, while the absent class receives no compensation. This disproportionate fee request is protected by clear-sailing and kicker clauses, meaning that the Settlement contains all three indicia of self-dealing disfavored by the Ninth Circuit. *See In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011) ("*Bluetooth*"). Class counsel requested all monetary relief for itself (and $3,000 for the named plaintiff), while unnamed plaintiffs receive *nothing* in exchange for the release of all related claims for monetary damages.

The court erred as a matter of law and should not have assigned any value to the injunction under *Koby v. ARS Natl. Services, Inc.*, 846 F.3d 1071 (9th Cir. 2017). Like the settlement reversed in *Koby*, the Settlement waives monetary claims, but does not provide class members any compensation. The only purported relief is a conditional injunction on defendant's future conduct: removal of a "no artificial flavors" claim on the packaging—if and only if Ferrara continues to use DL-malic acid

as an ingredient. As in *Koby*, plaintiffs did not demonstrate "that class members would benefit from the settlement's injunctive relief." 846 F.3d at 1079. As in *Koby*, the injunction—to the extent it has *any* value—is directed toward all future consumers regardless of whether they were harmed by the past deception and unfair price premium that plaintiffs pleaded, which is "an obvious mismatch between the injunctive relief provided and the definition of the proposed class." *Id.* The district court did not discuss or distinguish *Koby*, which was central to Copland's objection, and so approved a settlement that every class member should have rationally opted out because remaining in the class waives class member claims in exchange for nothing more than what non-class members receive.

Like the settlement reversed by *Bluetooth*, the Settlement provides nearly all of its value to the attorneys. The disproportion is even more stark here than in *Bluetooth*, where the settlement at least established a small $100,000 *cy pres* fund. Here, the only measurable benefit of the Settlement is paid to class counsel ($272,000 in attorneys' fees) and lead plaintiff ($3,000 as an incentive award). The district court only addressed *Bluetooth* by misconstruing it as a case about "collusion," which the district court concluded did not exist because of: (1) the participation of a mediator and (2) the agreement "the terms of the Settlement before discussing attorneys' fees." ER9. But as Copland explained in his objection, these exact features existed in *Bluetooth* as well. 654 F.3d at 948. Courts are instructed to be "vigilant not only for explicit collusion, but also 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." *Id.* at 947. This is because both defendant and class counsel have an incentive to

create an *illusion* of class benefit to justify waiving the broadest possible class member claims and awarding the most attorneys' fees through settlement at the lowest cost to the defendant. No collusion is necessary to create an unfair settlement when each settling party acts in their self-interest at the expense of the absent class members.

The district court provided the opposite of vigilance here. Plaintiffs' proposed order, which the district court entered as final judgment without substantive modification, simply says that it "has evaluated the factors set forth by the Ninth Circuit and determined that there was no collusion." ER9. The district court then parenthetically quotes the three warnings signs of a self-interested settlement: disproportionate attorneys fees, clear sailing for fees, and kicker. *Id.* ***All three*** warning signs exist here, but the district court does not even acknowledge this, let alone provide adequate scrutiny of the Settlement. Instead, the lower court concludes without explanation and as a *non sequitur* that there was "no collusion," which is necessary, but not sufficient for settlement fairness.

The allocation of the only concrete relief provided by the Settlement—$275,000 cash—overwhelmingly favors class counsel at the expense of the class in violation of Circuit precedent. Settlement approval must be reversed.

Argument

I. Because of inherent conflicts between class counsel and the class in class actions, courts must scrutinize settlement terms and attorneys' fee requests.

Unlike settlements in bilateral civil litigation, class-action settlements and fee awards require court approval pursuant to the standards set out in Federal Rule of

Civil Procedure 23. Even merely proceeding in court on behalf of a class demands a "rigorous analysis" of the Rule 23(a) and (b) prerequisites. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011). The need for this additional layer of review, during which the court acts as a fiduciary of the class, arises from the self-interested incentives inherent in class actions. Because class members are not present during the negotiations, "there is always the danger that the parties and counsel will bargain away the interests of the unnamed class members in order to maximize their own." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013) ("*Pampers*").

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

The dysfunction that can result from these incentives is a problem because class actions often are the only way plaintiffs can be compensated and defendants held to account for serious misdeeds with diffuse harm. Our adversary system—and the value of our class actions within it—depends upon unconflicted counsel's zealous advocacy for their clients, especially where those clients are absent class members who

do not get to choose their counsel for themselves and may not even know their legal rights are at stake. *Cf. Radcliffe v. Experian Info. Solutions Inc.*, 715 F.3d 1157, 1167 (9th Cir. 2013). As a result, rigorous adherence to the safeguards of Rule 23 is necessary to ensure that counsel is not self-dealing at the class's expense. Where, as here, class counsel favor themselves over their clients, a district court has a legal obligation to reject the settlement. *Bluetooth*, 654 F.3d at 948-49; *see also Pearson v. NBTY, Inc.*, 772 F.3d 778, 786 (7th Cir. 2014); *Eubank v. Pella Corp.*, 753 F.3d 716, 720 (7th Cir. 2014).

Various gimmicks enable class counsel to obscure settlement misallocations, by creating the illusion of relief to justify disproportionate attorneys' fees. The illusion of settlement value benefits both class counsel and the defendant: "The more valuable the settlement appears to the judge, the more likely the judge will approve it. And the bigger the settlement, the bigger the fee for class counsel." *See* Howard M. Erichson, *How to Exaggerate the Size of Your Class Action Settlement*, DAILY JOURNAL (Nov. 8, 2017).[3] Without judicial oversight to weed out such practices, class members are left with settlements in which an outsized portion of their recovery goes to class counsel. *See* Howard Erichson, *Aggregation as Disempowerment*, 92 NOTRE DAME L. REV. 859 (2016).

One such inflationary gimmick is spurious injunctive relief. *Id.* at 874-78; *see also generally* Erin L. Sheley & Theodore H. Frank, *Prospective Injunctive Relief and Class Settlements*, 39 HARV. J. L. & PUB. POL'Y 769, 778-80 (2016). The value of injunctive relief is "easily manipulable by overreaching lawyers seeking to increase the value

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

assigned to a common fund." *Staton*, 327 F.3d at 974. As Judge Vaughn Walker once described it, an injunctive-relief settlement coupled with "arrangements to pay plaintiffs' lawyers their fees" is the "classic manifestation of the class-action agency problem." *In re Oracle Secs. Litig.*, 132 F.R.D. 538, 544 (N.D. Cal. 1990). "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. Defendants benefit from *res judicata* following judicial approval of the settlement and the minimal cost of such relief, while class counsel hopes for approval of a higher fee request. The critical question for a reviewing court is whether the change achieved by the settlement actually compensates class members as consideration for the claims that the settlement releases. If an injunction is forward-looking, as here, then the relief does little for the class of consumers who were injured in the past. *See Koby*, 846 F.3d at 1079-80. Indeed, such class members get the same relief whether they stay in the settlement or opt out—which means that each individual class member would be better off if they preserved their claims because they get nothing extra for waiving them. If every single class member is individually better off if they opt out of the class, how can the settlement be fair for the class as a whole?

The vitality of the class-action mechanism depends on zealous scrutiny by the judiciary and the application of doctrinal tests that properly align the incentives of class counsel with those of the vulnerable, absent class members whose claims they settle away. "[P]ublic confidence in the fairness of attorney compensation in class actions is vital to the proper enforcement of substantive law." *Laffitte v. Robert Half*

Int'l, 376 P.3d 672, 692 (Cal. 2016) (Liu, J., concurring). The district court's scrutiny failed to meet this standard and, as a result, it awarded class counsel fees in an amount many times what is reasonable under Rule 23(h). This matters to class members because "[i]f fees are unreasonably high, the likelihood is that the defendant obtained an economically beneficial concession with regard to the merits provisions, in the form of lower monetary payments to class members or less injunctive relief for the class than could otherwise have obtained." *Staton*, 327 F.3d at 964.

Where settling parties are not prodded to do better, settlements often look a lot like the one here: spurious injunctive relief with attorneys' fees/incentive awards as the only concrete settlement value, and a broad release for the defendant.

II. The district court abused its discretion and erred as a matter of law by failing to apply *Koby* and approving waiver of monetary claims.

In approving the Settlement, the district court erred by accepting the parties' assertion that the conditional injunctive relief set forth in the Settlement provided sufficient value to waive the monetary claims of absent class members.

In *Koby*, this Court reversed approval of a settlement like this one, where the district court erroneously assumed value for injunctive relief not directed toward the class members. 846 F.3d at 1080. Yet the district court here did not cite or discuss *Koby*, even though Copland argued the case extensively. *See* ER53, ER62-67. In *Koby*, the parties settled an FDCPA class action relating to misleading voicemail messages sent by a debt collection company. 846 F.3d at 1074. The settlement included no cash relief for class members, only a *cy pres* award to a third party and an injunction requiring defendant "ARS to continue using, for a period of two years, the new

voicemail message it had already adopted voluntarily back in August 2011." *Id.* at 1075. "As the proponents of the settlement, [defendant] and the named plaintiffs bore the burden of demonstrating that class members would benefit from the settlement's injunctive relief." *Id.* at 1079. Plaintiffs in *Koby* could not bear that burden, and neither can Littlejohn. Class counsel does not provide evidence that this purported "relief" provides any benefit over the current labels, let alone sufficient value to class members in exchange for their release.

As in *Koby*, the purported injunctive relief to the class is neither relief, nor is it directed to the class. The parties must demonstrably show that the settlement "secures some adequate advantage for the class." *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 195 (5th Cir. 2010). The "injunctive relief" here consists entirely of two labeling revisions that are entirely conditioned on SweeTARTS containing "dl-malic acid as an ingredient." ER93. ***If and only if*** SweeTARTS contains DL-malic acid, defendant is required to remove the statement "No Artificial Flavors" from the relevant packages and identify "dl-malic acid" on the ingredients list (as opposed to "malic acid" generically)—for two years. *Id.* In *Koby*, the parties argued that a class would benefit from the modification of debt collection practices by the defendant, but the injunction "was worthless to most class members." 843 F.3d at 1079. This is because the injunction was prospective: it applied to all *future* debtors contacted by the defendant, whether or not they were class members, which was "an obvious mismatch between the injunctive relief provided and the definition of the proposed class." *Id.*; *see also True v. Am. Honda Co.*, 749 F. Supp. 2d 1052, 1077 (C.D. Cal. 2010) ("No changes to future advertising by Honda will benefit those who already were misled by

Honda's representations regarding fuel economy."). This settlement also includes a similarly obvious mismatch between the proposed injunctive relief benefitting *future* purchasers of SweeTARTS and the proposed class of *past* purchasers. The parties must show the value to the class, not merely the value to the general public.

"The fairness of the settlement must be evaluated primarily based on how it *compensates class members*—not on whether it provides relief to other people, much less on whether it interferes with the defendant's marketing plans." *Pampers*, 724 F.3d at 720 (cleaned up). In *Synfuel Technologies, Inc. v. DHL Express (USA), Inc.,* the Seventh Circuit rejected a settlement that included changes to the defendant shipping company's billing practices. 463 F.3d 646, 654 (7th Cir. 2006). The Seventh Circuit found that "future customers who are not plaintiffs in this suit [] will reap most of the benefit from these changes." *Id.* The Seventh Circuit noted that the class complaint specifically sought money for overcharges and "the fairness of the settlement must be evaluated primarily based on how it compensates class members for these past injuries." *Id.* Similarly, the class complaint here pleaded "ascertainable losses in the form of the price premium they paid for the unlawfully labeled and marketed Products" and sought restitution and money damages. ER129, ER134, ER142. The potential label changes have no settlement value because they do not in any way compensate class members for these alleged past injuries. Because the settlement provides no marginal consideration to the class, it is against the interests of unnamed class member and is not fair, reasonable, or adequate. "There is no evidence that the relief afforded by the settlement has any value to the class members, yet to obtain it

they had to relinquish their right to seek damages in any other class action." *Koby*, 846 F.3d at 1079.

In fact, the proposed settlement puts class members in a *worse* position than non-class members. Because the dubious injunctive relief is "enjoyed" by class members and non-members alike, a fiduciary would advise all their clients to opt-out of the suit. That class counsel instead sought speedy approval of the release and fee request demonstrates a breach of fiduciary duty to unnamed clients.

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

Due to the diverging interests of class and counsel, this Court requires that the relief be proportional to attorneys' fees. *See Allen*, 787 F.3d at 1224 n.4 (zeroing in on the "economic reality" of payment to class under settlement). Class counsel is entitled to fees only in proportion to the actual relief created by the settlement. *See Reynolds v. Ben. Nat'l Bank*, 288 F.3d 277, 286 (7th Cir. 2002) ("class counsel's compensation must be proportioned to the incremental benefits they confer on the class, not the

total benefits."). And because the parties can easily manipulate the value of the injunctive relief, this Court permits district courts to include injunctive relief in the common fund for purposes of calculating fees "only in the unusual instance where the value to individual class members of benefits deriving from injunctive relief can be accurately ascertained." *Staton*, 327 F.3d at 974.

The district court here never quantified the injunctive relief, but only rubber-stamped plaintiffs' bare assertion that it "provides value to the Class." ER14. But assigning *any* value to the injunctive relief was error based on the record. To the extent the injunction actually benefits class members, it suggests settlement inadequacy. The entire theory of class benefit hinges on the idea that Ferrara's label claim unlawfully stimulates market demand, thus causing an unfair "price premium" for SweeTARTS. "As a result of Defendant's violations, Plaintiff and the Class suffered ascertainable losses in the form of the price premium they paid for the unlawfully labeled and marketed Products, which they would not have paid had the Products been labeled correctly, and in the form of the reduced value of the actual Products compared to the Products as advertised." ER129. If this theory is correct, then the injunction may benefit future consumers (a different class than those who suffered alleged past injury). But if there are future effects on price, ***then class members must have suffered monetary injuries in the past.*** If *any* benefit flows from the injunction, then it proves the class has surrendered valuable claims for their alleged past injuries with no consideration.

III. The settlement approval cannot stand because class counsel negotiated $272,000 for themselves in a settlement where the class receives $0.

This settlement features all three indicia of impermissible self-dealing identified by the *Bluetooth*: (1) a disproportionate distribution of fees to counsel; (2) a "clear sailing agreement" that defendants will not challenge the fee request; and (3) a "kicker" that ensures any reduction in fees will revert to the defendant. *See Bluetooth*, 654 F.3d at 947; *Allen*, 787 F.3d at 1224.

The district court purports to analyze the settlement under *Bluetooth*, but its finding of "no collusion" constitutes alternative facts at best. Copland did not even allege collusion. To be lawyer-driven and self-dealing, a settlement need not be actually collusive. Courts "must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests . .. to infect the negotiations." *Id.* at 947 (citing *Staton*, 327 F.3d at 960); *see also id.* at 948 ("The Rule 23(e) reasonableness inquiry is designed precisely to capture instances of unfairness not apparent on the face of the negotiations."). There need only be *acquiescence* by class counsel for such self-dealing to occur: "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." *Staton*, 327 F.3d at 964 (quoting *In re GMC Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 755, 819-20 (3d Cir. 1995)); *accord Bluetooth*, 654 F.3d at 949.

Here, the self-dealing is evident by the conjunction of attorneys' fees, incentive awards, and no meaningful relief for class members. The Settlement permitted counsel to seek, unopposed, an award of fees, class representative awards, and costs

totaling up to $275,000. ER101. If any amount less than the full fee was awarded, it for "no apparent reason" was structured to revert to the defendant. *Bluetooth*, 654 F.3d at 949. Meanwhile, the class was entitled only to cosmetic injunctive relief measures that offer no genuine improvement for their alleged past injuries. While the complaint was filed on behalf of a putative California class, the settlement was expanded to release all monetary claims nationwide under any law (and purportedly the laws of foreign nations!), ER91, in exchange for no class recovery.

The district court failed to contemplate whether *Bluetooth* self-dealing occurred, and instead adopted plaintiffs' *ipse dixit* assertion that there was "no collusion." But *Bluetooth* is not limited to collusion: settlements can be objectively unfair even if there is no collusion. The two factors mentioned by the district court—the presence of a neutral mediator and agreement "to the terms of the Settlement before discussing attorneys' fees"—did not excuse the need for scrutiny in *Bluetooth*. *Compare* ER9 *with* 654 F.3d at 948. The district court's discussion of *Bluetooth* is wholly inadequate—the district court simply quoted *Bluetooth* and asserted, without any analysis, that the factors were considered. *Id.* For this independent reason, approval of the settlement should be reversed.

A. Disproportionate attorneys' fees suggest self-dealing.

The most telling sign of self-dealing in this settlement is counsel's receipt of an exceedingly "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 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1021 (9th Cir. 1998)).

"That the defendant in form agrees to pay the fees independently of any money award or injunctive relief provided to the class in the agreement does not detract from the need to carefully scrutinize the fee award." *Staton*, 327 F.3d at 964.

The benchmark for a reasonable attorneys' fee award in the Ninth Circuit in a case alleging economic injury is 25% of the class benefit. *Bluetooth*, 654 F.3d at 942. A settlement that allocates to class counsel well in excess of the Ninth Circuit's 25% benchmark cannot be approved without articulated reasons for the departure. *See, e.g, Id.* at 945 (vacating approval where fees amounted to more than 83% of the constructive common fund); *Dennis*, 697 F.3d at 868 (38.9% fee would be "clearly excessive"); *Allen*, 737 F.3d at 1224 n.4 (fee award that exceeds class recovery by a factor of three is disproportionate); *Pearson*, 772 F.3d at 781 (69% fee is "outlandish"); *Redman v. RadioShack Corp.*, 768 F.3d 622, 630-32 (7th Cir. 2014) (55%-67% allocation unfair).

The district court was obligated to scrutinize the "economic reality" of the value of the injunction relative to the attorneys' fee request. *Allen*, 787 F.3d at 1224. Other courts have adopted the same approach. *See*, *e.g.*, *Pearson*, 772 F.3d 778; *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 179 n.13 (3d Cir. 2013) (district court should consider actual receipts to class to determine settlement fairness); *Fager v. CenturyLink Comms., LLC*, 854 F.3d 1167, 1177 (10th Cir. 2016) ("We see merit in an approach that ties attorney recovery to the amount actually paid to the class."); Notes of Advisory Committee on 2003 Amendments to Rule 23 ("it may be appropriate to defer some portion of the fee award until *actual payouts* to class members are known" (emphasis added)); *id.* ("fundamental focus is the result *actually achieved* for class

members" (emphasis added); *id.* (*citing* 15 U.S.C. §§ 77z-1(a)(6); 78u-4(a)(6) (fee award should not exceed a "reasonable percentage of the amount of any damages and prejudgment interest *actually paid* to the class" (emphasis added))). *See also* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.13 (2010) ("*ALI Principles*"); Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.71 (2004) ("In cases involving a claims procedure…, the court should not base the attorney fee award on the amount of money set aside to satisfy potential claims. Rather, the fee awards should be based only on the benefits actually delivered."); *cf. Dennis*, 697 F.3d at 868 (chronicling problem of "fictitious" fund valuations that "serve[] only the 'self-interests' of the attorneys and the parties, and not the class.").

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

(E.D.N.Y. Sep. 3, 2013) (parties voluntarily found a way to increase payments from about $0.5 million to over $5 million after Frank objected on *Baby Products* grounds).

Absent class members can only be protected if class counsel is incentivized to negotiate for a process that maximizes recovery to the class.

Here, because the only class relief available (injunctive relief) has no value to class members, *see* Section II above, the class receives nothing in exchange for waiving their monetary damages claims. This means that class counsel receives ***100%*** of the net settlement funds, not even in the same ballpark as the Ninth Circuit's 25% benchmark. Negotiating disproportionate fees suggests self-dealing, which infects the entire settlement, not just the fee request. *Bluetooth*, 654 F.3d at 945-46.

Because the settlement here is pre-certification, the lower court should have applied an even higher degree of scrutiny due to the "even greater potential for a breach of fiduciary duty owed the class during settlement." *Bluetooth*, 654 F.3d at 946. Approval of a pre-certification settlement occasions appellate review of "the entire settlement, paying special attention to the terms of the agreement containing convincing indications that the incentives favoring pursuit of self-interest rather than the class's interest in fact influenced the outcome of negotiations." *Dennis*, 697 F.3d at 867 (cleaned up).

The most common settlement defects are ones of allocation of the settlement relief between the class members and the class attorneys. Again, this is because the adversarial process cannot safeguard the rights of those absent from the table. Allocational issues cannot be waived away simply by structuring the settlement to provide "separate" attorneys' fees, rather than fees from a traditional common fund.

See, e.g., Pampers, 724 F.3d at 717-18; *Bluetooth*, 654 F.3d at 943. "That the defendant in form agrees to pay the fees independently of any monetary award or injunctive relief does not detract from the need carefully to scrutinize the fee award." *Staton*, 327 F.3d at 964.

It is unfair for the class to receive a useless perfunctory injunction but class counsel to be "amply rewarded." *Bluetooth*, 654 F.3d at 947; *accord GMC Trucks*, 55 F.3d at 803 ("[N]on-cash relief…is recognized as a prime indicator of suspect settlements."); *Subway*, 869 F.3d at 551 (a settlement may not be approved where its "principal effect is to induce the defendant to pay the class's lawyers enough to make them go away").

B. The settlement contains "clear-sailing" and "kicker" provisions that are designed to insulate the disproportionate fee from scrutiny.

In addition to a disproportionate fee award, the defendant's agreement not to oppose the fee request ("clear sailing") and the segregation of the fee from class relief such that any reduction in fees reverts to the defendant (a "kicker") are red flags indicating that the class's interest has been subordinated to that of their putative attorneys. *See Bluetooth*, 654 F.3d at 947-48; *Redman*, 768 F.3d 622; *Pearson*, 772 F.3d 778. The class's representatives did not merely negotiate for themselves the right to request $275,000, they negotiated for themselves the twin security blankets of knowing that Ferrara would not oppose their fee and that any reduction would revert to that same non-opposing party.

Clear sailing clauses 'decouple class counsel's financial incentives from those of the class, increasing the risk that the actual distribution will be misallocated between attorney's fees and the plaintiffs' recovery.'" *Vought v. Bank of Am.*, 901 F. Supp. 2d 1071, 1100 (C.D. Ill. 2012) (quoting *Int'l Precious Metals Corp. v. Waters*, 530 U.S. 1223, 1224 (2000) (O'Connor, J., respecting the denial of certiorari)). They indicate that the class attorneys have negotiated "red-carpet treatment" to protect their fee award while urging class settlement "at a low figure or less than optimal basis." *Pampers*, 724 F.3d at 718 (quoting *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991)). "It is unlikely that a defendant will gratuitously accede to the plaintiffs' request for a 'clear sailing' clause without obtaining something in return. That something will normally be at the expense of the plaintiff class." *Malchman v. Davis,* 761 F.2d 893, 908 (2d Cir. 1985) (Newman, J., concurring). As such, a clear-sailing clause must be considered a "questionable feature" that "at least in a case…involving a non-cash settlement award to the class…should be subjected to intense critical scrutiny." *Redman*, 768 F.3d at 637; *accord Malchman*, 761 F.2d at 908 (suggesting that "perhaps they should be forbidden in all cases"); *see generally* William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 TUL. L. REV. 813, 816 (2003) (courts should "adopt a per se rule that rejects all settlements that include clear sailing provisions.").

Especially when combined with "clear-sailing" provisions, "kicker" provisions have the self-serving effect of protecting class counsel by deterring scrutiny of the fee award. The combination ensures that the only beneficiary of a fee reduction (the defendant, due to the kicker) cannot argue for reduced fees—leaving *no one* with the

both the incentive and ability to make those arguments. *See* Charles Silver, *Due Process and the Lodestar Method*, 74 TUL. L. REV. 1809, 1839 (2000) (arguing that such a fee arrangement is "a strategic effort to insulate a fee award from attack"); Lester Brickman, *Lawyer Barons* 522-25 (2011) (arguing the same; further arguing that reversionary kicker should be considered *per se* unethical); *Pearson*, 772 F.3d at 786-87 (describing a kicker as a "gimmick" and holding that there "should be a strong presumption of its invalidity"). Class counsel relied on this effect: telling the district that it should approve the entire fee request because "if a fee award is not made in the amount contemplated by the Settlement, these funds will remain with Defendant." Dkt. 30-1 at 6.

Additionally, fee segregation has the self-serving effect of protecting class counsel by deterring scrutiny of the fee request. *See Pearson*, 772 F.3d at 786 (calling it a "gimmick for defeating objectors"). Courts and potential objectors have less incentive to scrutinize a request because the kicker combined with the clear-sailing agreement means that any reversion benefits only the defendant that had already agreed to pay that initial amount.

The settlement's "clear sailing" clause and reversion of unawarded fees to the defendant accentuate that this is an unfair lawyer-driven settlement. Although Copland objected to the combination of "clear sailing" and "kicker" below, the court did not appear to subject these features to any scrutiny, nor even acknowledge the existence of these *Bluetooth* red flags.

The Settlement and its fee agreement compare unfavorably with *Bluetooth*. As in *Bluetooth*, the Settlement does not create a common fund for class benefit—yet this

fact did not prevent the Ninth Circuit from finding that counsel had seized a disproportionate share of the "constructive common fund." 654 F.3d at 945; *see also Dennis*, 697 F.3d at 862-863, 868 (in a "constructive common fund" settlement, an attorneys' award of "38.9% of the total…is clearly excessive"). *Bluetooth* speaks of not only a disproportionate share of the common fund, but also "when the class receives no monetary distribution but class counsel are amply rewarded." *Bluetooth*, 654 F.3d at 947; *GMC Trucks*, 55 F.3d at 803 (3d Cir. 1995) ("non-cash relief…is recognized as a prime indicator of suspect settlements").

As for the injunctive relief, the district court failed to make a "comparison between the settlement's attorneys' fees award and the benefit to the class or degree of success in the litigation." *Bluetooth*, 654 F.3d at 943. Both sides of the comparison are less favorable than *Bluetooth*. In terms of attorneys' fees, the request is richer than the one in *Bluetooth*, which was "substantially" lower than the lodestar value of attorney time. Here plaintiffs have requested a 1.489 multiplier of their time actually spent plus 70 hours for future billing. The request for this multiplier highlights the disproportionality of attorneys' fees in a case where class members receive $0 for the forfeiture of monetary claims. There is a "strong presumption that the lodestar is sufficient" without an enhancement multiplier. *Perdue v. Kenny A.*, 559 U.S. 542, 546 (2010). A lodestar enhancement is justified only in "rare and exceptional" circumstances where "specific evidence" demonstrates that an unenhanced "lodestar fee would not have been adequate to attract competent counsel." *Id.* at 553.[4] A

[4] *Perdue*'s limitation on enhancements was made in the context of interpreting 42 U.S.C. § 1988's language of "reasonable" fee awards, but several courts hold it has

multiplier based on outstanding results requires some "exceptional success" beyond the "expectancy of excellent or extraordinary results" already baked into pricey hourly rates. *In re Washington Public Power Supply Sys. Litig.*, 19 F. 3d 1291, 1304 (9th Cir. 1994).

In terms of benefit to the class, the proposed settlement does not constitute an "exceptional result." In fact, it violates Ninth Circuit law and Rule 23(e), which requires that class members—not attorneys—be the foremost beneficiary of a class settlement.

IV. There is no justification for class counsel's disproportionate benefit under the Settlement, so the approval must be reversed under rule 23(e).

"If fees are unreasonably high, the likelihood is that the defendant obtained an economically beneficial concession with regard to the merits provisions, in the form of lower monetary payments to class members or less injunctive relief for the class than could otherwise have obtained." *Staton*, 327 F.3d at 964; *accord Bluetooth*, 654 F.3d at 947. Because class counsel appropriates all the money in this Settlement, and because it contains all the indicia of self-dealing identified by *Bluetooth*, the district court should have rejected the settlement unless it is "supported by a clear explanation of why the disproportionate fee is justified and does not betray the class's interests." 654 F.3d at 949. The district court made no such reasoned finding.

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equal application to "reasonable" fee awards in class actions made under Fed. R. Civ. P. 23(h). *See, e.g., Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 Fed. Appx. 496, 500 (6th Cir. 2011); *Weeks v. Kellogg Co.*, No. 09-cv-8102, 2011 U.S. Dist. LEXIS 155472, at *129 & n.157 (C.D. Cal. Nov. 23, 2011); *cf. also In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 361 (3d Cir. 2010) (Weis, J. concurring/dissenting) (referring to *Perdue* as an "analogous statutory fee-shifting case.").

In fact, a proportionate fee is *necessary* for settlement fairness under Rule 23(e). Effective December 1, 2018, Rule 23 now explicitly requires courts to consider defects of allocation as part of their fairness review. Courts must consider, *inter alia*, "whether the relief provided for the class is adequate, taking into account . . . the terms of any proposed award of attorney's fees." Rule 23(e)(2)(C)(iii). The district court did not abide with the new rule.

Class counsel attempted to justify their disproportionate fee, but none of their excuses withstand scrutiny.

A. The allegedly marginal value of monetary claims does not justify the uncompensated release of these claims.

The parties attempted to rationalize the settlement's utter failure to obtain monetary relief, but these excuses fundamentally answer the wrong question. Plaintiff's asserted that the lack of benefit is justified because the claims were of low value, or because SweeTARTS are low-cost products, so it would be "infeasible to distribute this small sum of money to the class members." Dkt. 42 at 6. But these arguments do not justify waiver. The issue is not whether class members could obtain monetary relief—the issue is that the proposed settlement waives class claims in exchange for *nothing*.

Moreover, plaintiff is wrong that class actions cannot distribute money to purchasers of low-cost products; indeed, the class counsel here has done just that in another malic acid settlement. Class counsel has successfully taken the reverse position in numerous other consumer products cases seeking recovery for small-dollar alleged frauds. Most saliently, class counsel has moved to preliminarily approve a

settlement over substantially similar "malic acid" claims regarding Ocean Spray juices. *See Hilsley v. Ocean Spray Cranberries, Inc.*, No. 17cv2335-GPC (S.D. Cal.), Dkt. 232-3 at 27 (settlement agreement). This settlement, like many class action settlements distributes class benefit for the purchase of low-cost items through a claims process. In the *Ocean Spray* settlement, class members can claim $1 per purchase from a $5.4 million common fund. *Id.* It is simply untrue that class actions cannot redress "minimal" damages—that's exactly what Rule 23(b)(3) exists for.

Even assuming monetary claims are "minimal and fraught with problems" (Dkt. 30-1 at 17)—contrary to what the operative complaint said—class members should not have to waive individual claims for damages without the opportunity for individual relief. If the monetary claims are worthless, they could simply be dismissed, and class members would not be required to waive them. Instead, class counsel championed a settlement that waives damages claims for $0 and utterly fails to explain why this waiver is necessary. Furthermore, it does not change the allocational problem. Perhaps the defendant overpaid because the claims are so low-value, and a peppercorn of relief is adequate—but if there is a windfall, Rule 23(e) fairness requires that the attorneys share the windfall with their clients rather than disproportionately keep it for themselves. Any other rule would pay attorneys more to bring weak claims than strong claims, an incentive structure that is exactly backwards.

Plaintiff's current position also clashes with her prior pleadings. In the complaint, plaintiff pleaded several types of damages, including theories under breach of express warranty and breach of implied warranty—causes of action that require damages as an indispensable element. ER134-35. To obtain certification, class counsel

relies on the pendency of these claims to assure the district court that the class has requisite commonality for certification under Rule 23(b)(3). Class counsel stressed that the proposed settlement resolves claims for "common law fraud," which is "substantially similar from state to state." Dkt. 23 at 21 (quoting *Spencer v. Hartford Fin. Servs. Grp., Inc.*, 256 F.R.D. 284, 301 (D. Conn. 2009)). Common-law fraud, of course, provides a remedy at law: monetary damages. And the state-law fraud claims for many states that the settlement waives entitle a consumer to statutory damages. For example, New York, where Copland bought SweeTARTS, provides for "actual damages or fifty dollars, whichever is greater." N.Y. GBS § 349(g).

Most importantly, the damages claims do not appear to be worthless *to the defendant*. Otherwise, defendant could have saved money by settling only the injunctive claims under a Rule 23(b)(2) certification. The administration of such settlement is easier (and less costly) because class members require no opportunity to opt out when only injunctive claims are waived, and the notice requirements are less onerous. Obviously, the defendant perceives some benefit in settling the class damages claims as well—and class counsel has impermissibly appropriated all settlement benefits to itself. Ferrara settled the claims for $275,000, albeit with class counsel claiming $272,000 of the benefit. Class counsel engineered this arrangement while agreeing to sell out the unnamed class members' claims for zero dollars. Because of these self-dealing terms, approval of the Settlement should be reversed.

"The fact that class members were required to give up anything at all in exchange for worthless injunctive relief precluded approval of the settlement as fair, reasonable, and adequate under Rule 23(e)(2)." *Koby*, 846 F.3d at 1081. *Koby* is not an

outlier either; courts routinely hold worthless injunctions cannot justify the release of class claims. *See Subway*, 869 F.3d at 556 (injunction "utterly worthless"); *Pampers*, 724 F.3d at 719; *Staton*, 327 F.3d at 961.

B. The existence of the Settlement does not militate in favor of approval and release of class claims.

Plaintiffs contend that defendant's agreement to furnish attorneys' fees justifies their award (Dkt. 30 at 5-7), but this circular logic puts the cart before the horse. The Settlement can only be approved if it benefits the class; an agreement by defendant to pay attorneys' fees does not provide the class with consideration for their claims.

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).

The district court should have rejected the settlement due to the inequitable treatment between class counsel and unnamed members of the class, and for the independent reason that the settlement provides class members no marginal benefit over non-class members in exchange for their release. The proponents of a settlement must bear "the burden of demonstrating that class members would benefit from the

settlement's injunctive relief." *Koby*, 846 at 1079; *Pampers*, 724 F.3d at 719 (compiling authorities). The parties have never carried this burden, so reversal is necessary.

C. Allegedly modest attorneys' fees do not justify settlement.

Nor can plaintiff's allegedly "modest" 1.489 lodestar multiplier excuse the disproportion between class and attorney benefit. Even a modest request relative to lodestar cannot justify a misallocated settlement. *Bluetooth* itself involved a settlement that provided injunctive relief and less than lodestar attorneys' fees to class counsel. Even after the district court's scrutiny of class counsel's billing records showed that counsel's lodestar "substantially exceed[ed]" the negotiated fee, the court had not done enough to "assure itself—and [the Ninth Circuit]—that the amount awarded was not unreasonably excessive in light of the results achieved." 654 F.3d at 943. The district court still needed to compare the fee award with both the value of the benefit to the class and a "reasonable percentage award." *Id. Koby* likewise had a "modest" fee request, but also required reversal. *See Koby*, 846 F.3d at 1080 (reversing approval of settlement with $67,500 attorneys' fees); *see also In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1177 (9th Cir. 2013) (lodestar multiplier of .32 not determinative).

Other courts have adopted the same principle. In *Pampers*, the district court's unchallenged conclusion that a $2.73 million fee was "less than what the lodestar calculation would reflect, and [would] properly compensate[] class counsel for extraordinary work" could not justify a settlement where the fee was not "commensurate" with class relief. *Compare* Transcript of Fairness Hearing, No. 10-cv-301 (S.D. Ohio.), Dkt. 76, at 35, *with Pampers*, 724 F.3d at 720-21. Similarly, in *Subway*,

the defendant agreed to provide $520,000 in attorneys' fees—which was well below plaintiffs' claim of $1.125 million lodestar. *See In re Subway Footlong Sandwich Mktg. and Sales Practices Litig.*, 316 F.R.D. 240, 253 (E.D. Wis. 2016), *reversed*, 869 F.3d 551 (7th Cir. 2017). *See also Baby Prods.*, 708 F.3d at 180 n.14 (lodestar multiplier of 0.37 not "outcome determinative").

Fundamentally, "hours can't be given controlling weight in determining what share of the class settlement pot should go to class counsel"; "the reasonableness of a fee cannot be assessed in isolation from what it buys." *Redman*, 768 F.3d at 633, 635. *Accord In re HP Inkjet*, 716 F.3d at 1179.

Here, class counsel sought 1.489 their alleged lodestar for "excellent results," which the district court rubber stamped in final judgement. ER14 (awarding fees due to "lodestar analysis and the exceptional results achieved"). Yet the class was asked to settle for no compensatory relief at all. Class counsel seeks to use their accrued lodestar to "insulate [themselves] from the risk of pursuing an unprofitable case," something the Court "cannot" do. *Keirsey v. Ebay, Inc.,* No. 12-cv-01200-JST, 2014 U.S. Dist. LEXIS 21371, at *7-*8 (N.D. Cal. Feb. 18, 2014). "Just as the Court would not deprive class counsel of all of their potential profit in cases [where their recovery is substantial], it cannot insulate class counsel from the risk of pursuing an unprofitable case." *Id.* at *3. To grant a lodestar award is equivalent to asking the class to settle while treating class counsel "as if it had won [the] case outright." *Sobel v. Hertz Corp.*, No. 3:06-CV-00545-LRH, 2011 U.S. Dist. LEXIS 68984, at *44 (D. Nev. Jun. 27, 2011).

If a fee award were justified because it is no more than lodestar, no matter how little the class received, it would be reasonable for class counsel to negotiate a settlement where the class receives a single peppercorn—much like the injunction here—as consideration for the class's release. Such a rule creates a counterproductive incentive to bring low-merit cases. The risk of litigation will make it easy to justify a settlement that does not pay the class much while class counsel gets paid. Recognizing this reality, numerous courts, "aim to tether the value of an attorneys' fees award to the value of class recovery." *In re HP Inkjet*, 716 F.3d at 1179; *see e.g. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 121 (2d Cir. 2005) (commending the percentage-of-recovery fee approach because it "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation").

"Plaintiffs attorneys don't get paid simply for working; they get paid for obtaining results." *HP Inkjet*, 716 F.3d at 1182); *Redman*, 768 F.3d at 633, 635 ("the reasonableness of a fee cannot be assessed in isolation from what it buys"; "hours can't be given controlling weight in determining what share of the class action settlement pot should go to class counsel"). Even a modest request relative to lodestar cannot justify a misallocated settlement. A settlement that requires class members to surrender their claims but provides them nothing in exchange cannot be "exceptional." 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). "The prospect of mass indifference, a few profiteers, and a quick fee to clever lawyers is hardly the intended outcome for Rule 23 class actions." *Id.* at 510. This Court endorsed that holding, reasoning that certification to effect a settlement of "meaningless" or "trivial" relief is not superior to other methods of adjudication. 814 F.3d at 129.

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

V. In economic reality, the purported settlement relief demonstrates that the class has not been adequately represented.

In negotiating this settlement agreement, the class's representatives have breached their fiduciary duty to the class in violation of Fed. R. Civ. P. 23(a)(4) and (g)(4). "The district court must ensure that the representative plaintiff fulfills his [or her] fiduciary duty toward the absent class members" *Diaz v. Trust Territory of Pacific Islands,* 876 F.2d 1401, 1408 (9th Cir. 1989). An amorphous "class is not the client. The class attorney continues to have responsibilities to each individual member of the class even when negotiating a settlement." *Mandujano v. Basic Vegetable Products, Inc.*, 541 F.2d 832, 835 (9th Cir. 1976).

Here, while class counsel's client is obviously made $3,000 better off by the proposed settlement, unnamed class members are worse off than the public at large. Class members' claims are extinguished in exchange for no incremental relief to them.

A fiduciary to the class would advocate that *every* absent class member opt out so that they remain free to pursue their claims. *Cf. Koby*, 846 F.3d at 1081.

But instead, class counsel and the individual plaintiffs have agreed to a settlement that enriches themselves while forsaking the interests of absent class members, indeed affirmatively harming them through the release of claims. When class counsel is "motivated by a desire to grab attorney's fees instead of a desire to secure the best settlement possible for the class, it violate[s] its ethical duty to the class." *Tech. Training Assocs., Inc. v. Buccaneers Ltd. P'ship*, 874 F.3d 692, 694 (11th Cir. 2017); *accord Lobatz v. U.S. West Cellular of Cal., Inc.*, 222 F.3d 1142, 1147 (9th Cir. 2000) (if "class counsel agreed to accept excessive fees and costs to the detriment of class plaintiffs, then class counsel breached their fiduciary duty to the class."); *Pierce v. Visteon Corp.*, 791 F.3d 782, 787 (7th Cir. 2015) ("it is unfathomable that the class's lawyer would try to sabotage the recovery of some of his clients"); American Law Institute, PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.05, *cmt.* f (2010) ("*ALI Principles*") (fiduciary duty "forbids a lead lawyer from advancing his or her own interests by acting to the detriment of the persons on whose behalf the lead lawyer is empowered to act."). And such self-serving behavior falls short of the adequate representation demanded by Rule 23(a)(4). *See, e.g., Pampers*, 724 F.3d at 721; *Subway*, 869 F.3d at 557; *Gallego v. Northland Group*, 814 F.3d 123, 129-30 (2d Cir. 2016). For this independent reason, the Court should reverse approval of the Settlement.

Rule 23(a)(4), grounded in the Due Process Clause of the Constitution, conditions class certification upon a demonstration that "the representative parties will fairly and adequately protect the interests of the class." Rule 23(g)(4) imparts an

equivalent duty on class counsel, especially weighty "when the class members are consumers, who ordinarily lack both the monetary stake and the sophistication in legal and commercial matters that would motivate and enable them to monitor the efforts of class counsel on their behalf." *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 917 (7th Cir. 2011). Together these provisions demand that the named representatives and class counsel manifest "undivided loyalties to absent class members." *Broussard v. Meineke Discount Muffler Shops*, 155 F.3d 331, 338 (4th Cir. 1998).

Here, the superficial injunctive relief juxtaposed against a sizable $275,000 award to counsel and the named representatives indicate inadequate representation. *See, e.g., Pampers*, 724 F.3d at 721; *Subway*; 869 F.3d at 555-56; *Gallego*, 814 F.3d at 129-30; *see generally In re Razorfish, Inc. Sec. Litig.*, 143 F. Supp. 2d 304, 311 (S.D.N.Y. 2001) (Rakoff, J.) ("an excessive compensation proposal can cast in doubt the ability of proposed lead counsel to adequately represent the class."). When class counsel is "motivated by a desire to grab attorney's fees instead of a desire to secure the best settlement possible for the class, it violate[s] its ethical duty to the class." *Tech. Training Assocs.*, 874 F.3d at 694.

Subway is directly on point. 869 F.3d 551. Plaintiffs there alleged that the sandwich mega-chain had perpetrated a widespread consumer fraud by selling "Footlong" sandwiches that only measured 10 or 11 inches. *Id.* at 552-53. Abandoning their request for damages, they settled for $1,000 incentive awards to the named plaintiffs, $525,000 to class counsel and a potpourri of prospective injunctive relief for class members, including, for example, the requirement that Subway

locations keep a measuring tool on the premises. *Id.* at 554-55. The problem was that in reality the relief was "utterly worthless." *Id.* at 557. Due to natural variability in the baking process, both before and after the settlement there was "still the same small chance that Subway will sell a class member a sandwich that is slightly shorter than advertised." *Id.* Requiring Subway to prominently display a disclaimer to this effect added nothing because "customers already know this as a matter of common sense." *Id.* Since the representatives and counsel were extracting the only value from the settlement, the Seventh Circuit reversed the certification under 23(a)(4). *Id.*

Subway announces a general rule: "If the class settlement does not provide effectual relief to the class and its principal effect is to induce the defendants to pay the class's lawyers enough to make them go away, then the class representatives have failed in their duty under Rule 23 to fairly and adequately protect the interests of the class. And if the class representatives have agreed to a settlement that provides meaningless relief to the putative class, the district court should refuse to certify…the class." *Id.* at 556 (internal quotations omitted).

Likewise, in *Pampers*, class counsel and the named representatives attempted to justify oversized paydays by, *inter alia*, requiring the defendant to add a disclaimer to its diaper packaging and include "some rudimentary information about diaper rash" and two new links on its website. 724 F.3d at 716. The Sixth Circuit concluded that the disclaimers were so commonsensical that attributing any value to them "would denigrate the intelligence of ordinary consumers (and thus of the unnamed class members)." *Id.* at 720. Even if labeling changes impose a cost on the defendant, it is "egocentrism" to believe that that confers a benefit on class members. *Id.* In light of

the meagerness of the class's relief, the class's representatives' plentiful self-harvest demonstrated that they had not adequately represented the putative class. *Id.* at 722.

When the settlement here is reduced to its only concrete component—the $275,000 allocated to the attorneys' fee, incentive awards and expense reimbursement—it is clear that the class counsel have prosecuted the suit "just in their interests as lawyers" and that all representatives have "leverage[d]" "the class device" for their own benefit. *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006). A settlement class cannot be certified where the attorneys are the central beneficiary of that agreement; it should be "dismissed out of hand." *Subway*, 869 F.3d at 553 (internal quotation omitted).

A common thread runs through each of these cases: "cases are better decided on reality than on fiction." *Pampers*, 724 F.3d at 721 (internal quotation omitted). "[I]n cases such as this where the benefit is in non-monetary form, the district court must bring an informed economic judgment to bear in assessing its value." *Merola v. Atlantic Richfield Co.*, 515 F.2d 165, 172 (3d Cir. 1975).

The district court abused its discretion by failing to scrutinize the economic reality of settlement; in the alternative, the settlement class should be de-certified for lack of adequate representation.

Conclusion

For the foregoing reasons, the Court should reverse final approval of the Settlement, which requires class members to waive their damages claims so that defendant would agree to pay the attorneys.

Dated: November 20, 2019

Respectfully submitted,

/s/Theodore H. Frank

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Statement of Related Cases
Under Circuit Rule 28-2.6

.Appellant Copland is unaware of any related cases.

November 20, 2019

/s/ Theodore H. Frank
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Certificate of Compliance
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 12,010 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 November 20, 2019.

/s/Theodore H. Frank
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Proof of Service

I hereby certify that on November 20, 2019, 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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