THEODORE H. FRANK (SBN 196332)
HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1629 K Street NW, Suite 300
Washington, DC 20006
Telephone: 202-331-2263
Email: ted.frank@hlli.org

Attorneys for Objector James Copland

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JESSICA LITTLEJOHN, on behalf of herself, all others similarly situated, and the general public,

Plaintiff,

v.

FERRARA CANDY COMPANY, an Illinois Corporation,

Defendant.

Case No. 3:18-cv-00658-AJB-WVG

OBJECTION TO PROPOSED CLASS SETTLEMENT IN *LITTLEJOHN V. FERRARA CANDY COMPANY*, NO. 3:18-CV-00658 AND INTENT TO APPEAR

Judge: Hon. Anthony J. Battaglia
Courtroom: 4A
Date: May 31, 2019
Time: 2:00 p.m.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules and Statutes

Other Authorities

INTRODUCTION

The proposed settlement provides sweet attorneys' fees to class counsel, but leaves only a sour taste in the mouth for class members who get $0 in exchange for waiving their monetary claims. The most basic principle of class action settlement law requires that class members—not class counsel—be the primary beneficiaries of the settlement, and that class members be protected from conflicts of interest. This settlement violates this principle, and James Copland, represented *pro bono* by the Hamilton Lincoln Law Institute, objects.

Class counsel is set to receive $272,000 in fees and costs under the settlement, while the absent class receives no relief. This disproportionate fee request is protected by clear-sailing and kicker clauses,[1] 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 is requesting 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.

Class counsel now denigrates the value of class members' monetary claims, which they brought (claims that counsel continues to prosecute in numerous other similar lawsuits over malic acid), but counsel cannot explain why they recommend the *waiver* of these supposedly worthless claims. The claims are obviously not worthless to the defendant, or there would be no reason to not settle only the injunctive claims under Rule 23(b)(2). In fact, the administration of such settlement is easier because class members require no opportunity to opt out when only injunctive claims are waived. Obviously, the defendant perceives some benefit in settling the class damages claims—and class counsel has impermissibly appropriated all settlement benefits to itself.

The purported injunctive relief has no settlement value. Even assuming that the proposed labeling changes had some value (which the settling parties have not proved), those changes could only benefit future customers and would not compensate class members for

[1] *See* Settlement Agreement (Dkt.) ¶ 9.1 (clear sailing); *id.* ¶¶ 9.2 (kicker).

their past injuries. "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 v. ARS Nat'l Servs.*, 846 F.3d 1071, 1079 (9th Cir. 2017). Moreover, this dubious injunctive relief is "enjoyed" by class members and non-members alike. Because a class member will receive the same injunctive relief whether or not she participates in the settlement, a fiduciary would advise all their clients to opt-out of the suit. Class counsel instead seeks speedy approval of the release and fee request, which demonstrates a breach of fiduciary duty to unnamed clients.

The Court should exercise its own fiduciary responsibility to class members and reject the proposed settlement, which extinguishes monetary claims in exchange for no relief.

I. The objector is a member of the class and has standing to object.

Objector James Copland is a member of the class. As suggested by the Settlement Agreement and Preliminary Approval Order, Copland has provided a verification of his class membership "under oath as to the approximate date(s) and location(s) of their purchase(s) of the Products." Dkt. 23-3 ¶ 8.5.3; Dkt. 28 at 8. On several occasions since January 2012, Copland has purchased SweeTARTS products covered by the settlement for personal use and not for resale. *See* Declaration of James Copland ("Copland Decl.") at ¶¶ 3-6 (attached as Exhibit 1).

Copland intends to appear at the May 31, 2019 fairness hearing through his *pro bono* attorney Theodore H. Frank of the Hamilton Lincoln Law Institute's Center for Class Action Fairness ("CCAF"). At this time, Copland does not intend to call any witnesses at the fairness hearing, but reserves the right to make use of all documents entered on the docket by any settling party or objector or *amicus*. Copland also reserves the right to cross-examine any witnesses who testify at the hearing in support of final approval.

CCAF represents class members *pro bono* in class actions where class counsel employs unfair class action procedures to benefit themselves at the expense of the class. *See e.g., Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (observing that CCAF "flagged fatal

weaknesses in the proposed settlement" and demonstrated "why objectors play an essential role in judicial review of proposed settlements of class actions"); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 716-17 (6th Cir. 2013) ("*Pampers*") (describing CCAF's client's objections as "numerous, detailed, and substantive.") (reversing settlement approval and certification); *Richardson v. L'Oreal USA, Inc.*, 991 F. Supp. 2d 181, 205 (D.D.C. 2013) (describing CCAF's client's objection as "comprehensive and sophisticated" and noting that "[o]ne good objector may be worth many frivolous objectors in ascertaining the fairness of a settlement.") (rejecting settlement approval and certification); Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. Times, Aug. 13, 2013, at A12 (calling Frank "[t]he leading critic of abusive class-action settlements"). Since it was founded in 2009, CCAF has "recouped more than $100 million for class members" by driving the settling parties to reach an improved bargain or by reducing outsized fee awards. Andrea Estes, *Critics hit law firms' bills after class-action lawsuits*, Boston Globe (Dec. 17, 2017). CCAF's track record—and preemptive response to the most common false *ad hominem* attacks made against it by attorneys defending unfair settlements and fee requests—can be found in the Declaration of Theodore H. Frank (attached as Exhibit 2).

To avoid doubts about his motives, Copland is willing to stipulate to an injunction prohibiting him from accepting compensation in exchange for the settlement of this objection. *See* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623 (2009) (suggesting inalienability of objections as solution to objector blackmail). Copland brings this objection through CCAF in good faith to protect the interests of the class. Copland Decl. ¶¶ 9-10.

II. The district court has a fiduciary duty to the class as a whole.

"Class-action settlements are different from other settlements. The parties to an ordinary settlement bargain away only their own rights—which is why ordinary settlements do not require court approval." *Pampers*, 724 F.3d at 715. Unlike ordinary settlements, "class-action settlements affect not only the interests of the parties and counsel who negotiate them, but also the interests of unnamed class members who, by definition, are not present during the

negotiations. *Id.* "[T]hus, there is always the danger that the parties and counsel will bargain away the interests of unnamed class members in order to maximize their own." *Id.*

To guard against this danger, a district court must act as a "fiduciary for the class . . . with 'a jealous regard'" for the rights and interests of absent class members. *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010) (quoting *In re Washington Pub. Power Supply Sys. Litig.,* 19 F.3d 1291, 1302 (9th Cir. 1994)). It "must remain alert to the possibility that some class counsel may urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees." *In re HP Inkjet Printer Litig.* ("*HP Inkjet*"), 716 F.3d 1173, 1178 (9th Cir. 2013) (citation and internal quotation omitted). And it must not "assume the passive role" that is appropriate when confronted with an unopposed motion in ordinary bilateral litigation. *Redman v. RadioShack Corp.*, 768 F.3d 622, 629 (7th Cir. 2014). In particular, settlement valuation "must be examined with great care to eliminate the possibility that it serves only the 'self-interests' of the attorneys and the parties, and not the class, by assigning a dollar number to the fund that is fictitious." *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012). It is error to exalt fictions over "economic reality." *Allen v. Bedolla*, 737 F.3d 1218, 1224 (9th Cir. 2015).

There should be no presumption in favor of settlement approval: the proponents of a settlement bear the burden of proving its fairness. *See, e.g.*, *Koby v. ARS Nat'l Servs.*, 846 F.3d 1071, 1079 (9th Cir. 2017) (citing *Pampers*, 724 F.3d at 719); *True v. Am. Honda Co.*, 749 F. Supp. 2d 1052, 1080 (C.D. Cal. 2010) (citing Herbert Newberg & Alba Conte, 4 Newberg on Class Actions § 11:42 (4th ed. 2009); *accord* American Law Institute, *Principles of the Law of Aggregate Litig.* § 3.05(c) (2010) ("*ALI Principles*"). Any such presumption would be "inconsistent with [the] probing inquiry" required in this Circuit. *Retta v. Millennium Prods.*, No. CV 15-1801 PSG, 2016 U.S. Dist. LEXIS 152671, at *11 (C.D. Cal. Sept. 21, 2016) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)). "Under Rule 23(e) the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members. The court cannot accept a settlement that the proponents have not shown to be fair, reasonable and adequate." *In re*

GMC Pick-Up Truck Fuel Tank Prod. Liab. Litig. ("*GMC Pick-Up*"), 55 F.3d 768, 785 (3d. Cir. 1995) (internal quotation and alteration omitted).

Likewise, in determining whether the class can be certified, "[a] trial court has a continuing duty in a class action case to scrutinize the class attorney to see that he or she is adequately protecting the interests of the class." Herbert Newberg & Alba Conte, 4 Newberg on Class Actions § 13:20 (4th ed. 2009); *see also In re Target Corp. Customer Data Sec. Breach Litig.*, 847 F.3d 608, 612-14 (8th Cir. 2017) (vacating settlement class certification where analysis "was the product of summary conclusion rather than rigor" and district court refused to consider the representatives' adequacy in light of the settlement). The Court must "make sure that class counsel are behaving as honest fiduciaries for the class as a whole." *In re Baby Products Antitrust Litig.* ("*Baby Products*"), 708 F.3d 163, 175 (3d Cir. 2013) (quoting *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004)). More than that, it must protect against "even the appearance of divided loyalties of counsel." *Radcliffe v. Experian Info Solutions*, 715 F.3d 1157, 1167 (9th Cir. 2013).

Ultimately, "[b]oth the class representative and the courts have a duty to protect the interests of absent class members." *Silber v. Mabon,* 957 F.2d 697, 701 (9th Cir. 1992).

III. The settlement contains all the signs of impermissible self-dealing identified by the Ninth Circuit in *Bluetooth.*

This settlement features all three indicia of impermissible self-dealing identified by the Ninth Circuit: (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.

A. Class counsel's fee request for 100% of the class benefit reflects a selfish settlement where class counsel is the primary beneficiary.

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, 150 F.3d at 1021). "While attorneys' fees and costs may be awarded in a certified class action where so authorized by law or the parties' agreement under Rule 23(h), courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." *Bluetooth*, 654 F.3d at 941. "That the defendant in form agrees to pay the fees independently of any money award or injunctive relief provided to the class in the agreement does not detract from the need to carefully scrutinize the fee award." *Staton*, 327 F.3d at 964.

The benchmark for a reasonable award in the Ninth Circuit in a case alleging economic injury is 25% of the class benefit. *See, e.g.*, *Bluetooth*, 654 F.3d at 942; *HP Inkjet*, 716 F.3d at 1190. A settlement that allocates to class counsel well in excess of the Ninth Circuit's 25% benchmark cannot be approved. *See, e.g, Dennis*, 697 F.3d at 868 (38.9% fee would be "clearly excessive"); *Allen*, 737 F.3d at 1224 n.4 (fee award that exceeds class recovery by a factor of three is disproportionate); *Pearson*, 772 F.3d at 781 (69% fee is "outlandish"); *Redman v. RadioShack Corp.*, 768 F.3d 622, 630-32 (7th Cir. 2014) (55%-67% allocation unfair). This case is worse. Here, plaintiffs alleged an economic injury, yet the class's claims would be released for nothing—valueless "injunctive relief" (*see* Section III.C.3 below) that does not benefit any class member and indeed more likely benefits the defendant by insulating it from a further suit for damages. Class counsel receives infinitely more than the absent class gets under the proposed settlement—$272,000 in fees. *See* Settlement Agreement ¶ 9.1. The class receives nothing but is obliged to forfeit their monetary damages claims. *Id.* at ¶ 6.1. 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. 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 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 *GMC Pick-Up*, 55 F.3d at 819-20); *accord Bluetooth*, 654 F.3d at 949.

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

The settlement includes the additional *Bluetooth* warning signs of self-dealing. A "clear sailing" agreement, under which the defendant agrees "shall not object or oppose any such petition, including by contesting any fees, expenses, or incentive award requested, to the extent the petition does not request more than the amounts set forth above." Settlement Agreement ¶ 9.1. This "red-carpet treatment on fees" creates a substantial incentive for class counsel to accept an unfair settlement on behalf of the class. *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524-25 (1st Cir. 1991) ("[T]he very existence of a clear sailing provision increases the likelihood that class counsel will have bargained away something of value to the class."); *accord Bluetooth*, 654 F.3d at 947-48.

The settlement also includes a "kicker" provision. That is, any reduction in fees reverts, or is "kicked back," to the defendant *See* Settlement Agreement ¶ 9.2 (class counsel obligated to "make appropriate refunds or repayments if . . . the award is lowered"). The parties further agreed to a "quick pay" provision, where attorneys' fees "shall be paid by Defendant to class counsel within thirty (30) days of the date of the Court's Final Approval Order, notwithstanding the existence of any timely filed objections thereto, or appeal." *Id.* These clear sailing and kicker provisions ensure that "fees not awarded revert to the defendants" rather than being added to any potential class' recovery. *Bluetooth,* 654 F.3d at 947.

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 relies on this effect: telling the Court 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 ("Fee Memo") at 6.

While class counsel cites *Bluetooth* for several other propositions, they do not note the Ninth Circuit's disfavor of disproportionate attorneys' fee agreements with clear sailing and kicker, much less does class counsel distinguish this precedent. Instead, class counsel relies on an eighteen-year-old out-of-circuit district court order that could not possibly be good law. *Compare Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 695 (N.D. Ga. 2001) ("the Court should give substantial weight to a negotiated fee amount"); *with Bluetooth*, 654 F.3d at 938 (abuse of discretion "in failing to consider whether the gross disproportion between the class award and the negotiated fee award").

The proposed settlement and its fee agreement compare unfavorably with *Bluetooth*. As in *Bluetooth*, the proposed settlement does not create an 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; *Richardson*, 991 F. Supp. 2d 181, 204; *In re GMC Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 755, 803 (3d Cir. 1995) ("non-cash relief…is recognized as a prime indicator of suspect settlements).

Class counsel contends that the proposed settlement provides injunctive relief, but approval of such settlement at minimum requires 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 and on top of 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.*, 130 S. Ct. 1662, 1669 (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 1673.[2] A 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.

C. There is no justification for class counsel's disproportionate fee, so the settlement must be rejected 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

[2] *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 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.").

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 through settlement, and because this settlement contains all the indicia of self-dealing identified by the Ninth Circuit in *Bluetooth*, this Court must reject 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.

Class counsel attempts to justify their disproportionate fee, but none of their excuses withstand scrutiny. *First*, plaintiffs assert that they are entitled to fee shifting under California statutes (Fee Memo at 2-5), but fee-shifting statutes cannot save an unfair settlement that fails Rule 23(e), and in any event, class counsel is not entitled to fee shifting. *Second*, plaintiffs contend that defendant's agreement to furnish attorneys' fees justifies them (*id.* at 5-7), but this puts the cart before the horse. The Settlement Agreement can only be approved if it benefits the class. *Finally*, class counsel argues monetary relief "likely was not" available to class members (*id.* at 16-17), but this raises an obvious question: if class members' claims cannot generate monetary relief because they are supposedly worthless, then why must those claims be released? Obviously, the defendant does not believe they are worthless and has agreed to pay attorneys' fees and administration of a Rule 23(b)(3) settlement in order to extinguish them.

1. The fairness of the settlement must be decided under Rule 23(e), not the standards for statutory fee shifting—which is not available to class counsel in any event.

Class counsel elides the distinction between a prevailing party's entitlement to fees in fee-shifting actions, and the reasonableness of a class action settlement under Rule 23(e). The relevant question is not whether class counsel could hypothetically seek statutory fees (which they cannot), but whether the settlement is fair under Rule 23(e).

Illusory and non-targeted "relief" cannot provide fair consideration for waiver of class claims. Even low-value claims have litigation value in the class action context—as evidenced by the fact that defendant here settled them. "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. This applies even when suit brought "under statute with a fee-shifting provision." *Id.*; *see also Bluetooth*, 654 F.3d at 643 (reversing approval of settlement with clear sailing fee award purportedly authorized "under California Civil Code § 1750's fee-shifting provision"); *Crawford v. Equifax Payment Servs.*, 201 F.3d 877, 882 (7th Cir. 2000) (same, but with fees purportedly under FDCPA fee shifting); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948 (7th Cir. 2006) (same, but with fees purportedly under FCRA fee shifting). In other words, the existence of statutory fee-shifting cannot short-circuit the Court's duty to ensure fairness under Rule 23(e).

The settling parties' attempt to excuse class counsel's award of 100% of the settlement benefit based on fee-shifting ignores the distinction between a judgment and settlement in fee-shifting cases:

> Where a class action has been brought under a statute containing a fee-shifting provision, however, a proposed settlement transforms the action, so far as fees are concerned, from a "fee-shifting case" to what is called a "common-fund case." The fee award is no longer statutory, because statutory fee-shifting provisions impose a liability only upon judgment.

Restatement (Third) of Restitution and Unjust Enrichment § 29 cmt c (2011); *see also Brytus v. Spang & Co.*, 203 F.3d 238, 246 (3d Cir. 2000) ("When there has been a settlement, the basis for the statutory fee has been discharged, and it is only the fund that remains."). Thus, "common fund principles properly control a case that is initiated under a statute with a fee-shifting provision, but is settled with the creation of a common fund." *Florin v. Nationsbank*, 34 F.3d 560, 564 (7th Cir. 1994). Both *Brytus* and *Florin* were endorsed by this Court in *Staton v. Boeing Co.*, 327 F.3d 938, 967 n.18 (9th Cir. 2003). Settlements thus require an equitable division between class and counsel, even if the underlying statute provides for fee shifting and the relief is not a pure common fund. *E.g., Crawford*, 201 F.3d at 882.

Even if the proposed settlement would not bind absent class members, statutory fees are not actually available to class counsel under the California private attorney general statute or the CLRA. No evidence exists that plaintiff "engaged in a reasonable attempt to settle [her]

dispute with the defendant prior to litigation," as is required to receive attorneys' fees under California's private attorney general statute. *Graham v. DaimlerChrysler Corp.,* 101 P.3d 140, 144 (Cal. 2004). As for CLRA fees, again the record does not show adequate pre-suit settlement efforts by class counsel, which sent defendant's predecessor a purported demand letter 10 days before the suit was filed, not the required 30 days. *Compare* Dkt. 1-2 *with* Cal. Civ. Code § 1750 *et seq*. Moreover, by the time the suit was filed, the interest in SweeTARTS had already transferred from Nestle USA, Inc. to Ferrera Candy Company. Dkt. 10-2 ¶ 7. Class counsel admits that "Ferrara began negotiating in good faith to correct its advertising soon after it was substituted as the proper Defendant in this action" and says that this "would *likely preclude* a damages award at trial." Fee Memo at 17. Defendant's willingness to voluntarily remedy a CLRA demand would also be fatal to their requested attorneys' fee award. "[I]f a suit for damages cannot be maintained under the CLRA because a merchant offered an appropriate correction in response to a consumer's notice, then a plaintiff cannot collect attorney fees for such a suit." *Benson v. S. Cal. Auto Sales, Inc.*, 192 Cal. Rptr. 3d 67, 77 (Cal. Ct. App. 2015). More important, even if class counsel had satisfied the pre-suit demands, it is doubtful that California substantive law could be applied to a nationwide class of consumers. *See Phillips Petroleum v. Shutts*, 472 U.S. 797, 818 (1985) ("[F]or a State's substantive law to be selected in a constitutionally permissible manner, the State must have a significant contact or significant aggregation of contacts, creating state interests, such that the choice of its law is neither arbitrary nor fundamentally unfair.").

The fee-shifting cases cited by class counsel have no bearing on the question of whether a *class action settlement* waiving the rights of absent class members for $0 is fair, reasonable, or adequate under Rule 23. *See* Fee Memo at 3-5 (citing cases). Likewise, civil rights litigation does not present the same potential conflict between representatives, counsel, and absent class members, especially where absent parties are not required to waive their monetary rights. *Cf. Fitzgerald v. City of Los Angeles*, No. CV 03-01876 DDP, 2009 U.S. Dist. LEXIS 34803, at *2 (C.D. Cal. Apr. 7, 2009) (obtained declaratory and injunctive relief against unlawful searches of homes in "skid row") (cited Fee Memo at 4); *Riker v. Gibbons*, No. 3:08-cv-00115-LRH, 2010

U.S. Dist. LEXIS 120841, at *9 (D. Nev. Oct. 27, 2010) (obtained declaratory and injunctive relief to provide healthcare to inmates) (cited Fee Memo at 16).

Fee shifting is unavailable in this case, and even if it were, a settlement that provides nothing in exchange for waiving monetary claims is unfair, unreasonable, and inadequate, and should be rejected by the Court.

2. Settlement Agreement's provision of attorneys' fees does not remedy the imbalance between class and counsel.

Plaintiffs next argue circularly that the attorneys' fee request should be approved because the Settlement Agreement provides for attorneys' fees. Fee Memo at 5. But counsel's request for the entire settlement value cannot be justified based on the mere fact hours were billed and settlement agreement proposed. Even if class counsel were not proposing a healthy multiplier for themselves, lodestar cannot justify fees disproportionate to the class recovery.

> An attorney who works incredibly hard, but obtains nothing for the class, is not entitled to fees calculated by any method. For although class counsel's hard work on an action is presumably a necessary condition to obtaining attorney's fees, it is never a sufficient condition. Plaintiffs attorneys don't get paid simply for working; they get paid for obtaining results.

HP Inkjet, 716 F.3d at 1182; *see also Redman*, 768 F.3d 622, 633, 635 ("the reasonableness of a fee cannot be assessed in isolation from what it buys"; "hours can't be given controlling weight in determining what share of the class action settlement pot should go to class counsel").

Even a modest request relative to lodestar cannot justify a misallocated settlement. *See Bluetooth*, 654 F.3d at 943 (reversing even though lodestar "substantially exceed[ed]" fee award); *Baby Prods.*, 708 F.3d at 180 n.14 (lodestar multiplier of .37 not "outcome determinative"); *HP Inkjet*, 716 F.3d at 1177 (same with multiplier of .32). The lodestar neither justifies the fee nor the settlement fairness. Here, class counsel seeks **1.489** their proclaimed lodestar for "excellent results," even though the class is being 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).

Plaintiffs' counsel seek a 1.489 multiplier of their time actually spent and on top of 70 hours for future billing. If the settlement were to be approved over Copland's objection, detailed billing should be provided to ensure that all time expended actually relates to this case. Class counsel has filed at least 15 other strikingly-similar "malic acid" complaints since 2017, some with apparently very little prior investigation. For example, class counsel filed a complaint on the same date as this action, which included the same eight causes of action and a verbatim demand letter to the defendant sent on the same date as the letter in this case, March 23, 2018. *See Hunt v. Sunny Delight Bevs. Co.*, No. 8:18-cv-00557-JLS-DFM, Dkt. 1 (C.D. Cal. Apr. 2, 2018). The court presiding over *Sunny Delight* sanctioned class counsel and later awarded the defendant $84,383 because counsel used advertising photos that did not show relevant statements on defendant's actual packages. *See* 2018 U.S. Dist. LEXIS 217855, at *1 (C.D. Cal. Dec. 18, 2018).

3. The valueless injunctive relief cannot justify a disproportionate fee.

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 Court should reject 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 not and cannot satisfy this burden.

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 revisions that are entirely conditioned on SweeTARTS containing "dl-malic acid as an ingredient." Settlement Agreement ¶ 4.1. ***If and only if*** SweeTARTS contains DL-malic acid,[3] 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.* Class counsel provide only conclusory statements that these provisions have value; this is inadequate to find a settlement fair.

As an initial matter, the record does not show whether SweeTARTS currently contain DL-malic acid, and therefore, the record does not show whether defendant is required to do anything at all under the agreement. While the Settlement Agreement phrases the injunction as if it will be operative ("unless any such Product ***ceases to contain*** dl-malic acid"), defendant does not admit it actually uses DL-malic acid at this date. Instead, the defendant categorically denies wrongdoing. *Id.* at 7. Defendant may have already changed SweeTARTS production to

[3] "Malic acid is . . . available as the racemic DL-malic acid and the two . . . pure isomers, D-malic acid and L-malic acid. L-malic acid is the naturally occurring form. Malic acid naturally occurs in fruits including apples and cherries. Because of this, malic acid is commonly referred to as 'apple acid.'" *Technical Advisory Panel Report: Malic Acid* (April 2003), National Organic Standards Board, United States Department of Agriculture, available online at: https://www.ams.usda.gov/sites/default/files/media/L-Malic%20Acid%20TR.pdf. While DL-malic acid is commercially synthesized from either benzene or butane, L-malic acid is also commercially available; it is purified from biological sources such as through the fermentation of carbohydrates by microorganisms. *Id.*

use L-malic acid from natural sources, or it may have never used DL-malic acid to begin with. The Settlement Agreement enjoins defendant from making a statement on the litigation. *Id.* ¶ 12.5. In other "malic acid" suits filed by class counsel, defendants asserted that the plaintiff failed to actually test the accused products notwithstanding plaintiffs' claims to the contrary. *See, e.g.*, *Allred v. Kellogg Co.*, No. 17-cv-01354-AJB, 2018 U.S. Dist. LEXIS 38576, *4 (S.D. Cal. Feb. 23, 2018) ("if Allred indeed filed a lawsuit without any idea as to its veracity, Kellogg's remedy would lie in Rule 11."); *Branca v. Bai Brands, Ltd. Liab. Co.*, No. 3:18-cv-00757-BEN-KSC, 2019 U.S. Dist. LEXIS 37105, at *49 (S.D. Cal. Mar. 7, 2019). This Court granted Rule 41(a)(1)(A)(ii) dismissal with prejudice of *Allred* in February. It remains unclear whether the accused product actually did contain DL-malic acid, but the defendant in *Allred* may well have paid more than cost of settlement here by preparing a motion to dismiss, answer, and opposition to class certification. At minimum, class counsel's non-specific claims to have tested the accused products, should not be accepted at face value. *See Hunt v. Sunny Delight Bevs. Co.,* No. 8:18-cv-00557-JLS-DFM, 2018 U.S. Dist. LEXIS 217855, at *1 (C.D. Cal. Dec. 18, 2018) (sanctioning class counsel in another malic acid case where counsel failed to investigate and refused to withdraw factually false claims in the complaint). That the settling parties have not proved that defendant has to do anything under the settlement demonstrates that the purported injunctive relief is valueless.

Even if the injunction is not completely illusory, 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. 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 an obvious mismatch between the proposed injunctive relief benefitting *future* purchasers of SweeTARTS and the proposed class of *past* purchasers.

"The fairness of the settlement must be evaluated primarily on how it *compensates class members*—not on whether it provides relief to other people, much less on whether interferes with defendant's marketing plans." *Pampers*, 724 F.3d at 720 (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. Dkt. 12 at 17, 25. The potential label changes have no settlement value because they do not in any way compensate class members for these past injuries. In fact, the proposed settlement puts class members in a *worse* position than non-class members. Class members are being compelled to surrender their claims to enjoy the same "relief" all consumers will enjoy. 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.

IV. Class counsel's excuses for waiving damages claims cannot withstand scrutiny.

In their filings, class counsel attempts to rationalize the settlement's utter failure to obtain monetary relief, but these excuses fundamentally answer the wrong question. 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.

Even if we agree with class counsel's fee motion, which suggests the monetary claims are "minimal and fought with problems" (Fee Memo at 17)—and therefore even if we disagree with the operative complaint, which suggests the opposite—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 promotes a settlement that waives damages claims for $0 and utterly fails to explain why this waiver is necessary.

Notably, class counsel's current position clashes with their prior and current assertions that the action sought to remedy nationwide breach of contract. 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. Dkt. 12 at 22-23. Class counsel relies on the pendency of these claims. In assuring the 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. Class counsel also now contends that "SweeTARTS are low-priced candy products and it would be difficult to attribute a price premium to Ferrara's 'No Artificial Flavors' labeling claims." Dkt. 23 at 11. Class counsel takes a different position in cases where defendants have not yet agreed to settle. *See Hilsley v. Ocean Spray Cranberries, Inc.*, No. 17cv2335-GPC, 2018 U.S. Dist. LEXIS 202679, at *35 (S.D. Cal. Nov. 29, 2018) (describing "two proposed Price Premium damages models" concerning $3.25 retail price juice cocktails); *Morris v. Mott's LLP*, No. SACV 18-01799-AG, 2019 U.S. Dist. LEXIS 33611, at *18 (C.D. Cal. Feb. 26, 2019) ("offering statistics showing that most consumers pay a premium for foods perceived as natural" regarding fruity snacks which plaintiff pleaded "are generally under $5.00 per unit").

Most importantly, the damages claims do not appear to be worthless *to the defendant*. If the defendant shared class counsel's newfound position on damages, they would not have bargained for a settlement that requires waiver of these claims. Since the defendant apparently finds waiver valuable, and class members receive absolutely nothing in exchange for extinguishing their claims, one can only conclude that class counsel has proposed the waiver

of class claims in order to enhance the settlement consideration—that is, in order to enhance class counsel's attorneys' fees.

Class counsel engineered this self-dealing arrangement while agreeing to sell out the unnamed class members' claims for zero dollars. Because of these terms, the settlement must be rejected in its entirety. Reducing attorney fees does nothing to resolve the inequitable arrangement between defendant, class counsel, and unnamed class members, because it would only benefit the defendant who is already a privileged party under the agreement.

V. The proposed settlement should further be rejected because class counsel and the named representatives have not acted as a fiduciary to unnamed class members.

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 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 $3000 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. 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; *In re Subway Footlong Sandwich Mkt'g and Sales Practices Litigation*, 869 F.3d 551, 557 (7th Cir. 2017); *Gallego v. Northland Group*, 814 F.3d 123, 129-30 (2d Cir. 2016); *Ma v. Harmless Harvest*, No. 16-cv-07102, 2018 U.S. Dist. LEXIS 123322, at *20 (E.D.N.Y. Mar. 31, 2018). For this independent reason, the Court should reject the proposed settlement.

VI. This Court should not infer class approval from the number of objectors when evaluating settlement fairness.

One should not infer settlement endorsement from the fact of a low number of objections. *See ALI Principles* § 3.05 *cmt. a* at 206 ("Just as it is uneconomic to bring class-action litigation as individual litigation, it is even more uneconomic to object to an unfair class-action settlement."); Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 Fla. L. Rev. 71, 73 (2007); *see also GMC Pick-up*, 55 F.3d at 812-13; Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 Vand. L. Rev. 1529, 1561 (2004) ("Common sense dictates that apathy, not decision, is the basis for inaction."). There will never be a large number of objectors in a low-value class-action settlement, so the absence of thousands of objectors says nothing about the fairness of a settlement.

It is "naïve" to think a small number of objections is meaningful. *Redman*, 768 F.3d at 628; *accord In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 217-18 (5th Cir. Apr. 1981) ("[A] low level of vociferous objection is not necessarily synonymous with jubilant support. In many class actions, the vast majority of class members lack the resources either to object to the

settlement or to opt out of the class and litigate their individual cases."). There will never be a large number of objectors in a class-action settlement, so the absence of thousands of objectors indicates nothing. *See Vought v. Bank of Am., N.A.*, 901 F. Supp. 2d 1071, 1093 (C.D. Ill. 2012) (citing, *inter alia*, a 1996 FJC survey that found between 42% and 64% of settlements engendered no filings by objectors). Objections should be judged on quality not quantity. *See, e.g.*, *Pampers*, 724 F.3d at 716 (reversing settlement binding a multi-million-member class though only three objectors and only a single appellant); *Baby Prods.*, 708 F.3d 163 (reversing settlement binding a multi-million member class though only few objectors and three appellants). Allowing the lack of objections to control is tantamount to relieving the settling parties of their "burden of proving the fairness of the settlement." *Id.* at 719 (citing authorities).

CONCLUSION

The settlement makes class members worse off for the benefit of the class attorneys and the class representatives and must be rejected.

Dated: May 1, 2019

Respectfully submitted,

s/ Theodore H. Frank
HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1629 K Street NW
Suite 300
Washington, DC 20006
Telephone: 202-331-2263
Email: ted.frank@hlli.org

Attorney for Objector James Copland

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically served the foregoing on all CM/ECF participating attorneys at their registered email addresses, thus effectuating electronic service under S.D. Cal. L. Civ. R. 5.4(d).

DATED this 1st day of May, 2019.

/s/ Theodore H. Frank
Theodore H. Frank

CERTIFICATE OF SERVICE PURSUANT TO CLASS NOTICE AND PRELIMINARY APPROVAL ORDER

Pursuant the requirements of class notice and Preliminary Approval Order, Dkt. 28 at 8, I hereby certify that on this day I caused service of the forgoing on the following parties as indicated:

Ronald A. Marron Law Offices of Ronald A. Marron, APLC 651 Arroyo Drive San Diego, CA 92103	*Via First Class Mail*
Neal A. Potischman Davis Polk & Wardwell, LLP 1600 El Camino Real Menlo Park, California 94025	*Via First Class Mail*
Edward J. Schwartz United States Courthouse Chambers of Judge Battaglia 221 West Broadway, Suite 4135 San Diego, CA 92101	*Via Federal Express*

DATED this 1st day of May, 2019.

/s/ Theodore H. Frank
Theodore H. Frank

Theodore H. Frank (SBN 196332)
HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1629 K Street NW Suite 300
Washington, DC 20006
Voice: 703-203-3848
Email: ted.frank@hlli.org
Attorneys for Objector James Copland

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JESSICA LITTLEJOHN, on behalf of herself, all others similarly situated, and the general public,

Plaintiff,

v.

FERRARA CANDY COMPANY, an Illinois Corporation,

Defendant.

JAMES COPLAND,

Objector.

Case No. 3:18-cv-00658-AJB-WVG

CLASS ACTION

DECLARATION OF JAMES COPLAND

Judge: Hon. Anthony J. Battaglia
Courtroom: 4A (4th Floor Schwartz)
Date: May 31, 2019
Time: 2:00 P.M.

I, James Copland, declare as follows:

1. I have personal knowledge of the facts set forth herein and, if called as a witness, could and would testify competently thereto.

2. My address is 607 Pollock St., New Bern, NC 28562. My email address is jcopland@manhattan-institute.org. I can be contacted through my *pro bono* attorney Theodore H. Frank, Director of the non-profit Hamilton Lincoln Law Institute's Center for Class Action Fairness ("CCAF").

3. I purchased between two to four rolls of SweeTARTS Original in Westchester County, NY on multiple occasions for road trips between Westchester County, New York and Craven County, North Carolina between July 2018 and February 2019, at least one of which was bought at the convenience center located at the Shell gas station at 635 Marble Ave, Thornwood, NY 10594.

4. I also purchased two to four rolls of SweeTARTS Original for road trips between Craven County, North Carolina and Wake/Orange/Alamance County, North Carolina between August 2018 and January 2019, at least one of which was bought at the EZ Stop gas station and Sav Way at 2753 Alamance Rd, Burlington, NC 27215.

5. I purchased at least one large bag of separately packaged SweeTARTS at Halloween time for trick-or-treat distribution in Pleasantville, New York where I lived during the 2014-17 Halloween seasons. Upon information and belief, this was purchased at Key Food Marketplace at 35 Pleasantville Rd, Pleasantville, NY 10570.

6. I also purchased one roll or package of Chewy Sour SweeTARTS on multiple occasions at movie theaters in Westchester, New York between 2013 and 2018—specifically the City Center 15 Cinema DeLux at 237 Martine Ave, White Plains, NY 10601; the Greenburgh Multiplex Cinemas at 320 Saw Mill River Rd. in Elmsford, NY 10523; and the former movie theater in Hawthorne, NY at 151 Saw Mill River Rd. (the space has subsequently been converted to an Audi dealership).

7. I am thus a class member of the Settlement.

8. I intend to appear through my counsel Theodore H. Frank at the fairness hearing currently scheduled for May 31, 2019.

9. I bring this objection in good faith. I have no intention of settling this objection for any sort

of side payment. Unlike many objectors who attempt or threaten to disrupt a settlement unless plaintiffs' attorneys buy them off with a share of attorneys' fees, it is my understanding and belief that CCAF does not engage in *quid pro quo* settlements and will not withdraw an objection or appeal in exchange for payment.

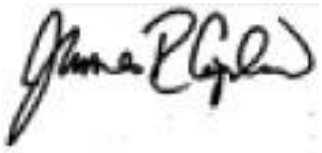
10. Thus, if contrary to CCAF's practice and recommendation, I agree to withdraw my objection or any subsequent appeal for a payment by plaintiffs' attorneys or the defendant(s) paid to me or any person or entity related to me in any way without court approval, I hereby irrevocably waive any and all defenses to a motion seeking disgorgement to the class of any and all funds paid in exchange for dismissing my objection or appeal.

11. If I were to opt out from the settlement, I would not find it financially feasible to vindicate any claims I might have against the defendants.

12. The specific grounds of my objection are identified in the memorandum to be filed by my attorney contemporaneously with this declaration.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on April 30, 2019, in New Bern, North Carolina.



James Copland

THEODORE H. FRANK (SBN 196332)
HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1629 K Street NW, Suite 300
Washington, DC 20006
Telephone: 202-331-2263
Email: ted.frank@hlli.org

Attorneys for Objector James Copland

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JESSICA LITTLEJOHN, on behalf of herself, all others similarly situated, and the general public,

Plaintiff,

v.

FERRARA CANDY COMPANY, an Illinois Corporation,

Defendant.

Case No. 3:18-cv-00658-AJB-WVG

DECLARATION OF THEODORE H. FRANK IN SUPPORT OF COPLAND OBJECTION

Judge: Hon. Anthony J. Battaglia
Courtroom: 4A
Date: May 31, 2019
Time: 2:00 p.m.

I, Theodore H. Frank declares as follows:

1. I have personal knowledge of the facts set forth herein and, if called as a witness, could and would testify competently thereto.

2. My business address is Hamilton Lincoln Law Institute ("HLLI"), 1629 K Street NW, Suite 300, Washington, DC 20006. My telephone number is (703) 203-3848. My email address is ted.frank@hlli.org.

Center for Class Action Fairness

3. I founded the non-profit Center for Class Action Fairness ("CCAF"), a non-profit public-interest law firm based out of Washington, DC, in 2009. In 2015, CCAF merged into the non-profit Competitive Enterprise Institute and became a division within their law and litigation unit. In January 2019, CCAF become part of the Hamilton Lincoln Law Institute, a new non-profit public-interest law firm founded in 2018.

4. CCAF's mission is to litigate on behalf of class members against unfair class action procedures and settlements. *See, e.g.*, *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (praising CCAF's work); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 716-17 (6th Cir. 2013) (describing CCAF's client's objections as "numerous, detailed and substantive") (reversing settlement approval and certification); *Richardson v. L'Oreal USA, Inc.*, 991 F. Supp. 2d 181, 205 (D.D.C. 2013) (describing CCAF's client's objection as "comprehensive and sophisticated" and noting that "[o]ne good objector may be worth many frivolous objections in ascertaining the fairness of a settlement") (rejecting settlement approval and certification). The Center has won millions of dollars for class members and received national acclaim for its work. *See, e.g.*, Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. Times, Aug. 13, 2013 ("the leading critic of abusive class action settlements"); Roger Parloff, *Should Plaintiffs Lawyers Get 94% of a Class Action Settlement?*, Fortune, Dec. 15, 2015 ("the nation's most relentless warrior against class-action fee abuse"); The Editorial Board, *The Anthem Class-Action Con*, Wall St. J., Feb. 11, 2018 (opining "[t]he U.S. could use more Ted Franks" while covering CCAF's role in exposing "legal looting" in the Anthem data breach MDL).

5. The Center has been successful, winning reversal or remand over a dozen federal appeals decided to date. *E.g., In re Subway Footlong Mktg. Litig.*, 869 F.3d 551 (7th Cir. 2017); *In re Target Corp. Customer Data Sec. Breach Litig.*, 847 F.3d 608 (8th Cir. 2017); *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718 (7th Cir. 2016); *In re EasySaver Rewards Litig.*, 599 Fed. Appx. 274 (9th Cir. 2015) (unpublished); *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060 (8th Cir. 2015); *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014); *Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014); *In re MagSafe Apple Power Adapter Litig.*, 571 Fed. Appx. 560 (9th Cir. 2014) (unpublished); *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013); *In re HP Inkjet Printer Litigation*, 716 F.3d 1173 (9th Cir. 2013); *In re Baby Products Antitrust Litigation*, 708 F.3d 163 (3d Cir. 2013); *Dewey v. Volkswagen*, 681 F.3d 170 (3d Cir. 2012); *Robert F. Booth Trust v. Crowley*, 687 F.3d 314 (7th Cir. 2012); *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011). Several of these appeals centered around *cy pres*. *E.g., Pearson*; *BankAmerica*; *Baby Products*; *Nachshin*. This October, I argued the first *cy pres* case ever to be heard by the Supreme Court, *Frank v. Gaos*, No. 17-961. While, like most experienced litigators, we have not won every appeal we have litigated, CCAF has won the majority of them.

6. CCAF has won more than $200 million dollars for class members by driving the settling parties to reach an improved bargain or by reducing outsized fee awards. Andrea Estes, *Critics hit law firms' bills after class-action lawsuits,* Boston Globe (Dec. 17, 2016). *See also, e.g., McDonough v. Toys "R" Us*, 80 F. Supp. 3d 626, 661 (E.D. Pa. 2015) ("CCAF's time was judiciously spent to increase the value of the settlement to class members") (internal quotation omitted); *In re Citigroup Inc. Secs. Litig.*, 965 F. Supp. 2d 369 (S.D.N.Y. 2013) (reducing fees, and thus increasing class recovery, by more than $26 million to account for a "significantly overstated lodestar"); *In re Apple Inc. Sec. Litig.*, No. 5:06-cv-05208-JF, 2011 U.S. Dist. LEXIS 52685 (N.D. Cal. May 17, 2011) (parties nullify objection by eliminating *cy pres* and augmenting class fund by $2.5 million).

Pre-empting *Ad Hominem* Attacks

7. In my experience, class counsel often responds to CCAF objections by making a variety of *ad hominem* attacks, often wildly false. The vast majority of district court judges do not fall for such transparent and abusive tactics. In an effort to anticipate such attacks and to avoid collateral litigation over a right to file a reply, I discuss and refute the most common ones below. If the Court is inclined to disregard the *ad hominem* attacks, it can avoid these collateral disputes entirely.

8. HLLI pays me on a salary basis that does not vary with the result in any case. HLLI and CCAF attorneys do not receive a contingent bonus based on success in any case, a structure that would be contrary to I.R.S. restrictions.

9. Class counsel often try to tar CCAF as "professional objectors," and then cite court opinions criticizing for-profit attorneys who threaten to disrupt a settlement unless plaintiffs' attorneys buy them off with a share of attorneys' fees. But this is not the non-profit CCAF's *modus operandi*, so the court opinions class counsel rely upon to tar CCAF are inapposite. *See* Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. Chi. Legal F. 403, 437 n. 150 (public interest groups are not professional objectors); Paul Karlsgodt & Raj Chohan, *Class Action Settlement Objectors: Minor Nuisance or Serious Threat to Approval*, BNA: Class Action Litig. Report (Aug. 12, 2011) (distinguishing CCAF from professional objectors). CCAF refuses to engage in *quid pro quo* settlements, and has never withdrawn an objection in exchange for payment. Instead, it is funded entirely through charitable donations and court-awarded attorneys' fees. The difference between a for-profit "professional objector" and a public-interest objector is a material one. As the federal rules are currently set up, "professional objectors" have an incentive to file objections regardless of the merits of the settlement or the objection. In contrast, a public-interest objector such as myself has to triage dozens of requests for *pro bono* representation and dozens of unfair class action settlements, loses money on every losing objection (and most winning objections) brought, can only raise charitable donations necessary to remain afloat by demonstrating success, and has

no interest in wasting limited resources and time on a "baseless objection." CCAF objects to only a small fraction of the number of unfair class action settlements it sees.

10. While one district court called me a "professional objector" in a broader sense, that court stated that it was not meant pejoratively, and awarded CCAF fees for a successful objection and appeal that improved the settlement for the class. *Dewey v. Volkswagen*, 909 F. Supp. 2d 373, 396 n.24 (D.N.J. 2012). Similarly, the Seventh Circuit in *In re Subway Footlong Mktg. Litig.*, 869 F.3d 551 (7th Cir. 2017) referred to me non-pejoratively as a "professional objector" in an opinion agreeing with my objection and reversing a settlement approval and class certification.

11. Indeed, CCAF feels strongly enough about the problem of bad-faith objectors profiting at the expense of the class through extortionate means that it has initiated litigation to require such objectors to disgorge their ill-gotten gains to the class. *See Pearson v. Target Corp.*, 893 F.3d 930 (7th Cir. 2018); *see generally* Jacob Gershman, *Lawsuits Allege Objector Blackmail in Class Action Litigation*, Wall St. J., Dec. 7, 2016.

12. Prior to 2016, I had a private practice unrelated to my non-profit work. One of my former clients, Christopher Bandas, is a professional objector who has settled objections and withdrawn appeals for cash payments. I withdrew from representation of Mr. Bandas in 2015 when he undertook steps that interfered with my non-profit work. Mr. Bandas was criticized by the Southern District of New York after I ceased to represent him, and class counsel in other cases often cites that language and attempts to attribute it to me. Class counsel in multiple cases, using boilerplate language, has tried to make it seem like my paid representation of Mr. Bandas was somehow scandalous, using language like "forced to disclose" and "secret." The sneering is false: my representation of Mr. Bandas was not secret, as I filed declarations in my name on his behalf in multiple cases, noting under oath that I was being paid to perform legal work for him; I filed notices of appearances in cases where he had previously appeared; and my declaration in the *Capital One* case ending the relationship was filed voluntarily at great personal expense to myself, as I had been offered and refused to take a substantial sum of money to accede to a Lieff Cabraser fee award of over $3400/hour. I only

worked for Mr. Bandas in cases where I believed there was a meritorious objection to be made, had no role in any negotiations he made to settle appeals, and my pay was flat-rate or by the hour and not tied to his ability to extract settlements. I argued two appeals for Mr. Bandas, and won both of them. There is nothing scandalous about that, unless one believes it is scandalous for an attorney to be paid to perform successful high-quality legal services for a client. CCAF had no attorney-client relationship with Mr. Bandas, and Mr. Bandas never paid CCAF, other than for his share of printing expenses when he was an independent co-appellant representing clients unrelated to CCAF.

13. Firms whose fees we have objected to have previously cited to *City of Livonia Employees' Ret. Sys. v. Wyeth*, No. 07 Civ 10329 (RJS), 2013 WL 4399015 (S.D.N.Y. Aug. 7, 2013), in efforts to tar CCAF. While the *Wyeth* court did criticize our client's objection (after mischaracterizing the nature of that objection), it ultimately agreed with our client that class counsel's fee request was too high, and reduced it by several million dollars to the benefit of shareholder class members.

14. Class counsel frequently cite an eight-year-old case, *Lonardo v. Travelers Indemnity Co.*, 706 F. Supp. 2d 766, 804 (N.D. Ohio 2010), where the district court criticized a policy-based argument by CCAF as supposedly "short on law"; however, CCAF ultimately was successful in the Seventh and Ninth Circuits on that same argument. *See In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011) (agreeing that reversionary clauses are a problematic sign of self-dealing); *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014) (same). Moreover, the court in *Lonardo* stated its belief that "Mr. Frank's goals are policy-oriented as opposed to economic and self-serving" and even awarded CCAF about $40,000 in attorneys' fees for increasing the class benefit by $2 million. *Lonardo*, 706 F. Supp. 2d at 813-17.

15. CCAF has no interest in pursuing "baseless objections," because every objection we bring on behalf of a class member has the opportunity cost of not having time to pursue a meritorious objection in another case. We are confronted with many more opportunities to object (or appeal erroneous settlement approvals) than we have resources to use, and make painful decisions several times a year picking and choosing which cases to pursue, and even

which issues to pursue within the case. CCAF turns down the opportunity to represent class members wishing to object to settlements or fees when CCAF believes the underlying settlement or fee request is relatively fair.

16. While I am often accused of being an "ideological objector," the ideology of CCAF's objections is merely the correct application of Rule 23 to ensure the fair treatment of class members. Likewise, I have often seen class counsel assert that I oppose all class actions and am seeking to end them, not improve them. The accusation—aside from being utterly irrelevant to the legal merits of any particular objection—has no basis in reality. I have been writing and speaking about class actions publicly for over a decade, including in testimony before state and federal legislative subcommittees, and I have never asked for an end to the class-action device, just proposed reforms for ending the abuse of class actions and class-action settlements. That I oppose class-action abuse no more means that I oppose class actions than someone who opposes food poisoning opposes food. As a child, I admired Ralph Nader and consumer reporter Marvin Zindler (whose autographed photo was one of my prized childhood possessions), and read every issue of *Consumer Reports* from cover to cover. I have focused my practice on conflicts of interest in class actions because, among other reasons, I saw a need to protect consumers that no one else was filling, and as a way to fulfill my childhood dream of being a consumer advocate. I have frequently confirmed my support for the principles behind class actions in declarations under oath, interviews, essays, and public speeches, including a January 2014 presentation in New York that was broadcast nationally on C-SPAN and in my Supreme Court briefing in *Frank v. Gaos*. On multiple occasions, successful objections brought by CCAF have resulted in new class-action settlements where the defendants pay substantially more money to the plaintiff class without CCAF objecting to the revised settlement. And I was the putative class representative in a federal class action, represented by a prominent plaintiffs' firm. *Frank v. BMOCorp., Inc.*, No. 4:17-cv-870 (E.D. Mo.).

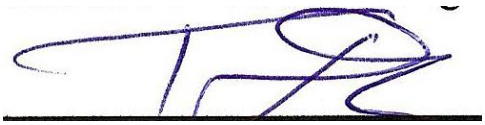
17. Some class counsels have accused us of improper motivation because CCAF has on occasion sought attorneys' fees. While CCAF is funded entirely through charitable donations and court-awarded attorneys' fees, the possibly of a fee award never factors into the

Center's decision to accept a representation or object to an unfair class-action settlement or fee request.

18. CCAF's history in requesting attorneys' fees reflects this approach. Despite having made dozens of successful objections and having won over $200 million on behalf of class members, CCAF has not requested attorneys' fees in the majority of its cases or even in the majority of its appellate victories. CCAF regularly passes up the opportunity to seek fees to which it is legally entitled. In *Classmates*, for example, CCAF withdrew its fee request and instead asked the district court to award money to the class; the court subsequently found that an award of $100,000 "if anything" "would have undercompensated CCAF." *In re Classmates.com Consol. Litig.*, No. 09-cv-0045-RAJ, 2012 WL 3854501, at *11 (W.D. Wash. June 15, 2012). In other cases, CCAF has asked the court for a fraction of the fees to which it would be legally entitled based on the benefit CCAF achieved for the class and asked for any fee award over that fractional amount be returned to the class settlement fund.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on May 1, 2019, in Arlington, Virginia.



Theodore H. Frank