NO. 19-56297

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT BRISENO, individually and on behalf of all others similarly situated,
Plaintiffs-Appellees,

v.

M. TODD HENDERSON,
Objector-Appellant,

v.

CONAGRA FOODS, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California, No. 2:11-cv-05379-CJC-AGR

Opening Brief of Appellant M. Todd Henderson

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Corporate Disclosure Statement (FRAP 26.1)

Pursuant to the disclosure requirements of FRAP 26.1, M. Todd Henderson 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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Erichson, Howard M., *Aggregation as Disempowerment*, 92 NOTRE DAME L. REV. 859 (2016)..26, 29, 44

Erichson, Howard M., *How to Exaggerate the Size of Your Class Action Settlement*, DAILY JOURNAL (Nov. 8, 2017) 26

Erichson, Howard M., *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951 (2014) 36

Estes, Andrea, *Critics hit law firms' bills after class-action lawsuits*, BOSTON GLOBE (Dec. 17, 2016) 23

Frank, Theodore H., *Settlement Insurance Shows Need for Court Skepticism in Class Actions*, OpenMarket blog (Aug. 31, 2016).. 27

Jones, Ashby, *A Litigator Fights Class-Action Suits*, WALL ST. J. (Oct. 31, 2011) 23

Liptak, Adam, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 13, 2013, at A12 23

Statement of Subject Matter and Appellate Jurisdiction

The district court has jurisdiction under 28 U.S.C. § 1332(d)(2) because plaintiffs' second amended consolidated class-action complaint alleges claims that exceed $5,000,000 exclusive of interest and costs, there are over 100 members in each of the proposed classes, and over two-thirds of the members of the proposed classes are citizens of states other than defendant's state of citizenship. ER349-50.[1] For example, named plaintiff Robert Briseño is a California citizen, while defendant ConAgra Foods, Inc. is a Delaware corporation with its principal place of business in Nebraska. ER350, ER364. (In 2016, ConAgra Foods, Inc., split into two companies, and the successor defendant is Conagra Brands, Inc., a Delaware corporation with its principal place of business in Illinois. We will call both entities "Conagra.")

This court has appellate jurisdiction under 28 U.S.C. § 1291. The district court ordered final approval of the settlement on October 8, 2019 ("Final Approval Order"), and issued final judgment on December 10, 2019 ("Final Judgment"). ER1-20. Objector M. Todd Henderson, the appellant in this case, filed a notice of appeal on November 7, 2019, appealing the Final Approval Order; he filed an amended notice of appeal including the final judgment on December 12, 2019. ER69-79. Henderson's notice of appeal is timely under Fed. R. App. P. 4(a)(1)(A) and 4(a)(2). Henderson, as a class member who objected to settlement approval below, has

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

standing to appeal a final approval of a class-action settlement without the need to intervene formally in the case. *Devlin v. Scardelletti*, 536 U.S. 1, 14 (2002).

Statement of the Issues

1. Courts deciding whether to approve a settlement must 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). Rule 23 further requires a 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). If the negotiated fees are outsized in relation to the value of the actual 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, 944-45 (9th Cir. 2011); *accord In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014). Did the lower court err as a matter of law by approving a settlement that allowed class counsel to obtain a disproportionate fee of $6.85 million compared to class relief consisting of $993,919 in cash payments and injunctive relief with no actual value when all three *Bluetooth* "red flags" were present? (Raised at ER129-131; ruled on at ER18-20.)

2. This Court holds that "where the class primarily receives non-monetary relief, but class counsel obtain millions of dollars, it may be an abuse of discretion not to at least attempt to approximate the value of injunctive relief and use that valuation in an assessment of disproportionality." *Campbell v. Facebook, Inc.*, No. 17-16873, 951 F.3d 1106, 2020 WL 1023350, 2020 U.S. App. LEXIS 6643, at *41 (9th Cir. Mar. 3, 2020). Did the district court err in failing to approximate the value of the injunctive relief and failing to use that valuation in assessing disproportionality? (Raised at ER131-32; ruled on at ER12-13.)

3. This Court further holds that an injunction is "of no real value" where it "does not obligate [defendant] to do anything it was not already doing." *Koby v. ARS Nat'l Servs.*, 846 F.3d 1071, 1080 (9th Cir. 2017). Did the district court err as a matter of law in finding that the injunctive relief had "some value" (ER12-13) where the injunction consisted of a labeling change (1) that the defendant had voluntarily made prior to the settlement, (2) for a product line that defendant no longer even owned? (Raised at ER131-32; ruled on at ER12-13.)

4. Under Rule 23(e)(2), a court may approve a settlement "only on finding that it is fair, reasonable, and adequate." It is legal error to apply a presumption of settlement fairness. *Roes v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1049 & n.12 (9th Cir. 2019). Did the district court commit an error of law when it held that a settlement should be approved unless an objector persuaded the court it was "clearly inadequate"? (Raised at ER128, ER65; ruled on at ER20.)

Standard of Review

A district court's decision to approve a class-action settlement is reviewed for abuse of discretion. *Bluetooth*, 654 F.3d at 940. A failure to apply the correct standard of law is an abuse of discretion. *Roes*, 944 F.3d at 1043. Questions of law are reviewed *de novo*. *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000).

Statutes and Rules

Federal Rule of Civil Procedure 23. Class Actions.

…

(e) Settlement, Voluntary Dismissal, or Compromise.

The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed 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; …

…

(5) *Class-Member Objections.*

(A) *In General.* Any class member may object to the proposal if it requires court approval under this subdivision (e). …

…

Statement of the Case

This is an appeal over approval of a settlement of a class action alleging deceptive marketing and sale of Wesson brand cooking oils. The class received $993,919 and the attorneys received $6.85 million.

A. Briseño sues Conagra over Wesson Oil labeling.

The sole original named plaintiff, Robert Briseño, alleged that "100% natural" representation on Wesson's oil labeling was misleading because the oils are made from unnatural, genetically-modified organisms ("GMOs"). Dkt. 1 at 1. Briseño alleged breach of express warranty and violations of California consumer-protection law on behalf of a nationwide class of Wesson Oil purchasers. Dkt. 1 at 8-15.

Conagra moved to dismiss, which the district court granted in part, finding among other things that plaintiff's request for an order "requiring [d]efendant to adopt and enforce a policy that requires appropriate disclosure of GM ingredients" was preempted because Congress and the FDA had "thoroughly regulated how oil products must be labeled." Dkt. 54 at 13. A broader amended complaint adding twenty named plaintiffs from fifteen states and alleging new federal and state-law claims partially survived a motion to dismiss, with several state-law claims dismissed. Dkt. 80 at 29-41; Dkt. 84; Dkt. 138.

Plaintiffs filed a second amended complaint alleging claims for consumer protection law violations, breach of express warranty and implied warranty of

merchantability, and unjust enrichment claims for eight to thirteen state subclasses each, with a proposed class defined as:

> All persons who reside in California, Colorado, Florida, Illinois, Indiana, Massachusetts, Nebraska, New Jersery, New York, Ohio, Oregon, South Dakota, Texas, Washington, or Wyoming who have purchased Wesson Oils from June 27, 2007 through the final disposition of this and any and all related actions….

ER372. The complaint sought economic and statutory damages and declaratory and injunctive relief. ER387-88.

B. Plaintiffs move to certify a class and the parties submit competing expert reports regarding damages.

In May 2014, plaintiffs moved to certify the classes. Dkt. 241. In support, plaintiffs submitted an expert report of Colin B. Weir, who opined that the class's damages were the amount of the "price premium" or "the additional amount that consumers paid for Wesson Oils as a direct result of the 100% Natural" label. Dkt. 241-1 at 26 & n.61 (citing Dkt. 243 at n.5 ("Weir Certification Decl.")). Weir's opinion did not attempt to calculate the alleged price premium. Weir stated that hedonic regression was "routinely used to calculate the value of product attributes" and that the "bulk of the literature testing for the presence of such price premiums … begins with the logical hypothesis that such a premium exists, and affirms the hypothesis after testing." Dkt. 243 ¶¶ 24, 26.

Conagra moved to strike Weir's Certification Declaration, arguing that Weir was unqualified because he had never testified to damages calculations using his

proposed methodologies and that his testimony failed to meet the reliability standards of Federal Rules of Evidence 702 and *Daubert*. Dkt. 262 at 1.

Conagra also submitted an expert report of Dr. Keith R. Ugone, who challenged Weir's analysis. Dkt. 268 ("Ugone Decl."). Dr. Ugone and Conagra argued that Weir had not and could not provide a damages model: if public information about GMO content in Wesson Oils were material, it would have led to corresponding changes in price, but the "historical price data shows no such fluctuations." Dkt. 265 at 28 (citing Ugone Decl. ¶ 24). Weir submitted a rebuttal declaration, providing a "preliminary" damages model. Dkt. 285 at 5.

C. The district court grants class certification in part, denying a Rule 23(b)(2) injunctive-relief class for lack of standing.

The district court denied plaintiffs' first motion to certify because plaintiffs failed to show that reliance, causation and damages could be determined on a classwide basis. Dkt. 350 at 57-59. The court also held that Weir's report and rebuttal declaration did not satisfy Rule 702 because he did not provide a damages model, but only represented that he *could* provide a model in the future. *Id.* at 13-14.

In September 2014, plaintiffs filed an amended motion for class certification, along with supporting expert declarations regarding damages calculations from Weir and Dr. Elizabeth Howlett. Dkts. 363, 367, 368, 385, 394, 396, 494. Weir opined that based on his hedonic regression, the inclusion of "100% natural" resulted in a 2.28% price premium. Dkt. 367 ¶ 2 ("Weir Amended Certification Decl."). Dr. Howlett opined that it was *possible* to conduct a "conjoint analysis" to determine the importance of "GMO content" in consumers' perceptions of the "100% natural"

label, but she never conducted such analysis. Dkt. 368 ¶¶ 93-144 ("Howlett Decl."). Conagra opposed certification and filed a motion to strike plaintiffs' experts. Dkts. 383, 385, 387.

The court denied Conagra's motion to strike and granted in part plaintiffs' motion to certify a Rule 23(b)(3) class. *See* Order, Dkt. 545 at 10-31, 138-40. The court found that Rule 23(a) requirements of "numerosity, commonality, typicality and adequacy" were satisfied. *Id.* at 46-57. The court certified 23(b)(3) classes for eleven states, denying certification for some of the state claims. *Id.* at 66-115. Regarding damages, the court found that Weir's analysis alone was insufficient for class certification because he made "no efforts to segregate the price premium attributable to a consumer's understanding that '100% Natural' means the cooking oils contain no genetically modified organisms." *Id.* at 123-24. The court held, however, that Weir's analysis combined with Dr. Howlett's proposed conjoint analysis would "produce a damage figure attributable *solely to Conagra's alleged misconduct*." *Id.* at 125 (emphasis in original).

Refusing to certify a Rule 23(b)(2) class, the district court held "that plaintiffs have again failed to meet their burden of showing that they have standing to represent an injunctive relief class." *Id.* at 60. Specifically, the district court found that named plaintiffs' statement that they "'will consider' or 'might consider' purchasing a product in the future is not sufficiently 'concrete' or 'real and immediate' to support constitutional standing under [] Article III." *Id.* at 61.

The Ninth Circuit authorized Conagra to bring a Rule 23(f) interlocutory appeal of the class-certification order. Dkt. 580. This Court issued two opinions. One

affirmed the plaintiffs' proferred damages model (combining Weir's hedonic regression and Dr. Howlett's proposed conjoint analysis) as "sufficient to survive class certification." *Briseño v. ConAgra Foods, Inc.*, 674 F. App'x 654, 657 (9th Cir. Jan. 3, 2017) (unpublished). The second also affirmed, holding that Rule 23 does not require an "administratively feasible" means of identifying absent class members. *Briseño v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1123 (9th Cir. 2017). The Supreme Court denied Conagra's petition for certiorari in 2017. ER197-98.

D. Conagra removes "100% Natural" from labels and divests its interest in Wesson Oil products.

On May 30, 2017, Conagra entered into a definitive agreement to sell the Wesson oil products line to The J.M. Smucker Company.[2]

In July 2017—twenty months before settlement—Conagra voluntarily removed "100% Natural" on the label and stopped advertising and marketing Wesson oils as "natural." ER188. Conagra denies that the decision to remove "natural" from Wesson Oil labels was in any way related to this litigation. ER239.

In March 2018, Conagra called off the sale of Wesson to the Smucker Company for regulatory reasons.[3] But Conagra found a new buyer and announced on December 18, 2018, that it had entered into another definitive agreement to sell

[2] Exhibit to 8-K dated Sept. 22, 2017 at 4, *available at* https://www.sec.gov/Archives/edgar/data/23217/000119312517296660/d456054dex991.htm.

[3] Exhibit to 8-K dated March 22, 2018 at 4, *available at* https://www.sec.gov/Archives/edgar/data/23217/000119312518091350/d196646dex991.htm

Wesson.[4] Conagra consummated the sale of Wesson oils to Richardson International on February 25, 2019. ER189. Richardson International, the owner of the Wesson brand, was not joined to the suit, and was not a party to the settlement.

E. The parties seek approval of a class-action settlement in March 2019.

The parties began mediation in the fall of 2018 and notified the district court that they had reached an agreement in principle on November 15, 2018. Dkt. 645. On March 11, 2019, the parties entered into a settlement agreement ("Settlement") to settle the eleven state classes that the district court had certified, defining the classes as all persons who purchased Wesson Oil Products (Wesson Vegetable Oil, Wesson Canola Oil, Wesson Corn Oil, and Wesson Best Blend) in their respective states for personal, non-commercial use during class periods corresponding to state statutes of limitations through the July 2017 label change. ER209-211, ER216.

Under the Settlement, class members could file a claim for a cash payment of fifteen cents ($0.15) for each unit purchased, up to a maximum of thirty (30) units per household without providing proof of purchase; there was no cap for claims with proof of purchase. ER217-18. Conagra also agreed to pay a separate $575,000 to be allocated among the Oregon and New York class members in proportion to the number of units purchased. ER218.

The Settlement creates a $10,000 fund to pay for claims over 30 units that had valid proofs of purchase. ER214-15. If proof of purchase claims exceeded $10,000,

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[4] Exhibit to 8-K dated Dec. 20, 2018 at 4, *available at* https://www.sec.gov/Archives/edgar/data/23217/000119312518353858/d661294dex991.htm.

class counsel would pay those claims from the attorneys' fees that were awarded in the case. *Id.*

The Settlement created no obligation to identify or notify individual class members.

The Settlement recognizes that Conagra had sold all of its interest in the Wesson Oil brand to a third-party purchaser prior to the Settlement, but includes an injunction that "should Conagra reacquire the Wesson brand," Conagra may not advertise or market Wesson Oil as "natural" unless the FDA permits the use of "natural" for oil derived from genetically engineered seed stock. ER219-20. The Settlement observes that Conagra had stopped using "natural" on labels of Wesson prior to the Settlement, and that "Conagra denies its decision to remove 'natural' from Wesson Oil labels was in any way related to this litigation." ER238-39. The Settlement further states: "[t]he Parties agree that the value of the injunctive relief to the Classes is $27,000,000." ER239.

The Settlement contains a "clear-sailing" provision under which Conagra agrees not to challenge plaintiffs' request for attorneys' fees and expenses totaling $6,850,000. ER236. The Settlement also had what this Court calls a "kicker"[5] in the event the district court awarded less than $6,850,000 in fees, the excess would remain with Conagra. ER236.

The district court granted preliminary approval of the Settlement on April 4, 2019. Dkt. 654.

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[5] *Bluetooth*, 654 F.3d at 947.

F. Plaintiffs seek final approval of the Settlement.

Plaintiffs moved for final approval on July 23, 2019, arguing that the Settlement value includes $30.6 million for the injunctive relief. Dkt. 661 at 14. Plaintiffs' estimate was based on another Weir declaration filed in support of the preliminary approval of the Settlement. ER315-42. Weir opined that for Wesson purchasers in the eleven class states, "the total amount that will be paid by consumers for the Products will be at least $11.54-million less than it would have been in the absence of the changes on an annual basis." ER323.

Based on Weir's estimate, plaintiffs asserted that "the value of the labeling change from July 1, 2017 to February 25, 2019, when ConAgra sold the Wesson brand, is approximately $19,080,000." Dkt. 661 at 14. Plaintiffs further argued that if Richardson (the new owner of Wesson Oil) continued to label Wesson without "natural" for another year, then the injunctive relief would total $30.62 million. *Id.* "Class Counsel assert[ed] that it is virtually certain that Richardson will not restore the allegedly false "100% Natural" claim to the Wesson Oil packaging." Dkt. 661 at 4 n.6.

Class counsel's motion for final approval argued that the $0.15 per unit recovery was a benefit of the Settlement, but it did not provide a total amount of claims. Dkt. 661 at 15-16. Class counsel requested fees of $6.85 million in fees and incentive awards totaling $25,000. Dkt. 662 at 3. Plaintiffs argued that the $6.85 million fee request "represents approximately 25.4% of the parties' estimated value of the injunctive relief or 23% of Plaintiffs' conservative estimated value of injunctive relief." Dkt. 662 at 18. Plaintiffs submitted a lodestar calculation of $11.499 million. Dkt. 662 at 3.

G. Henderson objects to the Settlement and fee request.

M. Todd Henderson objected to the Settlement and fee request. ER118-47. 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. ER126-27. Henderson is a University of Chicago Law School professor who has previously done expert work for CCAF at below-market rates. Dkt. 677-1 ¶¶ 18-30.[6]

Henderson is a class member as a resident of Illinois who purchased over thirty bottles of Wesson Oil during the Illinois class period. ER149. Henderson submitted a timely claim on the settlement website. *Id.*

Henderson objected that the Settlement was unfair under Rule 23(e) because class counsel was receiving 88% of the Settlement funds: $6.85 million in attorneys' fees and costs compared to less than $1 million in actual relief paid to the class. ER129-30. Henderson explained that under Ninth Circuit law, the settlement must be valued based on what the class *actually* receives. ER131 (citing *Allen*, 787 F.3d at 1224 n.4). Henderson pointed out that in addition to the disproportionate fee request, the

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[6] Plaintiffs argued that the Henderson objection should be stricken because of this purported "conflict of interest." Dkt. 672 at 3. Henderson responded that this argument was legally baseless because it conflated the obligations of a class representative under Rule 23(a)(4) with the right of a class member to object to a settlement under Rule 23(e). Dkt. 685 at 2-5. The district court did not strike Henderson's objection, and stated it did not find plaintiffs' arguments "particularly helpful," though denied Henderson's Rule 11 motion seeking sanctions over the multiplication of proceedings caused by this argument and a number of false *ad hominem* attacks plaintiffs made against Henderson and his counsel. Dkts. 678, 703, 711 at 4.

Settlement contained other warning signs of class counsel's self-dealing including "clear-sailing" (where Conagra agrees not to oppose the fee request) and a "kicker," or reversion agreement where any reduction in fees reverts back to Conagra. ER136-37 (citing *Bluetooth*). Though Conagra was willing to settle for about $8 million, suggesting a proportionate share for the class would be $6 million, class counsel had structured the settlement to capture the overwhelming majority of the proceeds for themselves; because of the kicker, the Court could not fairly correct the disproportionality by reducing fees, so the entire settlement must be rejected. ER137; ER39-41.

Henderson also objected that the Settlement's injunctive relief—requiring Conagra not to use "natural" *if* Conagra ever reacquires Wesson oil products—provides no incremental value to the class because it requires defendant to do nothing and because the labeling change that did occur happened prior to the Settlement. ER137-39 (citing *Koby*, 846 F.3d 1071).

Henderson maintained that plaintiffs had failed to prove the injunctive relief had any value, challenging the analysis of Weir, plaintiffs' expert. ER133-34. Henderson described how Weir's analysis assumed that the injunction somehow caused Richardson to maintain a label without "natural." *Id.* Henderson also challenged Weir's estimate that the injunction was worth $11.54 million per year—based on a price drop of $0.40 per bottle when "100% natural" price premium was eliminated—as unreliable because Weir never attempted to test whether the price *actually* dropped after the July 2017 label change. ER133.

Henderson objected that class counsel's lodestar could not justify a fee award that consumed over 88% of the constructive common fund. ER141. Henderson also disputed plaintiffs' claim that they were "catalysts" for the July 2017 labeling change and in any event could not justify a disproportionate settlement. ER142-43.

In response to Henderson's objection to the Settlement, plaintiffs submitted a reply declaration by their expert Weir, who claimed that it was possible to test the price premium hypothesis but "isolating the effect of a label change on the price of a product is often exceedingly difficult, due to the influence of other factors on price." ER90.

H. Henderson moves to strike Weir's declaration.

Henderson moved to strike Weir's two declarations valuing the injunctive relief in the settlement. Dkt. 684. Henderson argued that Weir's calculation was based on the false premise that the injunction required the manufacturer to change the Wesson Oil packaging. *Id.* at 2-3. Henderson further argued that Weir's methodology was inherently unscientific because Weir did not independently test whether the price of Wesson Oil changed after Conagra's July 2017 labeling change. *Id.* at 8-9.

Henderson also challenged Weir's new "conjoint survey." *Id.* at 9-10. During class certification, the district court held that Weir's regression analysis combined with Dr. Howlett's *proposed* conjoint analysis could measure damages. Dkt. 545 at 125. Howlett never conducted the conjoint analysis. Weir purported to have conducted a conjoint survey to account for this, but provided no information regarding the methodology of the survey, which Henderson argued was reason alone to strike. Dkt.

684 at 10. Henderson further noted that the reported results of Weir's conjoint survey—almost exactly 27% in each of the eleven states—called into question the methodology. *Id.*

I. Payments to class members totaled $993,919.

The claim deadline was August 22, 2019. ER82. The administrator reported on September 24, 2019, over a month after the objection deadline, that there were 97,880 timely claims for 2,792,794 units totaling $418,919. *Id.* Together with the $575,000 for the Oregon and New York classes, cash payments to the class would total $993,919. The exact number of class members is unknown, ER373, but the settlement administrator estimated 14.9 million class members, ER294. If accurate, the claims rate was 0.66%, meaning over 99% of the class would receive no cash.

J. The court overrules Henderson's objection and approves the Settlement.

The district court held the fairness hearing on October 7, 2019. Dkt. 694. Henderson appeared at the hearing through counsel. ER24. Class counsel repeatedly argued that Henderson had not satisfied his "burden he carries as the objector" that the settlement was "in any way unfair or unreasonable." ER43. Henderson responded that "it's not the objector's burden, it's the parties' burden to prove the settlement is fair, reasonable, and adequate, and that the disproportion [of fees] is justified." ER65; *see also* ER128.

Class counsel further argued that Henderson had "no alternative proposal" to the Settlement and proportionality was irrelevant *because* the kicker and separate fund for fees meant the class could not benefit if fees were reduced. ER53-54. The district

court asked about the issue of the separate fund, and Henderson responded that the kicker was precisely the problem. ER62-63. Conagra was willing to settle for about $8 million, but instead of acting in the interests of the class and structuring the settlement as a common fund, and taking readily available steps to identify class members and ensure the class recovered a proportional $6 million, class counsel segregated the fees to deprive the class of that money. ER62-65. Henderson noted that the parties had not met their burden of showing that the disproportionate relief was appropriate. ER65.

At the hearing, Conagra's counsel confirmed that there was no evidence that the price of Wesson oil dropped after the July 2017 labeling change:

> We also had the label change in July of 2017. After that label change, there's no evidence that there was a drop in the price that people paid for Conagra's product, the Wesson Oil product, and there was no decrease in sales. So it really belied all allegations of a price premium.

ER37.

On October 8, 2019, the district court granted final approval of the Settlement, awarded attorneys' fees and costs of $6.85 million. ER20. The court also denied Henderson's motion to strike the declarations of plaintiffs' expert Weir. ER9. The district court concluded: "Having one expert's opinion—however purportedly flawed—on the value of that injunction helps the Court develop its own view." *Id.*

The district court overruled Henderson's objection regarding the injunctive relief. The court noted its "reservations regarding Plaintiffs' price premium damages methodology." ER11. But the court held: "Although there is vigorous dispute over

the precise valuation of the injunctive relief—with Plaintiffs' expert valuing it at tens of millions and the Objector valuing it at nothing—the Court finds the injunction adds at least some value to the amount offered in settlement." ER12-13. The court further remarked: "Even if there were no injunctive relief, the Court would likely find that the amount offered in settlement was fair and reasonable given the likely obstacles to Plaintiffs recovering." ER13. "In the Court's view, the amount offered in settlement—even when not giving the injunctive relief the valuation Plaintiffs urge—is more than reasonable." *Id.*

The court did not specifically address the fact that the injunction is inoperative against the current owner of the Wesson brand. It did not discuss *Allen's* requirement that a district court must look at the settlement's economic reality nor *Koby*'s holding that injunctive relief has incremental no value to the class if it does not require defendant to do anything it was not already doing. The district court did not cite *Koby* at all.

The court found that the settlement was fair under *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003) because "[t]he parties' extensive litigation and negotiation allowed them to reasonably evaluate the cost, duration, and risk of further litigation. That evaluation was further supported by the recommendation of an experienced mediator, who set the settlement amount in a mediator's proposal." ER9-10, ER14.

In evaluating the settlement under Rule 23(e), the court held that "[t]here is substantial overlap between [Rule 23(e)(2)] factors and the *Staton* factors, so the Court does not repeat itself here." ER16.

The district court granted plaintiffs' request regarding attorneys' fees, holding that the $6.875 million fee request was reasonable given "the amount of hours reasonably spent on the litigation, counsel's efforts in litigating this years-long complex action, the results achieved, and the risks inherent in continued litigation." ER17.

The court rejected Henderson's concerns regarding disproportionality for several reasons. It noted that this was a weak case with difficulties of proof relating to liability and damages. ER19. The court held that "setting a precise value on the benefits achieved for class members [was] difficult" given that the settlement provided injunctive and monetary relief. *Id.* And finally, the district court held that the attorneys' fee "while high, reflects the long history of this case and the impressive result achieved given the weakness of Plaintiffs' case." ER20. Finally, it held that a settlement must be approved "unless it is clearly inadequate" and the objector failed to persuade the court that the settlement was clearly inadequate. *Id.*

The district court declined to consider the clear-sailing or kicker provisions, reasoning that the settlement was fair because "the classes were certified before the settlement was reached." ER19.

The court issued final judgment on December 10, 2019. ER1-4. This timely appeal followed. ER69-79.

Summary of Argument

The district court approved a settlement that pays the class under a million dollars and the attorneys $6.85 million in fees and expenses. The court reasoned that this upside-down result was acceptable because of the "impressive result," substantial lodestar, and injunctive relief of "some value"—an injunction that governed the defendant's labeling of a product it no longer had control over, and was thus meaningless to the class. This approach contravenes the Court's requirement that a district court look at the economic reality of a class-action settlement in assessing settlement fairness. *Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015).

The reason a district court must look at the actual value of the settlement to the class is to protect absent class members because both defendant and class counsel have the incentive to create an *illusion* of substantial class benefit. In claims-made settlements in which the class receives only publication notice, the median claims rate is less than 1%, as happened here. *See* Section I.B. And while Conagra knew that the claims rate would be miniscule, it also guaranteed that by a clause in the Settlement that class counsel would pay any documented claims totaling over $10,000, thus incentivizing plaintiffs to agree to a structure where class members were unlikely to make claims. (If too many class members made documented claims, that money would come out of class counsel's pockets. Class counsel agreed to a notice program of the bare constitutional minimum to ensure a low claims rate.) Meanwhile, class counsel benefited from the *appearance* of a large settlement that it could use to justify higher fees through the illusory injunction.

The district court further justified its approval of the Settlement based on the injunctive relief—even though the injunction had no real value because it restricted Conagra's marketing of a product it no longer owned. In fact, Conagra had voluntarily undertaken the injunction's minor labeling change 20 months before the Settlement was reached. The court erred as a matter of law because it should not have assigned *any* value to the injunction under *Koby v. ARS Natl. Services, Inc.*, 846 F.3d 1071 (9th Cir. 2017). And while courts are required to accurately quantify injunctive relief if they wish to consider it part of the settlement value, the district court made no such finding, instead merely assuming "some value." ER13. This was independent error. *See Campbell v. Facebook, Inc.*, No. 17-16873, 951 F.3d 1106, 2020 WL 1023350, 2020 U.S. App. LEXIS 6643, at *41 (9th Cir. Mar. 3, 2020). By allowing plaintiffs to hide the worthlessness of the relief, the district court undercut *Koby* and failed to protect the class.

The allocation of the only concrete relief provided by the Settlement—the approximately $7.9 million in cash—overwhelmingly favored class counsel at the expense of the class in violation of Circuit precedent. Settlement approval must be reversed.

Preliminary Statement

Attorneys with the Center for Class Action Fairness ("CCAF"), which became part of the non-profit Hamilton Lincoln Law Institute in 2019, bring Objector Henderson'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 more than $200 million for class members. Andrea Estes, *Critics hit law firms' bills after class-action lawsuits,* BOSTON GLOBE (Dec. 17, 2016) ($100 million at time); *see also, e.g.*, Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 13, 2013, at A12 (calling 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 CCAF's work); ER155-177 (documenting dozens of successful objections as required by preliminary approval order). For example, this Court recently ruled in favor of CCAF's client, an appellant class member who was a CCAF attorney who protested a settlement on Rule 23(a)(4) grounds. *In re Lithium Ion Batteries Antitrust Litig.*, 777 Fed. Appx. 221 (9th Cir. 2019). On remand, the previously-disfavored subclass was allocated an additional $10 million of the settlement fund. This appeal is brought in good faith to protect class members in this and future class actions against unfair and abusive settlements.

Argument

I. Because class-action settlements are predisposed to agency problems, courts recognize the need for scrutiny to prevent class counsel from self-dealing at the expense of absent class members. It is not enough that a settlement be large enough. It must also be *allocated* fairly to satisfy Rule 23.

A. Courts must be wary of the *allocation* of a class-action settlement.

To protect the members of the class who are not parties to the settlement agreement, courts have a duty to make sure that class counsel have not bargained away the rights of the rest of the class. Unlike settlements in other civil litigation, class-action settlements require court approval under Rule 23's standards. "The parties to an ordinary settlement bargain away only their own rights—which is why ordinary settlements do not require court approval. In contrast, class-action settlements affect not only the interests of the parties and counsel who negotiate them, but also the interests of the unnamed class members who by definition are not present during the negotiations." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013) ("*Pampers*"). To combat the omnipresent "danger that the parties and counsel will bargain away the interests of the unnamed class members in order to maximize their own," the district court must act as a fiduciary of the class and apply zealous scrutiny to the proposed settlement. *Id.*; *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015).

Every dollar reserved to the class is a dollar defendants cannot pay class counsel, so naturally, a conflict of interest can emerge. Defendant companies have no interest in policing the settlement: "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." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 949 (9th Cir. 2011) ("*Bluetooth*") (cleaned up). Thus, while class counsel and defendants have proper incentives to bargain effectively over the *size* of a settlement, they have no such constraints on *allocating* it between the payments to class members and the fees for class counsel—unless courts police that allocation. *Id.*; *see also Pampers*, 724 F.3d at 717.

The court's role in approving settlements is the last and only hope of the unnamed class members to protect their rights from being bargained away. Otherwise, the dysfunction that can arise in the allocation process detracts from the effectiveness of class actions as a way to hold defendants accountable for misdeeds with diffuse harm. The value of a class action 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). 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 proposed settlement. *Bluetooth*, 654 F.3d at 948-49; *see also Pampers*, 724 F.3d at 721; *Pearson v. NBTY, Inc.*, 772 F.3d 778, 786-87 (7th Cir. 2014).

B. Settlements may contain illusory relief that obscures the true *allocation* of the class relief.

Class counsel can structure a settlement to obscure the relative allocations between lawyers and class members by artificially inflating the settlement's apparent

value. The illusion of a large settlement benefits both class counsel and a 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).[7] Without judicial oversight to weed out such practices, class members are left with disproportionate settlements in which class counsel recovers far more than the 25-percent benchmark set by this Court. *See* Howard Erichson, *Aggregation as Disempowerment*, 92 NOTRE DAME L. REV. 859 (2016).

Consider the likelihood of settlement approval if class counsel openly sought approval of a common-fund cash settlement of $8 million, which paid the lawyers $6.9 million in fees and expenses and paid class members $1 million in collective damages—as this settlement ultimately does. Few judges would approve that deal, and it is foreclosed by precedent. *See, e.g.*, *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012) (class counsel receiving even 38.9% of settlement benefit is "clearly excessive"); *Bluetooth*, 654 F.3d at 947-49 (disproportionate fee award is a hallmark of an unfair settlement). For the deal to have any chance of court approval, it has to conceal this result. So, settling parties create hypothetical class recoveries and difficult-to-calculate "benefits" that ultimately have little value to the class but are cheap for defendants to provide. These hypothetical recoveries get a high price tag that inflates the overall "value" of the settlement package that goes to the judge, but do nothing for the class.

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

A "claims-made" structure is among the most common tools used to achieve the mirage of value. In this type of settlement, rather than make direct payment to class members, a defendant agrees to make a specified amount of money *available* to the class, in theory at least, but only pay out on the claims that class members actually file. *See Roes v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1058-59 (9th Cir. 2019) ("*Roes*") (describing the "perverse incentives" created by a reversionary claims-made settlement). The vast majority of class members will not file a claim and thus will go uncompensated. In this case, the parties were so sure claims would be low that class counsel agreed to pay documented claims out of their own pocket if the class's documented claims exceeded $10,000. ER214-15.

The parties' prediction was accurate because single-digit claims rates are endemic to class actions, particularly where there is no direct notice to the class. *See, e.g.*, *In re Carrier iQ, Inc. Consumer Privacy Litig.*, No. 12-md-02330-EMC, 2016 WL 4474366, at *4 (N.D. Cal. Aug. 25, 2016) (prominent settlement administrator found a median claims rate of 0.023% in settlements with publication-only notice); *Pearson*, 772 F.3d at 782 ("the percentage of class members who file claims [in consumer class actions] is often quite low"). In fact, private services are now available to forecast the cost of class-action settlements with actuarial certainty and assume 100% of the risk should payouts be higher. Theodore H. Frank, *Settlement Insurance Shows Need for Court Skepticism in Class Actions*, OpenMarket blog (Aug. 31, 2016).[8] Under the claims-made structure, class members recover—and a defendant pays—much less than when a

[8] *Available at* https://cei.org/blog/settlement-insurance-shows-need-court-skepticism-class-actions.

defendant disburses funds directly to the class in a common fund. At the same time, class counsel can, as they did here, boast about the amount purportedly "made available" and seek to justify a large fee award, even though class members will receive a small fraction of that amount. *E.g.*, ER25 (class counsel claims class got "136% of what they would have gotten at trial," though over 99% of the class received nothing).

The way to ameliorate this problem is to incentivize counsel to seek out absent members by tying fees to the amounts the class *actually* receives. For example, though supermarkets track the buying purchases of their club-card members, the parties neither subpoenaed that information nor notified those class members. *See, e.g., In re Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Practices Litig.*, No. 09-md-2023, 2012 U.S. Dist. LEXIS 143955, *8-9 (E.D.N.Y. Oct. 4, 2012) ("*Bayer*") (confirming plaintiffs' subpoena of grocery-store customer data to increase payments to class members after CCAF's objection); ER63-64. When Henderson objected, Circuit precedent did not *require* them to do so to comply with Rule 23(c) notice provisions. *But see Roes*, 944 F.3d at 1046 (finding much better direct notice inadequate). By settling for the bare constitutional minimum of indirect notice, the settling parties ensured that very little money would be disbursed. As long as class counsel can maintain the illusion of an amount "made available" that justifies their fee award, and defendants can buy peace at a fraction of that amount, class counsel has every incentive to ensure that their putative clients will not make claims and be compensated.

Injunctive relief is another tool that enables class counsel and the defendant to inflate the perceived value of the settlement. The value of injunctive relief is "easily

manipulable by overreaching lawyers seeking to increase the value assigned to a common fund." *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003). 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 benefits class members. Even if commencement of the *litigation* might have spurred a defendant to alter its conduct, that voluntary change in conduct is not consideration for the class members' release of claims. *Koby v. ARS Natl. Services, Inc.*, 846 F.3d 1071, 1080 (9th Cir. 2017). The value to class members of a defendant agreeing in the settlement to stop doing something it already stopped is virtually zero. *See id.*; *Staton*, 327 F.3d at 961; Erichson, 92 NOTRE DAME L. REV. at 874-76. And if the injunction literally requires no action by the defendant—because, as here, it only affects the defendant's actions vis-à-vis a brand that it no longer owns—the value to the class *is actually* zero.

Where courts fail to insist that settling parties compensate the class for their injuries, settlements will look like the one here: valueless injunctive relief; a claims process that limits class members' collective recovery; and attorneys' fees wildly disproportionate to the actual payout to the class, shielded from appellate review by self-dealing "clear-sailing" and "kicker" clauses. *E.g., Roes*; *Pampers*; *Bluetooth*; *Pearson*. The Settlement here has these telltale signs and worse—a provision that incentivized class counsel to keep the claims rate low by requiring class counsel to pay documented claims above $10,000. ER214-15. Meanwhile, class counsel capitalized on Conagra's voluntary, pre-settlement label change by deeming it a settlement benefit that

somehow compensated class members for their release of claims. ER239. Exacerbating the problems, the Settlement includes a "clear-sailing" clause whereby Conagra agreed not to challenge the attorneys' fees as well as a "kicker" such that any reduction in the fee award reverts to Conagra rather than the class. ER236. "The clear sailing provision reveals the defendant's willingness to pay, but the kicker deprives the class of that full potential benefit if class counsel negotiates too much for its fees." *Bluetooth*, 654 F.3d at 949. And worse, it prevents the court from correcting the misallocation of the settlement relief by returning excessive fees to class members.

The vitality of the class-action mechanism depends on rigorous 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. This oversight function cannot be delegated to private mediators who serve the interests of the named parties. *Compare* ER12, ER14, *with Roes*, 944 F.3d at 1050 n.13; *Bluetooth*, 654 F.3d at 948. The district court's scrutiny failed to meet this standard and, as a result, it overlooked the red flags of settlement unfairness identified by this Court. And as discussed in Section II below, the settlement violated Rule 23(e) as a matter of law.

II. The settlement approval cannot stand as a matter of law because class counsel negotiated $6.85 million for themselves in a Settlement where the class receives less than $1 million.

The Settlement was unfair as a matter of law because class counsel's fee award consumes 87% of the total benefit. Rule 23 explicitly requires courts to consider defects of allocation between the class and class counsel 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 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. This Court should not approve a settlement that allocates to class counsel well in excess of the Ninth Circuit's 25% benchmark. *See, e.g, Dennis*, 697 F.3d at 868 (38.9% fee would be "clearly excessive"); *Roes,* 944 F.3d at 1051 (fee award of 45% of gross cash fund is "disproportionate"); *Allen*, 787 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).

Unlike an all-inclusive pure common fund, the class benefits here are formally segregated from the attorneys' fees to class counsel, known as a "constructive common fund." *Dennis*, 697 F.3d at 862-63 (evaluating similar "constructive common fund" settlement); *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig*., 55 F.3d 768, 820 (3d Cir. 1995). Because "the adversarial process" between the settling parties cannot safeguard "the manner in which that [settlement] amount is *allocated* between the class representatives, class counsel, and unnamed class members," the most common settlement defects are ones of allocation. *Pampers*, 724 F.3d at 717 (emphasis in original). Allocational issues cannot be waved away simply by structuring the settlement as a constructive common fund with segregated fees, rather than a traditional common fund. *See, e.g., Bluetooth*, 654 F.3d at 943; *Pampers*, 724 F.3d at 717.

In assessing disproportionality, "[t]he ratio that is relevant … is the ratio of (1) the fee to (2) the fee plus what the class members received." *Redman*, 768 F.3d at 630. Here, the class stands to recover only $993,000, while class counsel sought unopposed, and was awarded, fees and costs of $6.85 million. ER20, ER82, ER214. Using that *Redman* ratio, class counsel's allocation here was over 87% of the constructive common fund ((1) $6,850,000 to (2) $6,850,000 + $993,000)—substantially higher than the figures rejected as inappropriate in *Dennis, Roes*, *Pearson*, and *Redman*.

This Circuit adopted a benchmark percentage approach to fee awards to align class counsel's interests with their clients' to the greatest extent possible. Evaluating the fee award based on the money that class members *actually* receive puts those incentives in exactly the right place—class counsel should work very hard to get the settlement relief into their clients' hands when they derive no benefit from a hypothetical valuation. If the settlement valuation can be inflated with illusory benefits, the incentives favor class counsel seeking their own payout rather than maximizing the payout to the class. *See Pearson*, 772 F.3d at 783, 787 (quoting *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014)).

That's why the Ninth Circuit requires district courts to look at the "economic reality" of actual recovery in assessing the settlement's fairness. In *Allen*, this Court found that the settlement had multiple signs of self-dealing, including a disproportionate amount of fees. 787 F.3d at 1224. The Court found the fees disproportionate because the $1.125 million attorneys' fee award was *three times* the $373,675 in actual claims that the class would receive. *Id.* at 1224 n.4. The *Allen*

settling parties stated at preliminary approval that they anticipated a 10-15% claims rate (actual claims rate was less than 8%). *Id.* This Court criticized the district court for not investigating the disproportion between fees and relief after the parties estimated the low claims rate. *Id.*

This case is worse. The $6.85M fee award is nearly *seven times* what the class will actually receive. The district court found 97,880 timely claims for 2,792,794 units (ER7) out of the nearly fifteen million class members. With the $575,000 reserved for claims from two states, ER7, that's $993,000 for the class.

The Ninth Circuit is not alone in requiring that courts evaluate settlements based on actual payouts to the class. *E.g., Pearson*, 772 F.3d at 781; *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 Communs., 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*").

When incentives are aligned and class counsel's fee is tied to what the class actually receives, class counsel is motivated to deliver real 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, 643 (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); ER164 (after CCAF's objection in *Bayer*, parties voluntarily found a way to increase payments from about $0.5 million to over $5 million).

The district court here quoted Rule 23(e)(2)'s requirements, but did not actually assess any of the factors, reasoning that there was substantial overlap with the *Staton* factors it had assessed. ER16. The district court did not make any findings regarding the proportion of fees to relief and rejected Henderson's objection that the disproportionate attorney fee award rendered the settlement unfair. ER18-20. The district court's reasons for excusing the disproportionality of the fee award are legally deficient.

First, the district court appeared to believe that a lopsided settlement is acceptable where the plaintiffs case is "weak." ER19. But again, that speaks to why

the gross settlement is $7.9 million, rather than $18 million or $50 million. Henderson does not challenge the total adequacy of the defendant's $7.9 million payment, just the fairness of the disproportionate allocation. And the weakness of the class's claims does not explain why class counsel is entitled to a disproportionate share of the settlement value. Perhaps the entire lawsuit is meritless, and a single peppercorn would have been adequate compensation for all of the claims against Conagra. But Conagra chose to settle for $7.9 million in cash, and that amount should be proportionally allocated between the class and the attorneys, rather than selfishly swept up by the attorneys. In *Pampers*, for example, both American and Canadian authorities exculpated defendant, reducing the litigation value of the claims to virtually nil. 724 F.3d at 715-16; *id.* at 723 (Cole, J. dissenting) ("claims in this case had little to no merit"). The *Pampers* problem was not that the settlement failed to approximate the litigation value of the claims. Rather, the settlement flunked because nearly the entire settlement value was consumed by the fees. *Id.* at 721; *see also Bluetooth*, 654 F.3d at 946 (finding district court had not justified disproportionate fee award even where district court found plaintiffs' claims were weak); *accord In re Subway Footlong Sandwich Mkt'g and Sales Practices Litig. Subway*, 869 F.3d 551, 557 (7th Cir. 2017) (reversing settlement resolution of a meritless suit that "enriche[d] only class counsel and, to a lesser degree, the class representatives").

Second, the district court discounted Henderson's disproportionality objection because the settlement was negotiated after the district court had granted class certification, citing *Bluetooth*'s stricter standard of review for settlements prior to class certification. ER19. *Campbell* recently flagged as an open question "whether district

courts are required to look for these [*Bluetooth*] warning signs in cases…that are settled *after* formal class certification." 2020 U.S. App. LEXIS 6643, at *39. This Court should decide that the warning signs are problematic regardless of whether they are negotiated before or after certification. Class certification is not a contraceptive against self-dealing. Those offending provisions do not become proper because there exists a cohesive, numerous, certifiable class or because the attorneys had, at the time of certification, demonstrated adequate representation. If a 7:1 ratio of fees to class recovery is unfair before class certification, class certification does not make it fair.

The reason that pre-certification settlements are subject to heightened scrutiny in the first place is because plaintiffs' claims on the merits are handicapped by the fact that the defendant might defeat class certification. Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951 (2014). In other words, it ensures that the total settlement amount is adequate by "protect[ing] the absent class members from inappropriately discounted settlements." *Porath v. Logitech, Inc.*, 2019 WL 266258, 2019 U.S. Dist. LEXIS 9378, at *5 (N.D. Cal. Jan. 18, 2019) (imposing injunction against pre-certification settlement negotiation), *aff'd In re Logitech, Inc.*, 784 Fed. Appx. 514 (9th Cir. 2019). But the problem of self-dealing pinpointed by *Bluetooth* goes to allocation, not to total adequacy. *See* Section I.A above. Clauses that suggest self-dealing demand maximum scrutiny whenever a settlement is proposed.

No matter the procedural level of review, however, the Settlement is substantively unfair under Rule 23(e)(2)(C)(iii) because fees grossly exceed the 25% benchmark. *See Roes*, 944 F.3d at 1050 (noting that this Court "may overturn an approval of a compromised settlement on substantive grounds if the terms of the

agreement contain convincing indications that self-interest rather than the class's interests in fact influenced the outcomes of negotiations") (quoting *Allen*, 787 F.3d at 1223) (cleaned up). The Settlement's clear-sailing and reversion clauses are similarly convincing indications of a lawyer-driven settlement, *see Pearson*, 772 F.3d at 786-87 (holding that reversion clause has "strong presumption of [] invalidity"), and do not suddenly become substantively less offending simply because a class had already been certified. *See, e.g., Eubank*, 753 F.3d at 723 (7th Cir. 2014) (highlighting reversion as a "questionable provision" that should have been "deleted" even though a class had been certified before settlement).

Finally, the district court erred in justifying the fee allotment on the basis of lodestar analysis and the "long history of this case." ER17, ER20. Although a lodestar might be reasonable under Rule 23(h), it cannot justify fees disproportionate to the class recovery under Rule 23(e). *See* Section III.C below. "Plaintiffs attorneys don't get paid simply for working; they get paid for obtaining results." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1182 (9th Cir. 2013); *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. *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 allocation nor the settlement fairness.

Indeed, Ninth Circuit law precludes Henderson from raising Rule 23(h) issues on appeal when a reduction in fees would revert to the defendant: he has no appellate standing to make a Rule 23(h) challenge because he would not benefit from a reduction in the fee award. *Glasser v. Volkswagen of Am.*, 645 F.3d 1084, 1088-89 (9th Cir. 2011). The *only* way Henderson can challenge the disproportionately high fee is through a Rule 23(e) *Bluetooth* objection striking the settlement. Unfortunately, the combination of clear-sailing and kicker provisions means *no one* has standing to challenge the fees outside of the totality of the settlement. The kicker is a "gimmick" for defeating objectors that the Seventh Circuit has correctly rejected. *Pearson*, 772 F.3d at 786.

The lower court here "appreciate[d] proportionality concerns" but thought that "the record in this case sufficiently 'dispel[s] the possibility that class counsel bargained away a benefit to the class in exchange for their own interests.'" ER20. The conclusion is a *non sequitur*. The opinion and record showed, without dispute, that the settlement provided $7.9 million of payments, and that the class got less than $1 million of that, while using clear sailing and a kicker to preclude reallocation to the class. That's the very definition of bargaining away a benefit to the class in exchange for the attorneys' own interests. If there had been an $7.9 million common fund, then under a 25% benchmark, the class would have received nearly $6 million instead of less than $1 million—class counsel's pursuit of their "own interests" at the expense of the class cost the class $5 million.

This Court has described in detail why kickers are unfair to class members. "The clear sailing provision reveals the defendant's willingness to pay, but the kicker

deprives the class of that full potential benefit if class counsel negotiates too much for its fees." *Bluetooth*, 654 F.3d at 949. "[T]here is no apparent reason the class should not benefit from the excess allotted for fees." *Id.* The district court dismissed these concerns (ER19) because the class had been certified before settlement, but that is a *non sequitur*. As with disproportionality, a class certification doesn't make deliberate disproportion and self-serving settlement terms for protecting class counsel from scrutiny at the expense of class members any more fair. The district court erred as a matter of law.

This Court should reaffirm its holdings in *Roes* and *Allen* that settlement valuation is to be based on the amount actually received by the class. It should also reaffirm its holding in *Bluetooth* that even class counsel of a certified class has no business selfishly structuring a settlement to benefit itself at the expense of the class. Because the district court did not, it committed reversible legal error for each of these two independent reasons. As a matter of law, the Settlement is unfair under Rule 23(e).

III. The district court erred as a matter of law by assigning any value to the Settlement's injunction.

The proponents of a settlement bear the burden of demonstrating the value of the injunctive relief. *Koby*, 846 F.3d at 1079; *Pampers*, 724 F.3d at 719. To begin, the district court committed reversible error by imposing that burden on Henderson, finding that Henderson had not proved the settlement "clearly inadequate." ER20; *see* Section IV below. The district court further erred by assigning *any* value to the injunction. The injunction—prohibiting Conagra from using "100% natural" on

Wesson Oil labels—was merely an illusion of relief: Conagra had *sold* the Wesson Oil brand prior to settlement. ER219. In fact, Conagra had voluntarily removed "100% natural" from the labeling before selling the product, 20 months prior to settlement. ER188. Under binding Ninth Circuit law, the district court erred as a matter of law by assigning value to injunctive relief that provides no marginal benefit to class members. *Koby*, 846 F.3d at 1080.

Even if it were not legal error to assign value to the injunction, the district court abused its discretion by not attempting to quantify the injunctive relief. *See Campbell*, 2020 U.S. App. LEXIS 6643, at *41.

Finally, while the court did not adopt plaintiffs' expert's estimation of the value of the injunctive relief, it would be error to affirm based on Weir's declaration because his methodology is scientifically unreliable.

A. The injunction has no real value to the class because Conagra had already divested the product line and removed "100% Natural" from Wesson's label before the Settlement agreement.

The district court found that the injunction had "some value." ER13. But assigning any value was legal error because the injunction was no more than an illusion of relief. Illusory or duplicative "relief" cannot provide fair consideration for the waiver of class members' claims. Even low-value claims for which class members are unlikely to file their own actions have litigation value in the class action context—as evidenced by the fact here that Conagra settled them for about $7.9 million, of which class counsel took over 87%. "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. Here, for two independent reasons, the injunctive relief provides class members no marginal benefit or consideration for the release of their claims and thus no real value.

1. Conagra sold the Wesson Oil brand before settlement.

Under the Settlement, Conagra prospectively agrees not to market Wesson Oil as "natural." ER219. This "relief" is illusion. As the Settlement observes: "Conagra divested all interest in the Wesson Oil brand to a third party purchaser, with the sale being final prior to the signing of this Agreement." *Id.* Conagra has no intention of reacquiring the Wesson Oil brand. ER49. In fact, Conagra had been attempting to sell off Wesson for more than two years before Settlement, finding another buyer after its 2017 agreement to sell fell apart. *See* p. 10 above. Restricting Conagra's marketing of a product it neither owns nor has any intention of ever owning again has no value.

This Court has rejected settlement agreements on the grounds that injunctions have "no real value" when they do not obligate a defendant "***to do anything it was not already doing***." *Koby,* 846 F.3d at 1080 (emphasis added). In *Koby*, the parties settled an FDCPA class action relating to misleading voicemail messages sent by a debt collection company with zero cash for the class and only an injunction requiring defendant to use a voicemail message it had "already adopted voluntarily" two years before settlement approval. *Id.* at 1074-75. This Court concluded that the defendant already "took that step for its own business reasons (presumably to avoid further litigation risk), not because of any court-or settlement-imposed obligation." *Id.* at

1080. For this reason, the defendant was "unlikely to revert back to its old ways regardless of whether the settlement contained the stipulated injunction." *Id.* (citing *Crawford v. Equifax Payment Services, Inc.*, 201 F.3d 877, 882 (7th Cir. 2000)). Thus, the injunctive relief was worthless and could not support the claimed value of the settlement agreement to the class.

Other courts agree that to be meaningful relief for class members' claims, an injunction must be a "material alteration in the relationship of the parties." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001). In *Subway*, the Seventh Circuit reversed a settlement involving claims that Subway's footlong sandwiches fell short of twelve inches. 869 F.3d at 553. The only class relief was an injunction consisting of business practices to ensure, to the extent practicable, that the sandwiches measured 12 inches. *Id.* at 554. In assessing the injunction, the court compared "***the state of affairs before and after the settlement***." *Id.* at 556 (emphasis added). The court concluded that "the injunctive relief approved by the district judge is utterly worthless" because it did not change what customers would receive from Subway. *Id.* at 556-57.

The same is true here. A comparison of the state of affairs before and after the Settlement shows that Conagra is not required to do anything it was not already doing. Before settlement, Conagra was *not marketing* Wesson Oil (because it did not own Wesson) and after the Settlement's injunction, Conagra is *still not marketing* Wesson Oil. The injunction limiting Conagra's future marketing of Wesson has zero effect on Conagra, makes no alteration to its relationship with class members, has zero value,

and therefore cannot be consideration for release of the class's claims as a matter of law. *Koby*, 846 F.3d at 1080.

For the injunction to have any value, the Court would have to believe in the farfetched contingency that Conagra would actually reacquire the Wesson brand. Even if there were evidence that Conagra *intended* to reacquire Wesson (there is not), the contingent injunction would still have no settlement value because (1) courts must analyze settlement fairness based on economic reality, not hypotheticals, *Allen v. Bedolla*, 787 F.3d at 1224, and (2) simply intending to reacquire the brand does not actually require Conagra to do anything, *Koby*, 846 F.3d at 1080. To find value in this Settlement's injunction is equivalent to finding value in Conagra's agreement to refrain from marketing Coca-Cola or Big Macs or any other company's product. The possibility to inflate a settlement value by defendant's agreeing to refrain from doing things they would never have done anyway is infinite. The law of this circuit has already—and rightly—shut that possibility down.

2. Conagra voluntarily removed "100% natural" twenty months before settlement.

Not only does Conagra have no present control over the marketing of Wesson, it had already voluntarily removed "100% natural" from Wesson Oil labels 20 months *prior* to settlement. ER188. Just like the voicemail that defendants "voluntarily adopted" two years before settlement approval in the *Koby* case, the voluntary removal of "100% Natural" here has zero value to the class members. *See Koby*, 846 F.3d at 1080. The settling parties have the burden to prove that the value of an injunction against future action has some actual value to class members. *Id.* at 1080. Like the

settling parties in *Koby*, the parties in this case have failed to meet their burden of proof, and the district court erred in approving the Settlement.

Koby is not alone. Courts routinely hold that voluntary pre-settlement changes later duplicated in settlement do not count as a compensable class benefit. *Pampers*, 724 F.3d at 719 (finding no settlement value of refund program available to class before settlement "without assigning away important rights"); *see also Staton*, 327 F.3d at 973 (finding error for valuing injunctive relief that included steps defendant took "on its own" prior to settlement); *Eubank*, 753 F.3d at 725 (finding warranty program "adopted *before* settlement" was not "part of the value created by the settlement") (emphasis in original). It is only the "incremental benefits" that count, not the ones that preceded settlement. *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 286 (7th Cir. 2002).

Here, Conagra's pre-settlement labeling change was voluntary and there is no evidence in the record to the contrary. ER239. It makes no difference that Conagra's labeling change came after the action was filed or that Conagra may have been motivated to change the label to avoid litigation. *Koby,* 846 F.3d at 1080. What matters is that Conagra was under no *legal obligation* to make that change. *id; see also* Erichson, 92 NOTRE DAME L. REV. at 874-76.

* * *

Under *Koby, Subway,* and *Pearson*, the injunction had no real value for class members and was not consideration for release of the class's claims. The district court here did not cite or discuss the binding Ninth Circuit decision of *Koby* nor these other circuit decisions, even though Henderson argued these cases extensively. *E.g.,* ER38-

42, ER62-65, ER131-135. The district court erred as a matter of law by finding that the injunction had any value in spite of *Koby*.

B. The injunction's prospective relief does not compensate the class defined as *past* purchasers of Wesson Oil.

There is another fundamental problem with counting *prospective* injunctive relief as class relief: it does not compensate the class who allege *past* injuries. "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 it interferes with the defendant's marketing plans." *Pampers*, 724 F.3d at 720 (internal quotation omitted) (emphasis in original). In *Koby*, the class was defined as those who *had* received defendant's voicemail in debt collection, but the injunction's new voicemail would be used in *new* debt collection efforts. 846 F.3d at 1079. The Court recognized the "obvious mismatch between the injunctive relief provided and the definition of the proposed class" and found that the settling parties failed to meet their burden that the injunction would benefit the class. 846 F.3d at 1079; *Pearson*, 772 F.3d at 786. (*Koby* went on to hold that even for those class members that would receive the voicemail in a new debt collection, the injunction had no real value. *See* Section III.A.1 and Section III.A.2 above.) The mismatch is also present here where a class releasing its damages claims for *past* purchases of Wesson Oil (ER209-211), receive labeling changes for *future* purchases of Wesson Oil.

C. The court erred in failing to calculate the value of the injunctive relief in assessing settlement fairness.

In two recent cases, this Court expounded on the critical importance of valuing injunctive relief while assessing settlement fairness. In *Roes*, the objectors challenged the fairness of a settlement because, *inter alia*, the fee award was disproportionate relative to class's cash recovery and injunctive relief was "essentially worthless." 944 F.3d at 1055. The district court awarded fees on a lodestar basis and cross-checked the fee award,[9] comparing fees to class relief using a $4 million settlement value that included a $1 million valuation of the injunction. *Id.* at 1051. This Court reversed: While the district court had found the injunctive relief was "substantial" and provided "real benefits," the court failed to "make any findings specifically justifying the $1 million dollar valuation," and failed to "articulate any calculations to support the $1 million valuation." *Id.* at 1055.

This Court reasoned that Ninth Circuit caselaw "demands that, because of the danger that parties will overestimate the value of injunctive relief in order to inflate fees, courts must be particularly careful when ascribing value to injunctive relief for purposes of determining attorneys' fees, and avoid doing so altogether if the value of the injunctive relief is not easily measurable." *Id.* at 1055 (citing *Staton*, 327 F.3d at 974). Like *Roes*, the district court's findings here that the settlement was fair because

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[9] *Roes* refers to the district court's comparison of fees to relief as a "lodestar cross-check." 944 F.3d at 1051. This Court has also used the term "lodestar cross-check" to refer to the reverse situation where fees are awarded on a percentage-of-recovery basis and class counsel's lodestar "provides a check on the reasonableness of the percentage award." *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050-51 (9th Cir. 2002).

both injunctive and monetary benefits were "substantial" (ER19) was not enough; it was independent error requiring reversal.

In *Campbell v. Facebook, Inc.*, this Court warned of not valuing injunctive relief in a case just like this: "To be sure, in a case where the class primarily receives non-monetary relief, but class counsel obtain millions of dollars, it may be an abuse of discretion not to at least attempt to approximate the value of injunctive relief and use that valuation in an assessment of disproportionality." 2020 U.S. App. LEXIS 6643 at *41. *Campbell* excused the district court's failure to approximate the injunctive relief only because the district court had previously declined to certify a Rule 23(b)(3) damages class and because the release did not include damages claims. *Id.* at *41-43.

The district court here does not have that same justification. Nor can it be neglected because, as the district court reasoned, setting a precise value on the injunctive relief is "difficult." ER19. The theory of plaintiffs' case is that the class members paid a "price premium" or a higher price for the Wesson Oil as a direct result of the 100% Natural" label. ER319. Plaintiffs' expert Weir opined that with the removal of the "100% Natural" label, "consumers have been receiving the full economic benefit of the removal of that entire Natural Claim—namely, ***paying less for the Wesson Oils*** because they are no longer paying the price premium that results from the use of the Natural Claim." *Id.* While the injunction has no real settlement value, (*see* Section III.A) and Weir's calculation of the injunction unscientific (*see* Section III.D), if the court believed the injunction to have "some value" (ER13), it was error under *Campbell* not to *attempt* to quantify that value when

using that value to assess the fairness of the settlement including proportionality of attorneys' fees.

The district court justified that it could avoid estimating the injunctive relief by awarding fees on a lodestar basis. ER17. As described above, the district court conflated Rule 23(h) and Rule 23(e). *See* Section II above. Awarding fees under 23(h) on a lodestar basis looks at whether the number of hours expended and the hourly rates charged were reasonable. *Staton*, 327 F.3d at 965. But that does not eliminate the need to examine the disproportion between fees and class relief for settlement *fairness* under 23(e). *Roes*, *Campbell* and *Bluetooth* all awarded fees on a lodestar basis, but the appeals challenged 23(e) *settlement* fairness. *Roes*, 944 F.3d at 1048, 1051; *Campbell*, 2020 U.S. App. LEXIS 6643 at *37-38, *Bluetooth*, 654 F.3d at 940, 943. Thus, even though the district court here awarded fees based on lodestar, Ninth Circuit law required the district court to review the proportion of fees to relief for settlement fairness and exclude the injunction from that proportionality assessment.

D. Weir's declaration cannot support settlement approval.

The Weir declaration implausibly estimated that the "annual value of the injunctive relief provided by the settlement across the eleven-state class to be approximately $11,540,000 per year." ER319. The district court did not adopt Weir's valuation, but denied Henderson's motion to strike because "[h]aving one expert's opinion—however purportedly flawed—on the value of that injunction helps the Court develop its own view." ER9. The Court never actually formed its own opinion regarding the value of the injunction, but simply found that the injunction had "some

value." ER13. Regardless, reliance on Weir's declaration would have been error, and it does not provide an alternative ground of affirmance.[10]

First, Weir's conclusion is based on the the false premise that Wesson Oil's packaging will be affected "[a]s a result of th[e] injunction." ER319. Expert testimony based upon an "assumption [that] finds no support in the physical facts as described by the reports and other evidence in the record" is properly excluded. *Guidroz-Brault v. Mo. Pac. R.R. Co.*, 254 F.3d 825, 830 (9th Cir. 2001); *Vargas v. Lott*, 787 Fed. Appx. 372, 374 (9th Cir. 2019) (unpublished); *see also GE v. Joiner*, 522 U.S. 136, 146 (1997) (affirming exclusion of opinion "connected to existing data only by the *ipse dixit* of the expert" with "too great an analytical gap between the data and the opinion proffered"). As explained above, the injunction has *no effect* on the Wesson labeling: Conagra voluntarily made the minor labeling change 20 months *before* the Settlement and uselessly restricted *Conagra's* marketing of Wesson without any legal obligation on Wesson's current owner. ER188, ER219. Thus, even if Weir's estimate were scientifically reliable, his conclusion that consumers paid less for Wesson Oil as a result of the *injunction* is mere fiction and ignores *Koby's* prohibition of valuing duplicative injunctive relief. 846 F.3d at 1079. Weir's false assumption makes his testimony unhelpful, unreliable, and incapable of supporting settlement approval.

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[10] The district court also did not adopt the parties' $27 million stipulated valuation of the injunction. ER239. It would have been error to rely on the agreed-to value because settlement fairness must be based on actual—not stipulated—settlement values. *See Allen*, 787 F.3d at 1224 n.4; *Roes*, 944 F.3d at 1055 (finding error in adopting parties' valuation of injunction without specific findings or calculations regarding value).

Second, Weir's opinion is scientifically unreliable because he failed to test his hypothesis that removal of "100% natural" from the labeling would actually cause prices of Wesson Oil to drop by $11.54 million per year. *See* ER90-91. Simply propounding a hypothesis without testing it is not scientific. "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593 (1993) (cleaned up). Weir could have tested his "price premium" hypothesis because the labeling change occurred in July 2017, nearly two years before the Settlement. *See* ER188. Because Weir refused to test his hypothesis with actual data, his analysis is unscientific and cannot support settlement approval.

In *Pearson*, the Seventh Circuit affirmed the district court's finding that the injunctive relief—labeling changes on glucosamine supplements—had no value. 772 F.3d at 785, 786. The "expert's estimate was a wild guess as to how much Rexall would have to cut the price of its pills in order to hold on to consumers." *Id.* at 786. The court criticized the expert report as an "arbitrary forecast" because the expert "did not attempt ***to test the effect of labeling changes***, similar to those required by the settlement, on consumers." *Id.* (emphasis added). Similarly, the Third Circuit reversed a jury verdict where an expert's testimony was "based on prior predictions of sales for a given period when actual performance data for that same time span [was] available." *Advent Sys. Ltd. v. Unisys Corp.,* 925 F.2d 670, 682 (3d Cir. 1991). "There is hardly anything, not palpably absurd on its face, that cannot now be proved by some so-called 'experts.'" *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 382

(7th Cir. 1986) (reversing jury award where expert's testimony predicting lost profits bore no relation "to economic reality").

In response to Henderson's objection to the Settlement, Weir submitted a reply declaration, claiming that while it was possible to perform a "before-and-after" analysis, it was difficult due to the influence of other factors on price including promotions, competition and advertising. ER90-91. But in his declaration filed in support of class certification, Weir stated that hedonic regression was "routinely used to calculate the value of product attributes" and that the "bulk of the literature testing for the presence of such price premiums … begins with the logical hypothesis that such a premium exists, and ***affirms the hypothesis after testing***." Dkt. 243 ¶ 26. (emphasis added). Because he failed to test his hypothesis, one should draw the adverse inference. As Conagra represented at the fairness hearing, after the 2017 "label change, there's no evidence that there was a drop in the price that people paid for Conagra's product, the Wesson Oil product, and there was no decrease in sales." ER37.

Third, Weir's price premium calculation is unscientific because it does not explain his methodology regarding his conjoint analysis. A necessary prerequisite to assessing whether a methodology is "scientifically valid" under *Daubert* is disclosure of the methodology. *See Daubert,* 509 U.S. at 593. During class certification, the district court only granted certification based on a combination of Weir's regression analysis with Dr. Howlett's *proposed* conjoint analysis isolating the damages relating to the non-GMO meaning of "natural." *See* Order, Dkt. 545 at 125. Because Howlett never conducted the conjoint analysis, Weir's injunction estimate claimed to have conducted

his own conjoint survey "to measure the relative value that consumers place on the GMO-free meaning." ER324-25. But Weir provided no information regarding the methodology of that survey. *Id.*

Garbage in, garbage out: an expert opinion based on false assumptions, untested and unfalsifiable hypotheses, and an undisclosed methodology, cannot support settlement approval.

IV. The district court applied the wrong legal standard.

As discussed above, this settlement was unfair as a matter of law under Rule 23(e), and the district court committed multiple errors of law in approving it. But the district court committed yet another reversible error in reviewing the settlement. The district court worried about a return to "expensive litigation" and "uncertain results" ER20, but that is not grounds for relaxing the standards required by Rule 23(e). All settlements, by definition, avoid "expensive litigation" and "uncertain results," but that is not enough to satisfy Rule 23(e); it is legal error to apply a presumption of settlement fairness. *Roes*, 944 F.3d at 1049 & n.12. Yet that is what the district court did, erroneously shifting the burden off the proponents of the Settlement. Class counsel argued that Henderson had the burden of showing that the settlement was unfair (ER65) and the district court demanded that Henderson bear the burden of persuading the court that the deal was "clearly inadequate." ER20. This by itself was legal error: Rule 23 requires a settlement not be approved *unless* it is "fair, reasonable, and adequate." It is error to require a showing that a settlement is "clearly inadequate." No court applying the correct standard of law could approve this

settlement, and this Court should hold that it flunks Rule 23(e) as a matter of law, but, at a minimum, the district court applied the wrong standard in choosing to approve it.

Conclusion

Allen and *Koby* precluded settlement approval here as a matter of law, as do persuasive precedents like *Pearson*. Settlement approval must be reversed, and the parties must renegotiate a settlement that does not pay class counsel nearly 90% of the settlement benefits. At a minimum, remand is required for the district court to apply the correct standard of law.

Dated: April 3, 2020

Respectfully submitted,

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Statement of Related Cases
Under Circuit Rule 28-2.6

This Court previously rejected a Rule 23(f) challenge to class certification in *Briseño v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017) and *Briseño v. ConAgra Foods, Inc.*, 674 F. App'x 654 (9th Cir. Jan. 3, 2017).

Henderson appealed the district court's collateral order denying Rule 11 sanctions in Appeal No. 20-55068, which will be voluntarily dismissed next week.

Executed on April 3, 2020

/s/Theodore H. Frank
Theodore H. Frank

Certificate of Compliance
Pursuant to 9th Circuit Rule 32-1 for Case Number 19-56297

I certify that: This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 13,671 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 April 3, 2020.

/s/Theodore H. Frank
Theodore H. Frank

Proof of Service

I hereby certify that on April 3, 2020, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

/s/Theodore H. Frank