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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

IN RE CONAGRA FOODS, INC.	Case No. CV 11-05379-CJC (AGRx) MDL No. 2291 **CLASS ACTION**

<u>OBJECTION TO PROPOSED SETTLEMENT AND TO FEE REQUEST</u>

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INTRODUCTION

Conagra agrees that it will never manufacture a bottle of Wesson Oil that has "natural" on the label, and plaintiffs implausibly claim that this injunction is worth $27 million and justifies their $6.85 million fee request. But in economic reality, the value is nil: ***Conagra no longer manufactures Wesson at all.***

The injunction does *nothing* except in the unlikely future event defendant reacquires a product line it strategically ditched.

The most basic principles of class action settlement law require that class members—not class counsel—be the primary beneficiaries of a settlement. In this Settlement, plaintiffs' attorneys propose to award themselves $6.85 million, which is seven times as much as the entire class currently stands to receive in cash. This disproportionate fee request is protected by clear-sailing and kicker clauses, meaning that the Settlement contains all three indicia of self-dealing disfavored by the Ninth Circuit. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011).

Plaintiffs pretend otherwise and suggest that the fee request they bargained for is an ordinary "25%" of the fund, but this figure derives from farce. As part of their agreement, the parties agree that an injunction requiring Conagra to do *nothing* is worth $27 million. *See* Settlement Agreement and Release, Dkt. 652-1 ("Settlement") ¶ 8.2.4. Plaintiffs also rely on the purported expert testimony of Colin Weir, but it is premised on the wildly false assumption that "As a result of that injunction, consumers will continue to receive the full economic benefit of the removal of the Natural Claim from all Wesson Oils labels." Declaration of Colin B. Weir, Dkt. 652-4 ("Weir Decl.") ¶ 12. Operation of the injunction (let alone any benefit) first depends on the defendant *reacquiring a business it intentionally sold*. Although under *Koby v. ARS Nat'l Servs.*, plaintiffs bear the "burden of demonstrating that class members would benefit from the settlement's injunctive relief" (846 F.3d 1071, 1079 (9th Cir. 2017)), neither Mr. Weir nor plaintiffs explain why this completely speculative contingency will occur.

Class counsel may point to other factors to try and justify the misallocation of settlement proceeds, but none of these justify it. An injunction to obligate a defendant to continue doing what it was already doing has "no real value." *Id.* at 1080. When evaluating the fairness of a settlement and fee award, the amount that the class *actually* receives matters. *See, e.g., Allen v. Bedolla*, 787 F.3d 1218, 1224 & n.4 (9th Cir. 2015). Further, class counsel's high lodestar cannot justify a disproportionate fee—nor can the pre-settlement removal of "100% natural" from Wesson Oil labels in 2017. Rule 23(e) applies regardless, and the insulated, disproportionate fee request renders the settlement unfair under Rule 23(e).

Objector Henderson does not contend that the Settlement is not large enough in the aggregate. Perhaps a settlement of about $8 million is appropriate. But whatever the value, Ninth Circuit law requires that class counsel only take their fair share. They may not pretend that a $8 million settlement is really a $33 million settlement in order to justify such a disproportionate fee. The Settlement is unfair and should be rejected under Rule 23(e) because it impermissibly allocates the lion's share of the benefit to class counsel.

I. M. Todd Henderson is a member of the class and has standing to object.

Objector Professor M. Todd Henderson is a member of the proposed settlement class. *See* Declaration of M. Todd Henderson ("Henderson Decl.") ¶ 4. Henderson resides in Illinois, with address set forth in his declaration. *Id.* ¶ 2. Henderson intends to appear at fairness hearing scheduled October 7, 2019 through his *pro bono* attorney Theodore H. Frank of the Hamilton Lincoln Law Institute's Center for Class Action Fairness ("CCAF").

CCAF represents class members *pro bono* where class counsel employs unfair class action procedures to benefit themselves at the expense of the class. 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).[1]

[1] In spite of this successful track record, it has been CCAF's experience that class action attorneys often employ *ad hominem* attacks in attempting to discredit objections. The most common of these attacks are rebutted in the contemporaneously-filed Declaration of Theodore H. Frank ("Frank Decl.") ¶¶ 18-35.

Notably, Henderson is a professor of law and economics, torts, and corporate and securities law at the University of Chicago Law School. Prof Henderson has opined as an expert on behalf of class-action plaintiffs in cases involving corporate governance. In other cases, he has opined both in opposition to—and in support of—class action attorneys' fee requests. In this case, Prof. Henderson volunteers uncompensated as a public-minded class member.

To avoid doubts about his motives Prof. Henderson 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). Henderson brings his objection through CCAF in good faith to protect the interests of the class. He adopts and joins any objections (and any statements from government officials) regarding the Settlement and fee request that are not inconsistent with this one. This objection applies to all class members. The problems Henderson's objection identifies with the Settlement apply to members of every subclass. *See* *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1183 (10th Cir. 2002).

Objector Henderson also gives notice of his intent to appear at the fairness hearing through Theodore H. Frank.

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." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013). 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*, 737 F.3d at 1224.

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.*, 846 F.3d at 1079 (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 WL 6520138, at *4 (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) (cleaned up).

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 is not fair, reasonable, or adequate, violating Rule 23(e).

Class counsel negotiated a settlement that allows themselves to extract 88% of the settlement value to the attorneys and supports the starkly disproportionate fee request with an intelligence-insulting stipulation that an injunction requiring the defendant to do precisely nothing is worth $27 million. This is the "classic manifestation" of the collective action agency problem in class litigation. *In re Oracle Secs. Litig.*, 132 F.R.D. 538, 544 (N.D. Cal. 1990) (Walker, J.). Merely reducing the fee award cannot correct this imbalance, because counsel has insulated its negotiated fee through through clear sailing and kicker agreements, which ensure that if counsel doesn't get its requested $6.85 million, the money remains with the defendant. Such a cynical and self-dealing settlement should be rejected in its entirety.

A. 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; *see generally* Fed. R. Civ. P. 23(e)(2)(C)(iv) (requiring Court to consider "the terms of any proposed award of attorney's fees").

1. Class counsel's fee request currently represents 88% of the class benefit, reflecting a selfish settlement where class counsel is the primary beneficiary.

The first sign of self-dealing in this Settlement is counsel's receipt of a "disproportionate distribution of the settlement." *Bluetooth*, 654 F.3d at 947 (quoting *Hanlon*, 150 F.3d at 1021). As plaintiffs recognize, the benchmark for a reasonable award in the Ninth Circuit in a case alleging economic injury is 25% of the class benefit. *E.g.*, *id.* at 942; *HP Inkjet*, 716 F.3d at 1190.

Here, class counsel bargained for attorneys' fees of $6,850,000. *See* Settlement ¶ 6.1.1.1. As of July 19, 2019, most of the claims period has elapsed and only 70,745 claims have been filed, with a total value of $290,563.65. Fee Memo (Dkt. 662) at 16. The Settlement also provides $575,000 for claimants residing in Oregon and New York, for a total value to the class of $865,563.65. *Id.* The vast majority of class member claimants will receive $4.50 or less, although claimants in Oregon and New York will receive several times this amount.[2] This means that class counsel stands to receive more than 88% of the net settlement funds, if administrative costs are excluded—more than three times this Circuit's 25% benchmark. Even granting that additional claims are received by the August 22 deadline, attorneys' fees will likely outstrip class relief by nearly seven-fold.

Class counsel may argue (contrary to their fee motion, Dkt. 662 at 7) that the Settlement does not actually create a common fund. This makes no difference. "That the defendant in form agrees to pay the fees independently of any monetary award or injunctive relief provided to the class in the agreement does not detract from the need carefully to scrutinize the fee award." *Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003). A "defendant is interested only in disposing of the total claim asserted against it." *Id.* "The rationale behind the percentage of recovery method also applies in situations where, although the parties claim that the fee and settlement are independent, they actually come from the same source." *GMC Pick-Up*, 55 F.3d at 820-21. "[P]rivate agreements to structure artificially separate fee and settlement arrangements cannot transform what is in economic reality a common fund situation into a statutory fee shifting case." *Id.* at 821; *see also id.* at 820 (severable fee structure "is, for practical purposes, a constructive common fund"). "[I]n essence the entire settlement amount comes from the same source. The award to the class and the agreement on attorney fees represent a

[2] Many of the 70,745 class member claimants appear to have claimed the maximum number of bottles allowed without proof of purchase (30), because average number of bottles per claimant is slightly more than 27, each bottle worth $0.15. Dkt. 662 at 16. Class members in Oregon and New York will receive several times this amount because the Settlement provides an additional cash fund of $575,000 to be distributed *pro rata* to claimants in these states as compensation for the statutory damage claims these class members surrender in the Settlement, apparently not available to class members in the nine other states.

Objector takes no position on whether funding for the *de facto* subclass of Oregon and New York claimants is fair to other class members, like Henderson, who receive no dedicated fund for their claims. *See* Fed. R. Civ. P. 23(e)(2)(D) (requiring equitable intraclass treatment). While named plaintiffs exist from all 11 states, "intraclass equity" is also a "requirement" of any settlement under Rule 23(a)(4). *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 863 (1999). When disparate subgroups exist, separate counsel should be appointed to negotiate the competing interests of these subclasses. *Id.*

package deal." *Johnson v. Comerica*, 83 F.3d 241, 246 (8th Cir. 1996). "If an agreement is reached on the amount of a settlement fund and a separate amount for attorney fees" then "the sum of the two amounts ordinarily should be treated as a settlement fund for the benefit of the class, with the agreed-on fee amount constituting the upper limit on the fees that can be awarded to counsel." *Manual for Complex Litigation* § 21.71 (4th ed. 2008).

Plaintiffs argue that the Settlement is worth $27 million or $30.6 million based on the injunction. Plaintiffs cite respectively the parties' stipulation as to the injunction's future value and Mr. Weir's extrapolation of his prior regression hypothesizing a price discount that would have materialized after the label change in July 2017. But stipulated and imaginary settlement values are not what counts when evaluating fairness. "Cases are better decided on reality than on fiction." *Pampers*, 724 F.3d at 721 (cleaned up). The benchmark must be what class members *actually* receive. *Allen*, 787 F.3d at 1224 n.4 (zeroing in on the "economic reality").

Here, the future value of the injunction is zero because no realistic probability exists that defendant will ever have any obligation under the injunction. *Accord Koby*, 846 F.3d at 1079 (no sufficient showing "that class members were likely to face future [harm at the hands of defendant]"). As for the purported expert valuation of the Settlement, it has no more probative value than the accuracy of its assumptions, which are simply false. The future injunction is speculative, and the July 2017 label change is not a Settlement benefit, and defendant denies it was caused by this litigation (and anyway, Mr. Weir does not demonstrate actual savings due to this prior label change).

a. The injunction likely never requires Conagra to do anything.

The Settlement provides a speculative, nearly illusory, injunction that only becomes operative in the event that Conagra reacquires a business that it purposefully sold. "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." Settlement ¶ 3.3.1. The injunction only becomes operative if two conditions are true in the future: (1) "Conagra reacquire the Wesson Oil brand" and (2) the FDA and federal government do *not* "permit[] use of a 'natural' claim on a product containing oil derived from genetically engineered seed stock." *Id.* ¶ 3.3.1-2. Courts have seen and rejected this type of illusory injunction. It is a proverbial "dam holding back" a flood that does not exist. *Grok Lines v. Paschall Truck Lines*, 2015 WL 5544504 (N.D. Ill. Sept. 18, 2015). Another court rejected as "quixotic" "the argument that there is a benefit from reformation of outdated insurance policies, under which no claims can be made." *Casados v. Safeco Ins. of Am.*, 2015 WL 11089527, 2015 U.S. Dist. LEXIS 193830, at *36 (D.N.M. Nov. 6, 2015).

No reason exists to believe Conagra ever reacquires Wesson Oil. Indeed, Conagra would have sold the business 18 months earlier in 2017 to J.M. Smucker except the Federal Trade Commission raised antitrust concerns about the sale.[3] About divesting Wesson, Conagra's CEO explained "We continue to reshape our portfolio and focus our resources on priorities that support Conagra's business strategy and drive value creation for shareholders." *Id.* The sale is part of a broader business strategy initiated in 2015 when activist investors moved for the appointment of the current CEO, who then spun off low-margin private label, ingredient, and frozen potato businesses, while acquiring several new brands like Frontera.[4] Wesson Oil does not fit into Conagra's current business plans, and was passed over for internal investment even before the failed 2017 sale. *Id.* Nothing in the record suggests that Wesson Oil will ever be reacquired, and therefore no reason exists that the injunction will ever become operative.

A speculative, hypothetical injunction necessarily has no value to class members. *Koby*, 846 F.3d 1071.[5]

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[3] *See* Monica Watrous, *Conagra finds another buyer for its Wesson oil brand*, FOOD BUSINESS NEWS (Dec. 19, 2018), available online at: https://www.foodbusinessnews.net/articles/13053-conagra-finds-another-buyer-for-its-wesson-oil-brand.

[4] *Conagra offloads Wesson Oil as it works toward turn around*, OMAHA WORLD-HERALD (May 31, 2017), available online at: https://www.omaha.com/eedition/sunrise/articles/conagra-offloads-wesson-oil-as-it-works-toward-turn-around/article_e9bc799b-3ccf-5c19-baf5-9fab5f4b684e.html.

[5] And even if, *arguendo*, the injunction provided some modicum of indeterminate value, it would be an abuse of discretion to include an estimate of that value in the common fund for purposes of awarding fees. *Staton*, 327 F.3d at 946, 974.

b. Mr. Weir's testimony constitutes circular *ipse dixit*.

Class counsel also relies on the supposed expert testimony of Mr. Colin Weir to allegedly value the injunction, but this analysis is fatally flawed because it simply *assumes* the injunction causes or prolongs the label change. In outlining his assumptions, Weir says:

> I have also been informed that the parties have reached a settlement that, among other relief, provides for the entry of an injunction ordering that Wesson Oils will not be advertised, marketed, or sold as "natural" unless the FDA issues express guidance or a regulation, or federal legislation is enacted, authorizing permitting use of a "natural" claim on a product containing processed oil derived from genetically engineered seed stock. **As a result of that injunction, consumers will continue to receive the full economic benefit of the removal of the Natural Claim from all Wesson Oils labels** for at least the foreseeable future, and possibly in perpetuity.

Weir Decl. (Dkt. 652-4) ¶ 12 (emphasis added).

Mr. Weir then concludes that removal of the "100% natural" label from Wesson Oil is worth "approximately $11.54-million per year" because the retail price of the oils supposedly would drop by this amount—about 40 cents per bottle—due to elimination of the hypothesized price premium attributed to "100% natural." *Id.* at ¶¶ 24-25. Weir does not attempt to test whether any price drop actually occurred, even though he has access to at least Conagra's wholesale sales figures.[6] But whatever the merits of Weir's hedonic regression, it is built on the demonstrably false assumption that Wesson Oil's packaging will be affected "as a result of the injunction." Because *nothing* results from the injunction, this Settlement value is in fact nil.

Plaintiffs then extrapolate from Mr. Weir's tenuous testimony and suggest an alternative valuation for the Settlement's alleged value as $30,600,000. Plaintiffs calculate the supposed annual consumer price benefit from July 1, 2017 to February 25, 2020. *See* Kelston-Levitt Decl.

[6] Weir's untested hypothesis that retailers would reduce the price of Wesson Oil to compensate for its less desirable label seems unlikely given that "Conagra's wholesale sales data show a 3.67% increase in case sales of Wesson Oil in its Fiscal 2018 results." Weir Decl. ¶ 28. If Wesson's retail price were really eroding, increasing sales seem unlikely because retailers would not buy *more* cases of a product at thinner margins. If the retail price of Wesson really declined, retailers would marginally shift shelf space (and sales) to competing oils.

(Dkt. 652) ¶ 16. But the hypothesized price drop of Wesson Oils—generously assuming it exists at all—is not a *Settlement* benefit. Consumers achieve the same dubious benefit whether the Settlement is approved or rejected *in toto*. The successor to Wesson Oil, Richardson International, is not bound by the injunction at all, and has no obligation to hew to the post-July 2017 labelling change.[7]

Nor was the July 2017 label changed "catalyzed" by the litigation. This is shown by the confidence that class counsel predicts it is "highly unlikely that Richardson International will resume labeling the products as 'natural' without affirmative legislative or regulatory authorization in the U.S." *Id.* ¶ 14. Richardson has no obligations under the Settlement—so the high unlikelihood of reversion must be chalked up to business considerations like market conditions, the risk of further litigation, and the regulatory uncertainty. *See Koby*, 846 F.3d at 1080 (finding no class benefit in voluntary changes defendant made during the litigation, even where those changes were codified in the settlement's injunction).

c. Disproportionate fees render the entire Settlement unfair.

A fee award that vastly exceeds the class relief is disproportionate and renders the settlement unfair. *E.g.*, *Bluetooth*, 654 F.3d at 945 (vacating approval where fees amounted to more than 83% of the constructive common fund); *Pampers*, 724 F.3d 713 (vacating settlement where fees consumed $2.7 million of the $3.1 million constructive common fund value); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 781 (7th Cir. 2014) (69% fee is "outlandish"). Indeed, the Ninth Circuit has even stated that an attorneys' fee of 38.9% would be "clearly excessive." *Dennis*, 697

[7] The alleged $11.54 million annual savings is also about four times the amount of damages Mr. Weir reckons could be collected if the litigation were successful. Only 27.2% of the alleged premium derives from the allegedly misleading GMO-free meaning of "natural." Weir Decl. ¶ 34. This means 72.8% of the hypothesized price premium would be legitimate—deriving from consumers' preference for products "'free of synthetic chemicals' or 'free of preservatives,'" which plaintiffs do not deny Wesson Oil is. *In re Conagra Foods, Inc.*, 302 F.R.D. 537, 551 (C.D. Cal. 2014). To the extent that some class members prefer oils free of preservatives switch to more expensive brands due to the July 2017 label change, these class members have been *harmed* by the change because Wesson continues to be free of preservatives. To be clear, the settlement provides no value as a matter of law, and the untested hypothesized price premium is furthermore unreliable and cannot justify any attorneys' fee award—but even if Mr. Weir's legally baseless theories were entirely credited it's not clear class members *benefited* from the removal of a label claim which derived 72.8% of its perceived value from accurate meanings possibly helpful to consumers.

F.3d at 868.

The relevant ratio for determining attorneys' fees is "(1) the fee to (2) the fee plus what the class members received." *Pearson*, 772 F.3d at 781 (cleaned up).[8] Thus excluding administrative costs, this leaves class counsel with over 85% of the total settlement fund.[9] Class action settlements may not confer such 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 (citation and internal quotation omitted) (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).

Negotiating disproportionate fees suggests self-dealing, which infects the entire settlement, not just the fee request. *Bluetooth*, 654 F.3d at 945-46. Class counsel's 88% fee request is a *Bluetooth* sign of self-dealing, and their efforts to disguise this fact with an audacious $27 million valuation of the settlement ignores binding Ninth Circuit precedent requiring that "the attorney's fee award [be] examined in terms of 'economic reality.'" *Allen*, 787 F.3d at 1224 & n.4 (internal citation and quotation omitted).

The reality here is that the class is receiving less than $800,000; the ghostly $27 million that Conagra claims to have provided is a ruse to justify attorneys' fees.

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[8] *See In re Sony PS3 "Other OS" Litig.*, No. 10-cv-01811-YGR, 2017 WL 424716 at *1 (N.D. Cal. Jan. 31, 2017) (rejecting constructive common fund settlement that would have sustained counsel with $2.25 million fee while absent class member claimants would have obtained less than 10% of that total); *Banks v. Nissan N. Am., Inc.*, No. 11-cv-2022-PJH, 2015 WL 7710297 at *13 (N.D. Cal. Nov. 30, 2015) (characterizing constructive common fund settlement that allowed class counsel to obtain 80% of the gross settlement as the "tail wagging the dog"); *Otey v. Crowdflower, Inc.*, No. 12-cv-05524-JST, 2014 WL 1477630 at *9 (N.D. Cal. Apr. 15, 2014) (finding that constructive common fund fees of "74.3 of the total settlement payment … grossly exceed the 25% benchmark"). *See also Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014).

[9] While the Ninth Circuit gives courts the discretion to calculate the percentage-of-recovery on either the gross or net fund, this Court has since utilized the net fund methodology, reasoning that there is "no principled reason to calculate a fee" by giving counsel a commission on their costs. *Compare In re Online DVD*, 779 F.3d 934 (9th Cir. 2015) *with Kmiec v. Powerwave Tech.*, No. 8:12-cv-00222-CJC-JPR, 2016 WL 5938709, at *5 (C.D. Cal. Jul. 11, 2016).

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

The Settlement includes a "clear sailing" agreement, under which "Conagra shall take no position with respect to the Fee and Expense Application" for fees of $6.85 million. Settlement ¶ 8.1.1.2. 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.

Moreover, the Settlement segregates attorneys' fees from class recovery with a "kicker" provision. That is, any reduction in fees reverts, or is "kicked back," to the defendant *See* Settlement ¶ 8.1.1.3 ("In the event the Fee and Expense Award is … reduced for any reason, the relevant amount of the overpayment of attorneys' fees and costs paid by Conagra shall be returned to Conagra"). These clear sailing and kicker provisions ensure that "fees not awarded revert to the defendant[]" rather than the 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").

The "kicker," in addition to being an indicia of unfairness under *Bluetooth*, also makes the Settlement substantively unfair. The "economic reality is that a settling defendant is concerned only with its total liability." *Pampers*, 724 F.3d at 717 (cleaned up); *accord Staton*, 327

F.3d at 964. This Settlement demonstrates that defendant is willing to pay at least $8 million to make this case go away. Even if this were a fair number, the kicker makes it impossible for this Court to give the class the relief *that defendant is willing to pay*. There is "no apparent reason the class should not benefit from the excess allotted for fees." *Bluetooth*, 654 F.3d at 949. It would be reversible error to approve a fee of $6.85 million out of, say, a $8.1 million common fund (excluding administrative costs, and generously assuming the number of claims *doubles* by the deadline): that would be "clearly excessive" under this Circuit's 25% benchmark. *Dennis*, 697 F.3d at 868. If the Court instead reduces the fee, it cannot pass that money on to the class; that money reverts to the defendant. The parties have prevented the Court from returning the fees and class relief to their natural equilibrium.

Objector does not contend that the Settlement is necessarily too small. Ninth Circuit law simply forbids counsel from diverting most of a settlement's value to themselves. Perhaps $8 million would be an appropriate valuation of the case. But if that's so, fairness under Rule 23(e) requires that class members—not attorneys—be the "foremost beneficiaries" of that recovery. *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 179 (3d Cir. 2013). Counsel may not game the system by agreeing to illusory injunctions and a claims process that limits class recovery while providing royal treatment for attorneys' fees.

B. There is no justification for class counsel's disproportionate fee, so the Settlement must be rejected under rule 23(e).

Because class counsel's fee stands to exceed class recovery by a factor of six or seven, 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. "If fees are unreasonably high, the likelihood is that the defendant obtained an economically beneficial concession with regard to the merits provisions, in the form of lower monetary payments to class members or less injunctive relief for the class than could otherwise have obtained." *Staton*, 327 F.3d at 964; *accord Bluetooth*, 654 F.3d at 947. Class counsel may resort to any of the following to rationalize their fee request: 1) the injunction; 2) their high lodestar; or 3) the supposed catalysis of Conagra's July 2017 change to Wesson packaging. None justify approval where class counsel has agreed to limit class recovery and appropriate most pecuniary benefit for themselves.

1. Hypothetical, illusory injunctive relief cannot justify a disproportionate fee.

The proponents of a settlement must bear "the burden of demonstrating that class members would benefit from the settlement's injunctive relief." *Koby v. ARS Nat'l Servs.*, 846 F.3d 1071, 1079 (9th Cir. 2017); *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 unlikely to ever become operative. Based on controlling Ninth Circuit precedent, the parties cannot rely on this prospective, hypothetical, nigh-illusory injunctive relief to justify class counsel's disproportionate fee. Plaintiffs cannot show the injunction has *any* value, let alone a value ascertainable enough to justify a percentage fee award based upon it.

Plaintiffs may argue that while the injunction going forward provides no incremental relief, the revised packaging of July 2017 has somehow already provided millions of relief, but there are several problems with this theory. First, because Conagra already made this change, the injunctive relief does not provide even hypothetical incremental value to the class—it is duplicative. If a defendant agrees to stop doing something it already stopped, the contractual consideration to class members for waiving their claims is essentially zero. *See* Howard Erichson, *Aggregation as Disempowerment*, 92 NOTRE DAME L. REV. 859, 874-76 (2016); *Koby*, 846 F.3d at 1080; *Staton*, 327 F.3d at 961; *In re Subway Footlong Litig.*, 869 F.3d 551, 557 (7th Cir. 2017). 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." *Koby*, 846 F.3d at 1080 (injunction is "of no real value" where "it does not obligate [defendant] to do anything it was not already doing"). When valuing a settlement, it is only the "*incremental* benefits" that matter, not ones that preceded settlement. *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 286 (7th Cir. 2002) (emphasis in original); *Hofmann v. Dutch Llc*, No. 3:14-cv-02418-GPC-JLB, 2017 WL 840646, at *7 (S.D. Cal. Mar. 2, 2017) (refusing to credit injunctive relief when the defendant had voluntarily revised its labeling before the settlement). Second, Conagra entirely disputes the premise. "Conagra contends its decision to institute label and marketing changes in July 2017 did not relate in any way to this litigation and therefore does not confirm or agree with Plaintiffs' valuation over and above the $27,000,000 agreed value of Injunctive Relief [based on alleged future value]." Dkt. 661 at 3 n.5.

Conagra's willingness to include "$27 million" injunctive relief and class counsel's willingness to accept it, are emblematic of the perverse class-action incentive problems that courts must guard against. *See, e.g.,* Erichson, 92 NOTRE DAME L. REV. at 872-78 (discussing "spurious injunctive relief"). Conagra incurs no cost by agreeing to an injunction forbidding it from doing something in a hypothetical alternate universe, and which it already ceased voluntarily two years ago back when it did own Wesson Oil. And the class obtains no value. The parties' stipulation to value the injunction at $27 million only confirms that injunctive relief value is "easily manipulable by overreaching lawyers seeking to increase the value assigned to a common fund." *Staton*, 327 F.3d at 974.

Plaintiffs argue that the presence of a mediator makes their settlement presumptively fair (Dkt. 661 at 18),[10] but this misunderstands the difference between self-dealing and explicit collusion. *See Bluetooth*, 654 F.3d at 948 (presence of neutral mediator not dispositive). To be lawyer-driven and self-dealing, a settlement need not be actually collusive. Erichson, 92 NOTRE DAME L. REV. at 871 (distinguishing mutual self-interest from collusion and "nefarious conspiracy"). 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." *Bluetooth*, 654 F.3d 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

[10] While this objection is focused on unfairly disproportionate fees (*Bluetooth*), plaintiffs make questionable claims about several *Churchill* factors, which are also considerations for approving a settlement. The purported "reaction of the class" is meaningless when no direct notice was provided and hurdles to object and opt-out were imposed. *See GMC Pick-Up*, 55 F.3d at 813; *see also* Section IV, *infra*. Further, mailing CAFA notice does not constitute the "presence of a governmental participant," and is especially absurd given that government reaction to the settlement seems to have been less than enthusiastic. Dkt. 661 at 17 ("Should any of them ultimately elect [challenged this settlement] … the parties herein will respond appropriately.").

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. The typical defendant is indifferent as to how its settlement expense is allocated between the class and class counsel. *E.g., Staton*, 327 F.3d at 964; *Pampers*, 724 F.3d at 717-18. It just wants a global release. *See* Erin Sheley & Theodore H. Frank, *Prospective Injunctive Relief and Class Settlements*, 39 HARV. J. L. & PUB. POL 769 (2016). Mediators are servants of the named plaintiffs; they "are masters in the art of what is negotiable." *Kakani v. Oracle Corp.*, No C 06-06493 WHA, 2007 WL 179377, 2007 U.S. Dist. LEXIS 47515, at *31 (N.D. Cal. Jun. 19, 2007). Courts, by contrast serve as the fiduciaries of absentees, and so must be vigilant of self-dealing where class counsel steers most settlement value to themselves.[11]

In reply, plaintiffs might attempt to propose an entirely new basis for its fee: that it's made millions of dollars available to class members who purchased Wesson Oils in the past, but this argument would similarly fail. Such hypothetical claims are ephemeral and irrelevant. When evaluating the fairness of a settlement and fee award, the amount that the class *actually* receives matters. *Allen*, 787 F.3d at 1224 & n.4.

Here, class counsel has negotiated for itself clear sailing for $6.85 million in attorneys' fees premised on an injunction that requires defendant to do absolutely nothing, which defendant laughably agreed to be worth $27 million. The fee request constitutes seven times as much relief as the whole class will likely receive under the Settlement, and if the court awards a penny less, Conagra gets to keep the difference. If this settlement is not self-dealing, no settlement is.

[11] Plaintiffs also contend that the separate negotiation of "attorneys' fees, expense reimbursement, and service awards" supports their fee request. Dkt. 662 at 9. But this is also a farce. In the Ninth Circuit, defendant would be able to calculate the "benchmark" 25% fee request given that the stipulated $27 million value for the injunction constitutes the bulk of the alleged relief. Indeed, the clear sailing fee request is just a little above that mark—25.2%. Therefore, parties effectively penciled in the intended attorneys' fee request when they negotiated the phony baloney value of an injunction that requires nothing of the defendant.

2. Lodestar hours do not control the fairness of allocation; the fee must be proportionate to the class' recovery.

Class counsel appeals to the fact that the fee award is below their lodestar in order to justify a fee award currently over 88% of the constructive common fund. Dkt. 662 at 9-10. But a high lodestar (i.e. a fractional lodestar multiplier) cannot substitute for making sure that the fee award does not dwarf the actual recovery by the class. *See, e.g.*, *HP Inkjet*, 716 F.3d at 1182 ("[A]lthough 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."). "[H]ours can't be given controlling weight in determining what share of the class action settlement pot should go to class counsel." *Redman*, 768 F.3d at 635. The reason for that is basic fairness. "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." *Keirsey v. Ebay, Inc.*, No. 12-cv-01200-JST, 2014 WL 644738, at *3 (N.D. Cal. Feb. 18, 2014). When injunctive relief "may be largely or even entirely worthless" then "even a modest award of attorneys' fees … is excessive." *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 721 (7th Cir. 2016).

While the ultimate outcome of the case may be risky, if it were litigated, class counsel has earmarked nearly all of the settlement value for itself. Risk may justify a smaller fund, but not a lopsided allocation. Thus, numerous cases have rejected efforts to excuse a disproportional fee simply because counsel only seeks a fraction of its lodestar. *See, e.g.*, *Bluetooth*, 654 F.3d at 943 (reversing even though lodestar "substantially exceed[ed]" fee award); *HP Inkjet*, 716 F.3d at 1177 (fee award not justified merely because it was less than one third of the base lodestar); *Baby Products*, 708 F.3d at 180 n.14 (lodestar multiplier of 0.37 not "outcome determinative"); *Kmiec v. Powerwave Tech.*, 2016 WL 5938709 (C.D. Cal. Jul. 11, 2016) (Carney, J.) (large lodestar "is not a compelling reason to depart from the Ninth Circuit's benchmark, particularly absent evidence of exceptional risk or difficulty"); *Banks v. Nissan N.*

Am., Inc., 2015 WL 7710297 (N.D. Cal. Nov. 30, 2015) (0.76 fractional multiplier doesn't justify fee that is 80% of the constructive common fund).

3. The proposed Settlement, with its disproportionate fee request, cannot be rationalized under catalyst theory.

Plaintiffs make passing references to being the alleged "catalyst" for Conagra's decision to change Wesson Oil's packaging in July 2017. Dkt. 661 at 12; Dkt. 651 at 11. But plaintiffs' poorly-sketched catalyst theory cannot salvage a settlement that provides seven times as much to attorneys as their purported clients.

In the first place, plaintiffs have not shown they catalyzed the label change. Conagra explicitly "denies this litigation contributed in any way to its decision to drop the 'Natural' claim from Wesson Oil." *Id.* Class counsel inadvertently supports Conagra's position by predicting it "highly unlikely that Richardson International will resume labeling the products as 'natural' without affirmative legislative or regulatory authorization in the U.S." Kelston-Levitt Decl. (Dkt. 652) ¶ 14. That Richardson International would avoid using the term "natural" even though it is unencumbered by any injunction from this litigation suggests that Conagra really did change its label due to regulatory uncertainty or other business reasons.[12]

But even if Conagra *did* change its label due to this litigation, fee shifting and catalyst theory do not provide get-out-of-Rule-23(e) cards. Class-action settlements require judicial scrutiny under Rule 23 because they implicate the rights of absent class members. Here, the Settlement includes a release of all class members' claims, yet they will receive the same "relief" as any consumer. To protect absent class members, and the integrity of the class system, the requirements of Rule 23(e) apply even where the class's claims arise under a statute with a fee-shifting provision. *See*, *e.g.*, *Koby,* 846 F.3d at 1081 (protecting class members from attorney-

[12] Plaintiffs cite the Declaration of Larry Kopald, whose rank speculation about Conagra's decision making has been proffered as expert testimony. Dkt. 661-1. As with the Weir report, Kopald incorrectly testifies "this settlement caused" the "100% natural" claim to be removed. *Id.* at 8. Although he concludes that Richardson would not revert to the old label based on the maxim "Fool me once, shame on me. Fool me twice, lose market share," *id.*, Kopald also recounts business reasons that both Richardson and Conagra would have removed "natural" on a product—that consumers allegedly increasingly see the terms as inconsistent with GMO-derived products, and to prevent further litigation. *Id.* at 6.

driven settlement of FDCPA litigation even though FDCPA provides for fee-shifting under 15 U.S.C. § 1692k); *Crawford v. Equifax Payment Servs.*, 201 F.3d 877, 882 (7th Cir. 2000) (same); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948 (7th Cir. 2006) (same; even though the FCRA provides for fee-shifting); *cf. Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001) (repudiating catalyst theory even for vindication of civil rights claims).

Attorneys' fees in class action settlements must abide with Rule 23. This is due to 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); *see also Staton v. Boeing Co.*, 327 F.3d 938, 967 n.18 (9th Cir. 2003) (endorsing *Brytus* and *Florin*).

Any other rule would require courts to award up to lodestar in any settlement involving a fee-shifting statute, without regard to what was actually achieved. *Contra Bluetooth*, 654 F.3d 935 (reversing even though fee award was substantially less than lodestar and case was brought under state laws permitting fee shifting). Even if, *arguendo*, fee-shifting statutes could override Rule 23(e)'s requirement of proportionality in settlements, the Settlement's lack of relief precludes fee-shifting. The proposed judgment is illusory and would not even qualify plaintiffs as prevailing parties.

IV. The Settlement unnecessarily burdens objectors, providing further indication that the Settlement is unfair and should not be approved.

"One hallmark of a reasonable settlement agreement is that it makes participation as easy as possible, whether class members wish to make a claim, opt out, or object." *McClintic v. Lithia Motors*, No. C11-859RAJ, 2012 U.S. Dist. LEXIS 3846, at *17 (W.D. Wash. Jan. 12, 2012). Here, the settling parties created three unnecessary and burdensome objection procedures calculated to discourage objections. *First*, the Settlement requires objections to contain the objecting class member's signature even if they are represented by an attorney. *See* Settlement ¶ 5.4.2. This provision is contrary to Federal Rule of Civil Procedure 23(c)(2)(B)(iv), which provides that a class member "may enter an appearance through an attorney if the member so desires," and 28 U.S.C. § 1654, which allows individuals to appear and conduct their cases through counsel.

Second, the Settlement requires that objections include a list of "previous objections that the Class Member [and his or her counsel] has filed in class action settlements in the past five years and the results of those objections (including any settlements that were reached concerning his or her objection)." *Id.* Such requirement is ineffective at preventing bad-faith objectors but merely creates an additional hurdle for good-faith objectors to jump through. *See Trabakoolas v. Watts Water Tech., Inc.,* No. 3:12-cv-01172-WHO (EDL) (Dkt. 276), at *4 (N.D. Cal. Feb. 14, 2013) (excising from class notice the requirement to list past suits in which the objector or his attorney has objected); *Navistar Maxxforce Engines, Mktg., Sales Practices, and Prods. Liab. Litig.*, 14-cv-10318, Dkt. 642 (N.D. Ill. Jun. 7, 2019) (similar); *see generally* Federal Judicial Center, Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide, 5 (2010), available at https://www.fjc.gov/sites/default/files/2012/NotCheck.pdf (last visited August 5, 2019) (directing courts to avoid notice language that places "burdensome hurdles" for "free exercise of rights, such as onerous requirements to submit a 'satisfactory' objection or opt-out request").

Third, the long-form notice requires class members to send copies of the objection to four different addresses, even if the objection is filed with the court and served through ECF.

Settlement ¶ 5.4.1. This requirement is unnecessary and burdensome on the clerks who will have to grapple with an unnecessary paper mailing (either filing it redundantly to the docket or correctly perceiving it to be a verbatim paper copy needlessly required by settling parties).

Henderson has complied with all of these rules because "[a]ny objection that fails to satisfy the requirements of this Section … shall be deemed void and waived unless otherwise ordered by the Court." *Id.* at ¶ 5.4.3. Based on the inclusion of these onerous procedures, this court should infer that the parties wished to undermine the autonomous decisions of class members, which serves as yet another indicator that the Settlement is unreasonable. At a minimum, the Court should assign no weight to the low number of objections. *Cf. In re Chiron Corp. Sec. Litig.*, No. C-04-4293 VRW, 2007 WL 4249902 at *10 (N.D. Cal. Nov. 30, 2007) ("Frustrating the settlement is exactly what class members are entitled to do, if they think the settlement is not fair. The class' 'frustration rights' should not themselves be frustrated.").

Even with superior notice, and even when a settlement is objectionable as this one is, class members rationally rarely object to class action settlements. It is "naïve" to infer class approval from a low objection rate." *Redman*, 768 F.3d at 628. Moreover, "where notice of the class action is, again as in this case, sent simultaneously with the notice of the settlement itself, the class members are presented with what looks like a fait accompli." *Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 680-81 (7th Cir. 1987). "[T]he absence or silence of class parties does not relieve the judge of his duty and, in fact, adds to his responsibility." *Amalgamated Meat Cutters & Butcher Workmen v. Safeway Stores, Inc.*, 52 F.R.D. 373, 375 (D. Kan. 1971).

The Court should draw no inference in favor of the settlement from the raw number of objections. *GMC Pick-Up*, 55 F.3d at 812-13. "One good objector may be worth many frivolous objectors in ascertaining the fairness of a settlement." *Richardson v. L'Oreal USA, Inc.*, 991 F. Supp. 2d 181, 205 (D.D.C. 2013).

CONCLUSION

This court should deny final approval of the settlement and the motion for attorneys' fees.

Dated: August 6, 2019

Respectfully submitted,

/s/ Theodore H. Frank

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PROOF OF SERVICE

I hereby certify that on this day I electronically filed the foregoing Objection using the CM/ECF filing system thus effectuating service of such filing on all ECF registered attorneys in this case.

DATED this 6th day of August, 2019.

/s/ Theodore H. Frank
Theodore H. Frank