UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No.: 1:20-cv-23564-MGC

DAVID WILLIAMS and CAROLL ANGLADE, THOMAS MATTHEWS, MARTIZA ANGELES, and HOWARD CLARK, *on behalf of himself and all others similarly situated*,

Plaintiffs,

v.

RECKITT BENCKISER LLC and RB HEALTH (US) LLC,

Defendants.

Theodore H. Frank,

Objector.

OPPOSITION OF THEODORE H. FRANK TO DEFENDANTS' MOTION TO STRIKE THE SUBMISSIONS OF THEODORE H. FRANK AND TRUTH IN ADVERTISING, INC.

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INTRODUCTION

Motions to strike are "disfavored due to their drastic nature and are often considered time wasters." *Schmidt v. Wells Fargo Bank, N.A.*, 2020 WL 1703801, 2020 U.S. Dist. LEXIS 61779, *3 (M.D. Fla. Apr. 8, 2020). Defendants' motion to strike is both a "time waster" and frivolous on its face. It relies on false speculation and unsubstantiated accusations, mischaracterizations of arguments that are supported by law and FDA Guidance as his personal "expert testimony," and a tunnel focus solely on the substantive merits of the labeling claims rather than the broader Rule 23 question of whether the change in labeling brought about by the injunctive relief offers any benefit to the class. Defendants even misleadingly rely upon a district-court case decision that was overruled by a higher court.

As Mr. Frank stated in his declaration (Dkt. 75-1 ¶ 4) filed with his objection (Dkt. 75), he purchased Neuriva during the class period for *personal consumption*. This sworn statement didn't stop defendants, who conducted no discovery or inquiry, from baselessly accusing Frank of perjury, claiming that he did not buy Neuriva for personal use but instead "for the sole purpose of attempting to object to the Settlement." Mot. 1. In fact, Frank's purchase of Neuriva was consistent with his routine practice of taking both prescription and over-the-counter nootropics; he personally used the product. *See* Supplemental Declaration of Theodore H. Frank ("Supp. Frank Decl.") ¶¶ 9-12. This fact undercuts defendants' entire argument that Frank lacks Article III standing because he "designed to manufacture an injury." Mot. 1.[1]

Further, defendants argue that because Frank has disavowed any future intent to purchase Neuriva he therefore could not benefit from the injunctive relief component of the settlement. This concedes part of Frank's objection: The injunctive relief provided by the settlement is worthless to the many class members who will not purchase Neuriva in the future. To be sure, it is worthless as a matter of substance to all class members regardless of their future purchase. The Court therefore should not include the injunction in its evaluation of settlement fairness or plaintiffs' attorneys' fee

[1] On August 17, 2021, defendants filed a Notice of Withdrawal of Section I of Defendants' Motion to Strike in response to Mr. Frank's counsel's representation "that Mr. Frank did not purchase Neuriva with the intent to object to the Settlement." Dkt. 104 at 1. Because jurisdiction cannot be waived, and to protect against any possible withdrawal of the withdrawal, Frank responds to the motion in full.

request. Defendant's remaining argument in this vein are nonsensical. There is no requirement in the class definition that an objection challenge an aspect of the settlement that is beneficial to the objector. Nor would Rule 23 permit such an oxymoronic limitation. Again, Frank's objection argues that he should not be forced to release his claims in exchange for worthless injunctive relief when class counsel has structured the settlement to benefit themselves at the class's expense. Class members' Rule 23 objection rights would be undercut if they lost the right to object to problematic settlements that favor the attorneys and parties over the class members; if a class member won't benefit from the "consideration" for which she is releasing her claim against the defendant, of course she should be able to object. *See, e.g., Kim v. Allison*, 2021 WL 3627260, __F.4th__ (9th Cir. Aug. 17, 2021) (upholding objection that attacked, *inter alia*, injunctive relief that could not benefit the class); *cf. also Eubank v. Pella Corp.*, 753 F.3d 718, 729 (7th Cir. 2014) (calling similar motion contesting standing of class member protesting the settlement did not permit him to file a claim "frivolous"). Otherwise, class members would is release their claims for little to nothing in return and without any due process right to complain about that mistreatment. Here, a renegotiated settlement that reallocates the settlement fund to properly prioritize class relief would "actually benefit the objector" and indeed other class members.

Frank's objection identifies obvious deficiencies in the parties' argument that the labeling change benefits the class. These deficiencies are readily understood by and accessible to laypersons. Frank did not purport to be an expert offering his own observations and evidence for the Court to consider. Rather, through legal argument he identified clear problems with the studies proffered by defendants and undertaken by the very doctors and scientists that defendants claim are more capable assessing these issues. It doesn't take an expert or a doctor or scientist to recognize that problems with the injunctive relief, or that the labeling claims are misleading both in their original and revised forms. Frank's critique was based on readily accessible FDA Guidance and common sense, rather than any independent opinion of the attorneys purporting to act as experts. His objection therefore is not subject to Federal Rule of Evidence 702 or *Daubert*.

Frank discussed the deficiencies with defendants' studies under FDA Guidance in his objection to show how the settlement replaces one claim ("clinically proven") with another that is no less fraudulent ("clinically tested" and "shown"). This is a sub-issue in the more relevant inquiry: Does

the settlement's injunctive relief provide *any* benefit to the class? The answer to that question—which Frank will discuss in more detail in his supplemental filing on September 13—is clearly "no," due to the lack of any material difference in how consumers understand those terms. In any event, defendants provide no sound basis for striking Frank's critique of their studies, which they can and did address through briefing.

In addition to this substantive response to the motion, the Court ordered Frank to list any cases in which any court in the past ten years has entered an order striking objections or submissions from Frank, the Center for Class Action Fairness ("CCAF"), or Hamilton Lincoln Law Institute ("HLLI"); whether any court has sanctioned Frank, CCAF, or HLLI; and any commendations by a court with respect to Frank, CCAF, and HLLI. Frank sets forth this requested information in his supplemental declaration filed in connection with this opposition.

ARGUMENT

I. Objector Frank is an aggrieved class member with standing to object to the settlement.

A. Frank has standing to object to the settlement.

Defendants' mistakenly claim that Frank invokes the jurisdiction of this court. In fact, the *settling parties* require the jurisdiction of the court to seek "court approval of [a] proposed class action settlement[]." *See Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019); *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 924 (11th Cir. 2020) (*en banc*). The ability of objecting class members to challenge settlement approval, by contrast, "does not implicate the jurisdiction of the courts under Article III of the Constitution." *Devlin v. Scardelletti*, 536 U.S. 1, 6-7 (2002). Consequently, he "needs only a procedural vehicle with which to place his arguments before the district court, which is provided by Federal Rule of Civil Procedure 23[(e)(5)(A)]." *Stetson v. Grissom*, 821 F.3d 1157, 1163 (9th Cir. 2016) (rule renumbered by 2018 amendments). "As a member of the class an objector … necessarily has an interest in the settlement that creates a "case or controversy" sufficient to satisfy the constitutional requirements of injury, causation, and redressability." *Berni v. Barilla S.p.A.*, 964 F.3d 141, 145 (2d Cir. 2020) (cleaned up). As *Berni* illustrates, an objecting class member has standing to object in cases arising from allegedly misleading and fraudulent labeling as well as any other type of class action.

This legal principle is set forth clearly in Rule 23. In relevant part, Rule 23(e)(5)(A) provides that "[a]ny class member may object to the proposal if it requires court approval under this subdivision (e)"—just as the request for the court's approval of the proposed settlement here does. "When used (as here) with a singular noun in affirmative contexts, the word "any" ordinarily refers to a member of a particular group or class without distinction or limitation in this way implies *every* member of the class or group." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018) (cleaned up). Thus a distinction exists between the standing of class representatives to bring a claim and the standing of an absent class member to object to a settlement adjudicating his rights.

Defendants do not establish that Frank lacks either Article III standing or a right to object. Instead, their cited legal support generally discusses the lack of standing for non-class members or class members who affirmatively profited from the illegal conduct alleged. *Association for Disabled Americans v. Amoco Oil Co.*, 211 F.R.D. 457, 461 (S.D. Fla. 2002), involved a non-class member organization that sought to object even though the group was not a class member and had not demonstrated that it represents any actual class member. Similarly, in *Keil v. Lopez*, 862 F.3d 685, 699 (8th Cir. 2017), the court noted that an objecting class member did not have standing to raise arguments about the adverse treatment of a subclass to which she did not belong. *Accord In re First Capital Holdings Corp. Financial Prods. Sec. Litig.*, 33 F.3d 29, 30 (9th Cir. 1994) (objector profited from alleged illegal conduct). And, *In re Hydroxycut Marketing & Sales Practices Litigation*, 2013 WL 5275618, 2013 U.S. Dist. LEXIS 133413, at *62 (S.D. Cal. Sept. 17, 2013), similarly involved objectors who had not "satisfied their burden of establishing that they are class members and therefore have standing to object." In any event, Frank, like all class members, was injured by his purchase of a product with misleading labeling; he paid for a product that does not work as defendants represented; and defendants were unjustly enriched thereby. The court is not required to determine that every class member believed the labeling or bought the product based on that belief in order to meet the standing requirements of Article III for class actions. Nor is the class defined to include such a requirement.

As Judge Easterbrook stated succinctly: "Class members suffer injury in fact if a faulty settlement is approved, and that injury may be redressed if the court of appeals reverses. What more is needed for standing?" *In re Navigant Consulting, Inc. Sec. Litig.*, 275 F.3d 616, 620 (7th Cir. 2001). Frank paid money for a product that is not capable of conferring the benefits promised and defendants were

unjustly enriched thereby. *See* Complaint, Counts I-II, Dkt. 36; *id.* ¶ 128 (alleging that misrepresentations caused *every* class member to overpay for the product); ¶ 146 (alleging *per se* violation of Florida statutory law due to misbranding of Neuriva). Unlike in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), every member of the class suffered an alleged injury from defendants' alleged wrongdoing and will suffer an injury if an unlawful settlement is approved.

Nor do defendants state the law accurately with respect to "self-inflicted" injury. Self-inflicted injuries "may seem a suspicious basis for standing," but "[it] is clear, however, that no rigid lines are drawn on this basis" by courts." 13A Charles A. Wright, *et al.*, Federal Practice and Procedure § 3531.5 (2019). An injury, such as paying an increased price due to defendants' false advertising, can be justiciable even where a litigant makes a "voluntary choice to suffer" it. *Id.* That legal injury is not negated because one anticipates and expects it. *See Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1332 (11th Cir. 2013) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982) (recognizing standing of civil rights testers)). An entire body of civil rights-era cases would not exist if plaintiffs who purposefully subjected themselves to injury lacked standing to bring suit.

And, again, the cases cited by defendants are not on point—and they involve plaintiffs rather than objecting class members, and facts different from those at issue here. *Muransky v. Godiva*, 979 F.3d 917, 931 (11th Cir. 2020), held that a named plaintiff without injury in fact from the bare inclusion of additional credit card digits on a store receipt could not manufacture standing by taking steps to guard against nonexistent future injury, such as destroying the receipt, and rely on those actions to claim injury. *Contra also, e.g.*, *Red v. General Mills, Inc.*, No. 2:15-cv-02232, 2015 U.S. Dist. LEXIS 172671, at *12-*13 (C.D. Cal. Dec. 29, 2015) (claim for unfair competition law did not allege deception in labeling; allegedly harmful ingredients were displayed on product label); *Guttmann v. Nissin Foods (USA) Co. Inc.*, No. C 15-00567, 2015 U.S. Dist. LEXIS 108217 (N.D. Cal. Aug. 14, 2015) (similar).

But all of this is irrelevant in this case. The undisputed evidence is that during the class period, Frank purchased Neuriva Products for personal consumption within the United States and did in fact consume the Neuriva he purchased as part of his regiment of nootropics and other supplements intended to improve cognitive function before deciding to stop using Neuriva due to its lack of perceived effect. *See* Frank Decl. ¶¶ 4, 6, Dkt. 75-1; Supp. Frank Decl. ¶¶ 10, 12-14.

It is common for the Center for Class Action Fairness to represent its own attorneys and their family members in objections to class action settlements. The Court is likely familiar with the problem of bad-faith objectors who threaten to disrupt a settlement unless plaintiffs' attorneys buy them off with a share of attorneys' fees. *See Garber v. Office of the Comm'r of Baseball*, No. 12-CV-03704, 2017 WL 752183, at *4 n.9 (S.D.N.Y. Feb. 27, 2017) (describing bad faith objectors' practice of filing non-meritorious objections to obstruct or delay proceedings so as to extract payment in exchange for the withdrawal of the objection). An objector does not always start out with the intent to settle away her objection in exchange for personal gain. Indeed, despite a careful vetting process, CCAF has had two of its clients lured away with monetary settlement offers at the expense of the class, forcing CCAF to withdraw from the representation after expending significant attorney time and resources on an objection and undermining its mission. No vetting system is perfect. By representing CCAF attorneys and their families rather than individuals not well known to them, CCAF is able to reduce the risk that it will expend time and resources on an objection from which its client may ultimately decide to gain personally, rather than for the benefit of the class. *See* Supp. Frank Decl. ¶ 19.

Collectively, CCAF attorneys and their family members purchase and use many products. Because of the incentives inherent in representational litigation, it is not surprising that many of the products are involved in settlements that fail to protect the interests of the class. The potential for conflict in class-action settlements is structural and acute because every dollar reserved to the class is a dollar defendants cannot pay class counsel. "Ordinarily, 'a defendant is interested only in disposing of the total claim asserted against it,' and 'the allocation between the class payment and the attorneys' fees is of little or no interest to the defense.'" *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 949 (9th Cir. 2011) (quoting *Staton v. Boeing*, 327 F.3d 938, 964 (9th Cir. 2003)). Class counsel, meanwhile, have an obvious interest in maximizing the fee award. A "district court cannot rely on the adversarial process to protect the interests of the persons most affected by the litigation—namely, the class." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013).

In light of these incentives in class-action settlements, "it is well settled that objectors have a valuable and important role to perform" "in opening a proposed settlement to scrutiny and identifying areas that need improvement." *White v. Auerbach*, 500 F.2d 822, 828 (2d Cir. 1974); *Huang v. Equifax*, 999 F.3d 1247, 1257 (11th Cir. 2021) (internal quotation omitted). Accordingly, one of the safeguards

that Rule 23 provides to absent class members is the right to object to a proposed settlement and request for attorneys' fees. Fed. R. Civ. P. 23(e)(5). And Frank and CCAF have had unparalleled success in vindicating the rights of absent class members. Frank Decl. at 2-24; Frank Supp. Decl. ¶¶ 34-45.

Frank doesn't need to "establish any deception" to demonstrate standing. Even where there is no deception, "[a]s a member of the class, an objector necessarily has an interest in the settlement that creates a case or controversy sufficient to satisfy the constitutional requirements of injury, causation, and redressability." *Berni*, 964 F.3d at 145 (cleaned up). Nothing more is required. *Id.* (objecting class member who purchased deceptively labeled box of pasta had standing to object even though "he was not deceived by [defendant's] packaging"); *In re Subway Footlong Sandwich Mkg. & Sales Practices Ltiig.*, 869 F.3d 551, 555 (7th Cir. 2017) ("as a class member who is bound by the settlement, Frank clearly has standing").

Similarly, class members have standing to challenge unwanted settlements regardless of the underlying merit of the plaintiffs' claims and regardless of whether the settlement supposedly "fully compensates" the objector. *Subway*, 869 F.3d at 555; *Rawa v. Monsanto Co.*, 934 F.3d 862, 867 (8th Cir. 2019). That Frank will not benefit from the injunctive relief because it provides him no benefit is at the heart of his objection. Defendants do not cite any case holding that a class member has no standing to object to a settlement based on the objector's argument that the relief for which he was releasing his claims provided him no benefit. That circular argument would defeat one of the core purposes of giving class members a right to object. When a settlement proposes relief that a class member believes is unfair, unreasonable, or inadequate, Rule 23 gives her a right to object and hope that a new settlement will correct the deficiency in the original one. It would be nonsensical if such an argument would deprive the class member of standing to protect her rights.

B. Frank is an aggrieved class member.

Defendants are also wrong that Frank is not "aggrieved."

Frank does not complain of illusory injunctive relief and excessive attorneys' fees as independent components. He objects that the settlement is unfair because it privileges the interests of class counsel and the defendants over those of the absent class members. *Glasser v. Volkswagen of America* involved challenges to only to attorneys' fees and only has application where the objector

"expressly disclaim[s] recovery under a constructive common fund theory." 645 F.3d 1084, 1089 (9th Cir. 2011). It has no application where an objector challenges an unfair settlement and disproportionate fee allocation as a constituent part of that unfairness. *See Bluetooth*, 654 F.3d at 949 n.9; *Subway*, 869 F.3d at 555.

The remedy to the problem identified by Frank is rebalancing the settlement to provide class members such as himself with a reasonable share of the concrete settlement value, *i.e.*, a reasonable share of the $2.9 million cash fund currently reserved for attorneys' fees as part of the constructive common fund. Frank asks the Court to reject the settlement so that the parties can reapportion the "construction common fund" and allow for a more equitable allocation of settlement proceeds. Dkt. 75 at 25. This argument is amply supported, as is his standing to raise it. *See, e.g.*, *Bluetooth*, 654 F.3d at 938 (vacating approval of settlement and segregated fee award orders because "the disparity between the value of the class recovery and class counsel's compensation raises at least an inference of unfairness"); *In re MagSafe Apple Power Adapter Litig.*, 571 Fed. App'x 560 (9th Cir. 2014) (reversing settlement approval and fee award where district court failed to "assess with specificity whether class counsel received a disproportionate share of the settlement" including the value of injunctive relief); *Subway*, 869 F.3d at 555 (rejecting challenge to standing because "Frank's appeal does not take aim at the judge's ruling on … attorney's fees" which would not benefit him but to "the certification of the class and the approval of the settlement"); *cf. also Eubank v. Pella Corp.*, 753 F.3d 718, 729 (7th Cir. 2014) (calling similar motion on standing "frivolous" but denying additional sanctions because "Saltzman's removal as lead plaintiff and his lawyers' removal as class counsel are sanction enough"). As Frank explained in his objection, a segregated-fee-fund settlement structure with a "kicker" is inferior and begets unfairness because the Court cannot remedy any allocation issues by reducing fee awards and or named representative payments. And, here, there are unfair allocation issues that do require rebalancing before the settlement can be approved as fair under Rule 23. *See also Pearson v. NBTY*, 772 F.3d 778, 786-87 (7th Cir. 2014). That the proposed injunctive relief does not benefit Frank is part of his argument that he is an aggrieved class member because he is releasing his claims in a settlement that misallocates the available relief at his expense.

Even under defendants' argument, an aggrieved class member is one who "fall[s] within the class definition and also [has] been injured by the defendant's conduct." Mot. 10. Frank meets that

definition. *See* Section I.A. Without noting that it is no longer good law, defendants rely on one district court holding finding an objector to be not aggrieved because she voluntarily submitted herself to the settlement. *See* Mot. 9-10 (citing *Low v. Trump Univ., LLC*, 246 F. Supp. 3d 1295, 1306 (S.D. Cal. 2017)). On direct appeal, the Ninth Circuit, reversed that holding and concluded that the objecting class member had standing even though she had willingly participated in the settlement. *Low v. Trump Univ., LLC*, 881 F.3d 1111, 1117 & n.3 (9th Cir. 2018). Defendants also rely on *Collins v. Quincy Bioscience, LLC*, No. 19-22864-CIV, 2020 U.S. Dist. LEXIS 218673 (S.D. Fla. Nov. 16, 2020), but the objector there failed to establish that he was a class member at all and claimed that the product "work[ed] wonders." And, as discussed above, *Glasser* is inapplicable because, unlike the objector there who exclusively challenged the segregated attorneys' fees, Frank challenges the fairness of a settlement that allows class counsel to disproportionately hoard the settlement value for themselves in a constructive common fund. *See MagSafe Apple Power Adapter*, 571 Fed. App'x at 564 (distinguishing *Glasser* because objectors appealed both settlement approval and the fee award while the *Glasser* objector appealed only the order awarding attorneys' fees and not the order approving the settlement agreement).

Accordingly, defendants' argument is "patently meritless" that because the settlement segregates the attorneys' fees from the class's relief, Frank has no interest in that aspect of the settlement. *See In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 820 (3d Cir. 1995). Defendants' argument is exactly why the Seventh Circuit has labeled fee segregation a "gimmick" and why Frank challenged the settlement structure as unfair and unreasonable. *Pearson*, 772 F.3d at 786; *see* Dkt. 75 at 25-29. If the Court rejects the proposed settlement, then the parties can reach a settlement that more fairly allocates the total settlement amount—which is the key figure that defendants care about—between counsel and the class. That total settlement amount includes the value of injunctive relief, monetary relief, and attorneys' fees. *See Pearson*, 772 F.3d at 787 (rejecting claims-made settlement that provided "trivial" changes to labels and "modest compensation" while attorneys received almost $2 million and acknowledging "Defendants are interested only in the total costs of the settlement to them"). Frank has an interest in such reallocation that will improve the settlement benefit to himself and all other class members. *See GMC Pick-Up Truck*, 55 F.3d at 820; *accord Subway*, 869 F.3d at 555. Thus, unlike the objector in *Broomfield v. Craft Brew Alliance, Inc.*, 2020 WL 1972505 (N.D. Cal. Feb. 5, 2020), Frank has an interest in obtaining an improved allocation of relief upon

disapproval and re-negotiation of the settlement. The relief available to him and other class members can be increased even if they already are recovering their full purchase price, as their alleged damages are greater than that figure. *See* Dkt. 36 at 45 (requesting "all recoverable damages," interest, and other relief from defendants).

C. The parties' arguments are inconsistent with Fed. R. Civ. Proc. 23(a).

"A class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Wal-Mart v. Dukes*, 564 U.S. 338, 348-49 (2011) (cleaned up). To certify the class, absent class members must also "have suffered the same injury." *Id.* at 350 (quoting *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 (1982)). To the extent the parties are claiming that there exist people within the class definition who purchased Neuriva Products for personal use, but do not have standing because they have different injuries than the class representatives, the settlement class cannot be certified. The parties previously represented to the Court that the settlement class should be certified because "the alleged deception to which each of the class representatives was exposed was no different than the alleged deception to which all of the Class Members allegedly were exposed." Dkt. 52 at 13. They now tell the Court that there are an unknown number of class members for which this is not true. They cannot have it both ways. There is no evidence that Frank is not a member of the class that the parties defined. Either he is similarly situated to the other class members and can object under Rule 23(e)(5)(A), which permits *any* class member to object, or the class does not satisfy Rule 23(a), and the Court cannot certify the settlement class.

D. Defendants' *ad hominem* attacks on Frank should be ignored.

Anticipating the settling parties' attempts to distract from the merits of his objection through the use of *ad hominem*, Frank sought to ward off such irrelevant and twisted attacks by filing a declaration that rebuts the most common such attacks lodged by settling parties. *See* Dkt. 75-1. With this brief, he files a supplemental declaration that further expounds upon his and CCAF's good-faith motives and past achievements in protecting class members from unfair settlements and other practices. As has been CCAF's all-too-customary experience in its history, the defendants here adopt a "hammer and tongs" approach that is unwarranted. *See In re Classmates.com Consol. Litig.*, No. C09-45RAJ, 2012 U.S. Dist. LEXIS 83480, at *34 (W.D. Wash. Jun. 12, 2012) (imposing $100,000 sanction

against class counsel). They are wrong on many of the facts, despite evidence in the record directly disputing their claims. For example, Mr. Frank's "entire law practice" is *not* "devoted to filing objections to class settlements." *Compare* Mot. 1 *with* Dkt. 75-1 at 1-2, 29 (CCAF is "a division" within non-profit public-interest law firm Hamilton Lincoln Law Institute co-founded by Frank); *see, e.g.*, *CEI v. FCC*, 970 F.3d 372 (D.C. Cir. 2020); *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2020); Ellen Gilmer, *Environmental Settlement Tool's Reboot Leaves a Target on Its Back*, Bloomberg Law (Mar. 2, 2021); Frank Supp. Decl. ¶ 24. And, the only "ideology" of CCAF or Frank's class-action objections is merely the correct application of Rule 23 to ensure the fair treatment of class members. Dkt. 75-1 at 28-29. Defendants' efforts to tar Frank because CCAF is not undefeated in court over its twelve-year history is silly. Mot. at 7. As Frank's declaration stated, "While, like most experienced litigators, we have not won every appeal we have litigated, CCAF has won the majority of them." Dkt. 75-1 at 3. CCAF is deservedly proud of its track record of protecting class members from unfair class action settlements. A detailed accounting of CCAF's litigation record is set forth in Mr. Frank's declaration, as well as examples of the national media coverage of its work. *Id.* at 3-20; *see also* Frank Supp. Decl. ¶¶ 34-45.

That Frank is the only objector should not count against his objection. CCAF has prevailed in many cases where it represented the only objector to a bad settlement. Just as class members lack the incentive to bring litigation in the absence of the class device, the same is even more true for class members faced with the choice of whether to object to a class-action settlement. "[T]he vast majority of class members lack the resources either to object to the settlement or to opt out of the class and litigate their individual cases." *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 217-18 (5th Cir. Apr. 1981). There will never be a large number of objectors in a class-action settlement, so the absence of many objectors indicates little. *See Vought v. Bank of Am., N.A.*, 901 F. Supp. 2d 1071, 1093 (C.D. Ill. 2012) (citing, *inter alia*, a 1996 FJC survey that found between 42% and 64% of settlements engendered no filings by objectors); *see generally* Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71 (2007). This is especially true here where the notice falsely suggests that the defendant will pay $8 million in claims when the parties knew with near certainty (giving their experience with similar settlements) that the actual claims made would be a fraction of what the attorneys were being paid. It is "naïve" to assume that the lack of objections or opt-outs shows acceptance of the proposed settlement: "rather it shows oversight, indifference,

rejection, or transaction costs." *Redman v. RadioShack Corp.*, 768 F.3d 622, 628 (7th Cir. 2014) (Posner, J.). No attorney could profitably bring a good-faith objection in this case, even before the extensive additional briefing this Court has required. Without the *pro bono* work of CCAF, the flaws in this settlement would risk going entirely unnoticed. "At the end of the day, it is not the number of Objectors but the quality of their objections that should guide the court's review." *Jones v. Singing River Health Services Foundation*, 865 F.3d 285, 300 (5th Cir. 2017).

II. Defendants' response to CCAF's arguments that the labeling change is valueless is misguided.

A. Frank's critique of the value of the injunction does not and need not constitute expert testimony.

Defendants challenge Frank's arguments undermining the declaration of Dr. Gary W. Small as evidentiarily flawed because his attorneys "purport[] to testify on matters of expert science"; however, they do nothing of the sort. Frank's objection relies on common-sense and layman-accessible argument to show precisely why a switch in phrasing from "clinically proven" to "clinically tested" and "shown" is no material change at all. Frank's objection also discredits the studies supposedly supporting Neuriva's labeling to show that they do not support either labeling claim, pre- or post-settlement, and why Dr. Small's testimony should not be credited. But this discussion is lagniappe to his main point that the injunction lacks value and therefore cannot support settlement approval. The Court need not make a finding on the merits of plaintiffs' claims in order to conclude that the injunctive relief does not benefit the class and therefore cannot be used to support settlement approval.

It would be absurd, and contrary to Rule 23(e), if objectors were not permitted to point out obvious and accessible evidence undermining a supposed expert's opinion or to challenge the value of a settlement's injunctive relief. None of Frank's argument required any specialized knowledge or expertise, and his attorneys did not claim the mantle of expert or offer any testimony in that regard. The information Frank set forth to undermine the value of the labeling change was not the opinion or testimony of either himself or his attorney. *Contra Putnam v. Head*, 268 F.3d 1223 (11th Cir. 2001) (cited at Mot. 12); *contra also Lopez v. Allstate Fire & Cas. Ins. Co.*, 2015 WL 5584898 (S.D. Fla. Sept. 23, 2015) (cited at Mot. 13). It is properly viewed instead as a challenge to the opinion of Dr. Small and

the legal argument and factual contentions of the settling parties. This is Frank holding the settlement proponents to their "substantial burden" "to demonstrate and document [the settlement's] fairness." *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1266 (11th Cir. 2020) (quoting *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983)); *see also Koby v. ARS Nat'l Servs., Inc.*, 846 F.3d 1071, 1079 (9th Cir. 2017). And, indeed, the Court "must make the necessary factual and legal inquiries and decide all relevant contested issues prior to certification" as part of its "rigorous analysis" to determine whether the parties carried their burden of proof for settlement approval and class certification. *Sher v. Raytheon Co.*, 419 Fed. App'x 887, 890, 891 (11th Cir. 2011). The Court's rigorous analysis is especially necessary at the settlement stage of class actions, when there is no adversarial presentation of the issues. And so, unsurprisingly, numerous decisions have rejected expert valuation of class settlement relief, simply based upon contrary common sense and legal argument. *See, e.g.*, *Briseño v. Henderson*, 998 F.3d 1014 (9th Cir. 2021); *Subway*; *Pearson*. Only objecting class members have an interest in challenging purported expert opinions or the valuation of settlement relief. It would deny class members their due process right to challenge experts and settlement relief valuation and deprive the court of the customary adversarial posture as it determines whether plaintiffs have carried their burden of proof.

Moreover, issues of law—such as the bearing of the injunctive relief on the Rule 23(e) analysis—are "not [even] subject to expert testimony." *Commodores Entm't Corp. v. McClary*, 879 F.3d 1114, 1129 (11th Cir. 2018); *Incardone v. Royal Carribean Cruises, Ltd.*, 2018 WL 6520934, 2018 U.S. Dist. LEXIS 209109 (S.D. Fla. Dec. 11, 2018) (Goodman, J.) (striking expert testimony improperly addressing "ultimate legal conclusions"). That Frank's critique of the settlement relief does not itself constitute expert testimony is further demonstrated by defendants' observation that some of the critique draws upon the allegations of the operative complaint in this action, as well as the complaint in a different action. Mot. 14. The cited information undermines the studies that defendants rely upon and is readily accessible to laypersons. *See Worsham v. A.H. Robins Co.*, 734 F.2d 676, 685 (11th Cir. 1984). It would be absurd to require every person who discusses or cites these arguments and information to be qualified as an expert.[2]

[2] Not without irony, it is the defendants who are violating Fed. R. Evid. 702 by offering an expert (Dr. Punam Keller) who provides testimony based upon no discernible methodology. *See* Dkt. 100 at 11-14.

B. Frank's critique of the value of the injunctive relief is substantively sound.

While a motion to strike is an odd and inappropriate vehicle for defendants to respond to Frank's objection on the merits, Frank rebuts defendants' arguments here and will provide an additional response on September 13, as this Court ordered on August 18. Dkt. 105. Defendants offer two "major" grounds on which Frank is wrong regarding the absence of any science substantiating Neuriva's claims, as the settlement's injunctive relief allows, that the product is "clinically tested" and "tested by science" or "similar language, such as clinical studies have 'shown'" Neuriva to boost brain performance. Dkt. 52-1 at 8 & Ex. E2. But nothing in defendants' motion to strike shows that Neuriva has been studied, much less "shown" to provide any of the benefits they claim.

With respect to defendants' first challenge, that the FDA Guidance is nonbinding doesn't somehow bestow any additional value on the injunctive relief. Even if not binding, the guidance constitutes the considered recommendations of the expert government agency responsible for approving drugs for consumer use and ensuring the safety and efficacy of such drug products. On the central question, defendants identify no reason that "clinically tested" and "shown" marks a material change from "clinically proven" based on their hair-splitting on the authority of the FDA Guidance.

With respect to defendants' second challenge, defendants are wrong that the studies supposedly supporting Neuriva's labeling claims provide "sufficient substantiation" under the FDA Guidance, but, more importantly, they miss the key point of Frank's objection, that the injunction changing "clinically proven" to "clinically tested" and "shown" fails to benefit the class. Defendants nitpick the definition of "pilot study" and dispute the invalidity of studies involving subjects of a different nationalities despite FDA Guidance cautioning against reliance on such studies, among other of their responses. But defendant's response misses the forest for the trees. The cited studies all have deficiencies that undermine the support for Neuriva labels' claims. Yet none of defendants' responses to these deficiencies identified in Frank's objection show how the change in labeling required by the proposed settlement adds any value that would justify approval of the settlement.

Defendants regurgitate that scientific evidence supports certain ingredients in Neuriva in isolation, such as the connection between memory and caffeine consumption. This is irrelevant to the injunctive relief in the settlement before the Court. That relief merely changes "clinically proven" to "clinically tested" and "shown" and "science proved" to "science tested." Even if the claims refer only

to ingredients in isolation, such claims still would be misleading to consumers under both the pre- and post-settlement labeling claims. Per the FDA Guidance, "dietary supplement manufacturers [must] carefully draft their labeling claims and carefully review the support for each claim to make sure that the support relates to the specific product and claim, is scientifically sound, and is adequate in the context of the surrounding body of evidence." Dkt. 77-1 at 5. The post-settlement language still suggests to consumers the overall message that the product has been clinically tested and shown to support brain performance. Why would the labels state that individual ingredients had been clinically tested to show certain results when the results of such tests had no bearing on the product itself? Such assertions imply to consumers support for such claims with respect to the overall product. Yet the FDA has emphasized that "other substances involved in the study or included in the dietary supplement product itself"—as in Neuriva—"might also affect the dietary supplement's performance or study results." *Id.* at 5-6.

Frank's study-by-study review showed how deficient the support was for the original labeling claim that Neuriva was "clinically proven" and thus how class members and consumers did not benefit at all from a change to "clinically tested." Frank stands by his critique of the studies; even the studies of individual ingredients are flawed under FDA Guidance. And while defendants try to slice the study compositions and results to support their labeling claims, they identify no study of Neuriva at all, much less one showing its efficacy. Nor do they provide any grounds for finding that the underlying studies make the labeling change less deceptive to consumers or provides any benefit to the class.

Both labeling representations are deceptive to consumers under any ordinary reading as well as under the FDA Guidance. It doesn't take an expert or scientist to see this. Regardless of the scientific support underlying the original "clinically proven" claim, the change in language to "clinically tested" and "shown" is not materially different and therefore provides no benefit—which is the question before the Court as it evaluates whether to approve the settlement under Rule 23.

CONCLUSION

For the foregoing reasons, Frank respectfully asks the Court to deny defendants' motion to strike.

Date: August 23, 2021

Respectfully submitted,

/s/ Matthew Seth Sarelson
Matthew Seth Sarelson
DHILLON LAW GROUP, INC.
2100 Ponce De Leon Blvd. Ste 1290
Coral Gables, FL 33134
Phone: 305-773-1952
Email: Msarelson@dhillonlaw.com

M. Frank Bednarz (*pro hac vice* admission pending)
IL ARDC No. 6299073
HAMILTON LINCOLN LAW INSTITUTE
CENTER OF CLASS ACTION FAIRNESS
1145 E. Hyde Park Blvd. Unit 3A
Chicago, IL 60615
Phone: 801-706-2690
Email: frank.bednarz@hlli.org

Attorneys for Objector Theodore H. Frank

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed with the Court via the CM/ECF system, which will send notification of such filing to all attorneys of record.

August 23, 2021

/s/ Matthew Seth Sarelson
Matthew Seth Sarelson