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.

OBJECTION OF THEODORE H. FRANK

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INTRODUCTION

Plaintiffs—three sets of plaintiffs in three separate complaints—sued Reckitt Benckiser LLC and RB Health (US) LLC ("Defendant") because Defendant made "simply false or, in some instances, disturbingly misleading" claims on their Neuriva-branded supplements. Dkt. 36 at 4. Defendant's products falsely claimed—and under the proposed settlement will continue to claim—that Neuriva "Fuels 5 indicators of brain performance." *Id.* at 10; Dkt. 52-1, Ex. E1 (packaging under proposed settlement).

The proposed settlement retains and validates all false and misleading claims, with one cosmetic difference. Instead of saying that, for example, enhanced "indicators" of "brain performance" are "clinically proven," now the packages will say that Neuriva 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. That's just as false—the product has never been "tested" or "shown" to boost anything, and Defendant does not cite a single example supporting their claims. The mish-mash of pilot and small studies involving different supplements made by different manufacturers doesn't support the claims either.

The settlement provides up to $2.9 million in attorneys' fees, but this is premised on a fictional $8 million fund that Defendant will never pay assuming typical claim rates. The settling parties do not report how many claims have been filed to date, and based upon empirical data, claims made in low-value publication-notice settlements like this one result in little money being paid to the class.[1]

The Court is rightfully concerned about the injunctive relief and (1) whether it has any value and (2) whether by approving the language change from "clinically proven" to "clinically tested" it merely replaces one fraudulent statement with another.

Objector Theodore H. Frank contends it provides no benefit, and brings this objection on behalf of the class. The settlement serves chiefly the Defendant and class counsel, which hopes to win outsized fees for a case first filed last June in California, and stayed for settlement discussions within

[1] *See, e.g., Briseño v. Henderson*, 998 F.3d 1014, 1026 (9th Cir. 2021); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 782 (7th Cir. 2014); *In re Carrier iQ, Inc., Consumer Privacy Litig.*, 2016 U.S. Dist. LEXIS 114235, 2016 WL 4474366 at *4 (N.D. Cal. Aug. 25, 2016) (citing administrator declaration attesting to usual sub 1% claims rates in publication notice settlements).

six months without conducting any formal discovery. In discharging its fiduciary duty to the class, the Court should deny final approval, which will return the parties to vigorously litigate the case or settle on terms less lop-sided against class interests.

ARGUMENT

I. Objector Frank is a Member of the Settlement Class.

During the class period, Objector Ted Frank purchased Neuriva Products for personal consumption and not resale, within the United States, between January 1, 2019 and April 23, 2021. *See* Declaration of Theodore H. Frank, ¶ 4 (attached). Frank is not within any of the classes of persons excluded from the settlement. *Id.* at ¶ 6. He therefore has standing to object.

Frank is Director of Litigation at the Hamilton Lincoln Law Institute, whose Center for Class Action Fairness ("CCAF") represents him *pro bono*. CCAF attorney M. Frank Bednarz intends to appear at the fairness hearing on his behalf. *See* Notice of Appearance of Counsel (contemporaneously-filed). CCAF represents class members *pro bono* where class counsel employs unfair procedures to benefit themselves at the expense of the class. *See, e.g.*, *Briseño v. Henderson*, 998 F.3d 1014 (9th Cir. 2021) (sustaining CCAF's client's objection to a lopsided claims-made settlement with illusory injunctive relief); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (same; noting that CCAF "flagged fatal weaknesses in the proposed settlement" and demonstrated "why objectors play an essential role in judicial review of proposed settlements of class actions"); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 716-17 (6th Cir. 2013) ("*Pampers*") (same; noting CCAF's client's "numerous, detailed, and substantive" objections). Since it was founded in 2009, CCAF has "develop[ed] the expertise to spot problematic settlement provisions and attorneys' fees." Elizabeth Chamblee Burch, *Publicly Funded Objectors*, 19 THEORETICAL INQUIRIES IN LAW 47, 55-57 & n.37 (2018). CCAF has recouped more than $200 million for class members by driving settling parties to reach an improved bargain or by reducing outsized fee awards. *See* Andrea Estes, *Critics hit law firms' bills after class-action lawsuits*, BOSTON GLOBE (Dec. 17, 2017) (more than $100 million at time). Frank brings this objection through CCAF in good faith to protect the interests of the class. Frank Decl. ¶ 8. His objection applies to the entire class; he adopts any objections and amicus briefs not inconsistent with this one, including the forthcoming corrected filing by Truth in Advertising, Inc. Dkts. 70 & 71.

II. The Court has a Fiduciary Duty to the Absent Class Members.

"Class-action settlements are different from other settlements." *Pampers*, 724 F.3d at 715. "[T]he district court cannot rely on the adversarial process to protect the interests of the persons most affected by the litigation—namely, the class." *Id.* at 718. Instead, "[c]areful scrutiny by the court is necessary to guard against settlements that may benefit the class representatives or their attorneys at the expense of the absent class members." *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983) (quotation omitted). "[T]he district judge has a heavy duty to ensure that any settlement is 'fair, reasonable, and adequate' and that the fee awarded plaintiffs' counsel is entirely appropriate." *Piambino v. Bailey II*, 757 F.2d 1112, 1139 (11th Cir. 1985) ("*Piambino II*") (Tjoflat, J.). This duty is "akin to the high duty of care that the law requires of fiduciaries." *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1320 (S.D. Fla. 2007) (internal quotation omitted).

Defendants are "uninterested in what portion of the total [settlement] payment will go to the class and what percentage will go to the class attorney." *Piambino II*, 757 F.2d at 1143 (internal quotation omitted). Due to this indifference, judges must look for not only actual collusion but also "subtle signs that class counsel have allowed pursuit of their own self-interest and that of certain class members to infect the negotiations." *Pampers*, 724 F.3d at 718 (internal quotation omitted). Thus, while it is *necessary* that a settlement is at "arm's length" without express collusion between the settling parties, it is not *sufficient* for settlement approval. *Jane Roes 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1050 n.13, 1060 (9th Cir. 2019) ("*Roes*") (distinguishing "self-interest" from "purposeful collusion"). There is no presumption in favor of settlement approval; a rigorous analysis is required, not merely a surface-level one. *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1261-63 (11th Cir. 2020) ("*NPAS*"). The settling parties' burden to demonstrate fairness is heightened because this settlement has been proposed before class certification. *Pampers*, 724 F.3d at 721; *Roes*, 944 F.3d at 1049.

An actual showing is required, beyond a court's "complete confidence in the ability and integrity of counsel." *Day v. Persels & Assocs., LLC*, 729 F.3d 1309, 1315 (11th Cir. 2013). In sum, the Court should always keep foremost in mind that "the class settlement process is 'more susceptible than adversarial adjudications to certain types of abuse.'" *Holmes*, 706 F.2d at 1147 (quoting *Pettway v. Am. Cast Iron Pipe Co.*, 576 F.2d 1157, 1169 (5th Cir. 1978)).

III. The Injunctive Relief is Worthless and Should Not be Relied Upon to Evaluate Fairness or Attorneys' Fees

The court appropriately requested that the parties submit supplemental briefing on the injunctive relief defined by the settlement and whether the relief has any value at all. Order Requiring Memoranda on Injunctive Relief, Dkt. 58. The settling parties bear the burden to quantify any degree of benefit from the injunctive relief. *Koby v. ARS Nat'l Servs., Inc*, 846 F.3d 1071, 1079 (9th Cir. 2017). They filed hundreds of pages of exhibits to obscure the simple answer: "No." Neither the class nor consumers at large benefit from the defendant continuing to assert the fanciful claim that the product is "clinically tested" and "shown" rather than "clinically proved." The latter words imply the former.

The settlement would add this Court's imprimatur to the labeling, which would still claim Neuriva "Fuels 6 Indicators of Brain Performance." Defendants simply substitute "Clinically Proved" with phrases like "Science tested it," "shown," and "Clinically Tested." Dkt. 52-1 at E-2. Just as before, no clinical tests show that Neuriva "fuels" one indicator of brain performance, let alone five or six. Not one study cited by the parties even tests a supplement with the same ingredients as Neuriva, which plaintiffs' complaint correctly observed in their complaint to be the bare-bones minimum hurdle to have "studied" a nutritional supplement under FDA guidance. Dkt. 36 at 29. Neuriva has *not* been studied, let alone "shown" to provide any of the benefits that the defendant claims. The labeling change is "substantively empty." *Pearson*, 772 F.3d at 785. And the settlement does little more than bless defendant's conduct while transferring up to $2.9 million to plaintiffs' attorneys.

Objector Frank respectfully submits that the answers to the Court's questions are quite simple:[2] (1) the injunctive relief/labeling change is worthless and (2) if the Court finally approves this settlement it will endorse continued consumer fraud, replacing one fraudulent statement with another.

First, Objector will analyze the science submitted by defendant and Dr. Small (defendant's expert) demonstrating that, at a minimum, the science submitted by defendant apparently to

[2] Objector Frank addresses the same inquiries that the Court requested of the settling parties—why the "proposed injunctive relief provides any meaningful benefit and why it is not illusory" (query 1); "examples of orders in other class action cases involving alleged fraudulent misrepresentations where injunctive relief similar to the relief proposed here was approved even though a supposedly worthless product would still be sold" (query 2); and "why this Court should approve this settlement (in which an allegedly ineffective brain improvement product would still be permitted to be sold as a brain enhancement supplement)" (query 3). Dkt. 58.

demonstrate that Neuriva works as represented, does nothing of the sort. In fact, if this is what defendant contends supports its Neuriva labeling claims, serious questions arise with regard to whether approval of this settlement will further an ongoing fraud by merely substituting "clinically proven" to "shown" and/or "clinically tested."

Second, Objector will discuss why the proposed labeling changes are nothing but worthless window dressing, both as a matter of common sense and as a matter of law. Reasonable consumers would interpret both phrases to mean that defendant's labeling claims are supported by competent and reliable scientific evidence, contrary to reality.

And third, Objector will show how the purported exemplars of so-called similar settlements submitted by defendant actually highlight the serious deficiencies with this settlement.

A. The defendants' submission does not answer the Court's queries and in fact, demonstrate that if the Court were to approve this Settlement it would only replace one fraudulent statement with another.

1. FDA guidelines governing dietary supplement labeling provide the roadmap to answering the Court's queries.

In 2009 the FDA published a guidance to dietary supplement manufacturers, "Guidance for Industry: Substantiation for Dietary Supplement Claims Made Under Section 403 (r) (6) of the Federal Food, Drug, and Cosmetic Act." (Attached to Declaration of M. Frank Bednarz, Exhibit A). This guidance, hyperlinked in plaintiffs' complaint, provides essential background for the Court to effectively evaluate the value or lack thereof of the injunctive relief here.

In this Guidance the FDA sets forth the overriding litmus test in evaluating labeling claims: "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." *Id.* at p. 3.

Per the FDA, "The first step in determining what information is needed to substantiate a claim for a dietary supplement is to understand the meaning of the claim and to clearly identify each implied and express claim." *Id.* at p. 4. Moreover, "When a claim may have more than one reasonable interpretation, we recommend that a firm have substantiation for each interpretation." *Id.* Finally, "Although it is important that individual statements be substantiated, it is equally important to substantiate the overall 'message" contained when the claims are considered together." *Id.*

Changing "clinically proven" to "clinically tested" is no change at all. There's no "material difference" and thus no value. *Duran v. Obesity Research Institute, LLC*, 1 Cal. App. 5th 635, 652 (Cal. Ct. App. 2016). When read in context, where the packaging and advertising already intimates that Neuriva helps support brain performance, either "clinically proven" or "clinically tested"—can only be understood to mean that reliable clinical evidence supports Defendant's brain performance representations. From a reasonable consumer's perspective why would they be told that the products were "clinically tested" if it did not mean that they were clinically proven? Indeed, the fact that the Defendant can, under the settlement, use "shown" as a representation instead of "clinically tested" confirms this reading. To hold that the reasonable consumer could catch this subtle labeling change and understand that all it meant was that the product had been clinically tested and *not* proven would assume that the reasonable consumer reads labels with the linguistic sophistication of the lawyers who crafted this illusory language change. *See Tran v. Sioux Honey Ass'n, Coop.*, 471 F. Supp. 3d 1019, 1025 (C.D. Cal. 2020) ("The relevant consumer is "the ordinary consumer within the larger population," not the "least sophisticated consumer" nor one that is *"exceptionally acute and sophisticated.*") (emphasis added). And anyway ***Neuriva has not even been tested***. Plaintiffs' complaint accurately observed that defendant had no testing concerning Neuriva or even a supplement with a similar composition to Neuriva, and instead relied on dubious studies concerning ingredients, many of which are dissimilar to Neuriva's ingredients anyway. Dkt. 36 at 28, 33-34. In fact, the plaintiffs pleaded that defendant's citation to purported studies of dissimilar products was itself deceptive. *Id.* at 28-29. It is deceptive! Yet the proposed settlement endorses the deception and even allows defendant to claim that a stack of *non sequitur* references has "shown" their claims true.

Per the FDA, in determining whether a particular clinical study has relevance to a claim made about a particular dietary supplement or ingredient in the supplement:

> We recommend that the studies being used as substantiation for dietary supplement claims identify a specific dietary supplement or ingredient and serving size and that the conditions of use in the studies are similar to the labeling conditions of the dietary supplement product. Factors that would tend to indicate a stronger relationship between a substance that is the subject of a study and the substance that is the subject of the dietary supplement claim includes similarities in formulation, serving size, route of administration, total length of exposure, and frequency of exposure. *Manufacturers should be aware that*

> *other substances involved in the study or included in the dietary supplement product itself might also affect the dietary supplements performance or study results.*

Id. at pp. 5-6. (emphasis added).

As discussed below, all of studies cited by defendant run afoul of one or more of the above proscriptions. In particular, Neuriva is a product that combines several different purportedly active ingredients. Thus, reliance on trials that only studied the purported effects of an individual ingredient are automatically unreliable in determining whether that ingredient works the same when it is combined with other ingredients.

In this regard, not only has defendant not submitted any clinical trials on Neuriva but it has not even cited any clinical trials on the combinations of Neuriva ingredients—phosphatidylserine ("PS") 100mg and coffee cherry extract ("CCE") 100mg (or 200mg in Neuriva Plus).

Example 5 of the FDA guidance is directly on point. (Ex. A at 6.) FDA supposes that a dietary supplement manufacturer has "high quality studies" showing that each of the individual ingredients in the supplement, on their own, are effective in producing the claimed result, but because the studies "did not involve the dietary supplement itself" the results of these studies "are not applicable to the specific dietary supplement product." *Id.*

Every clinical study submitted by defendant suffers this defect, and even these piecemeal studies have serious flaws rendering them wholly irrelevant, as discussed below. All that defendant has submitted to the court are individual ingredient studies which, as the FDA has made clear, are not applicable to determining whether Neuriva works as represented. Because "clinically tested" refers to the individual ingredients and not Neuriva as a whole, this further misleads because it exaggerates to consumers that proof of the efficacy of the individual ingredients is proof of Neuriva's efficacy.

Likewise, there are other factors set forth by the FDA that, as seen below, cause the studies cited by defendant to run afoul of FDA requirements. Thus, in evaluating the relevance/applicability of a particular study, the FDA requires that the study be based "on a population that is similar to that which will be consuming the dietary supplement" (using the example of a study performed on young adults for a product intended for the elderly as an example of just such a disconnect). *Id.* at p. 6. Example 10 set forth by the FDA in its guidance describes an instance where a firm has high quality studies demonstrating that a product improves memory and cognitive function in the elderly but notes

that these studies cannot relied upon for school-aged children because the "patient population … is completely different from the intended population …." *Id.* at p. 7. Similarly here several of the studies cited by defendant are performed in young adults when Neuriva's intended market is the elderly concerned with memory loss or mild cognitive problems due to aging.

2. Defendant fails to correct the misrepresentations flagged by plaintiffs' complaints.

The Consolidated and Amended Complaint (Dkt. 51)—referred to in the Amended Settlement Agreement and Release as the Second Amended Complaint[3] makes two primary allegations (1) that defendant has falsely and misleadingly claimed that its labeling claims about Neuriva ("brain performance claims") were "clinically proven", "clinically proven natural ingredients" or the like ("science proved", "backed by science" and so on) (Dkt. 51, ¶¶ 5-6) when, for example, none of the Neuriva Products have been clinically tested and (2) that the claims that the Neuriva products work as represented are false because Neuriva cannot and does not work as represented because its purported "natural ingredients" are food, which gets digested into constituent parts like other foods, long before they enter one's bloodstream. Neuriva key ingredients no longer exist in their original form after digestion (Dkt. 51, ¶ 71). Furthermore, plaintiffs alleged that even if molecules of Neuriva or its ingredients somehow did survive digestion they could never get into the brain and have any effect because the Blood Brain Barrier ("BBB") would prevent them from ever entering the brain at all or in any meaningful amount. Dkt. 51, ¶¶ 70, 71, 76, 77, 94, 103, 104, 120.[4]

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[3] No such document entitled Second Amended Complaint is listed on the docket so Objector assumes that the Consolidated and Amended Complaint filed 1/27/21 is the operative complaint for purposes of evaluating the settlement.

[4] The Neuriva labeling prominently states that the two key ingredients—Phosphatidylserine (PS) and Coffee Cherry Extract (CCE)– are both plant based—or in other words—food. Putting aside the studies cited by defendant, a common-sense question can and must be asked by this Court—do the products get digested and if so how in the world can they be effective if they no longer exist in their original form once they get to the bloodstream? In a similar instance involving another so-called brain health product, Prevagen, when pressed by the FDA, the makers of Prevagen admitted that because its main ingredient was a food, it was completely digested into its constituent parts. The same is likely true with regard to Neuriva; at a minimum, before the Court gives its blessing to this settlement

The settlement's injunctive relief must be measured in light of these allegations. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 945 n.8 (9th Cir. 2011) ("*Bluetooth*") (examining whether relief obtained in settlement matched theory of the complaint); *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 810 (3d Cir. 1995) ("*GM Trucks*") ("[T]he relief sought in the complaint serves as a useful benchmark in deciding the reasonableness of a settlement.") (internal quotation omitted). Nothing about the labeling change addresses the above-listed complained of conduct.

From all appearances, Neuriva does not and cannot work as represented, but with the promise of millions in fees, plaintiffs waived the white flag before resolving one contested motion or taking a single deposition, effectively (1) agreeing that defendant could absolve itself of its prior liabilities and (2) seeking judicial blessing for the defendant to continue its fraudulent conduct. "[A]chiev[ing] the settlement after little or nodiscovery . . . raise[s] a red flag." *GM Trucks*, 55 F.3d at 806; *Palmer v. Dynamic Recovery Solutions, LLC*, No. 6:15-cv-59-Orl-40KRS, 2016 U.S. Dist. LEXIS 59229, at *33 (M.D. Fla. May 4, 2016) (denying approval of settlement reached "early in the litigation and without the benefit of meaningful discovery"). "If, as it appears, [class counsel] was indeed motivated by a desire to grab attorney's fees instead of a desire to secure the best settlement possible for the class, it violated its ethical duty to the class." *Tech. Training Assocs., Inc., v. Buccaneers Ltd. P'ship*, 874 F.3d 692, 694 (11th Cir. 2017).

Of the clinical studies cited by defendant in response to the Court's inquiry, ***not one*** discusses or even looked into the fact that Neuriva's ingredients are foods and that when ingested it is subject to powerful digestive forces in our stomachs and intestinal tract.

What follows is a study-by-study analysis of the studies cited by defendant in support of the labeling changes agreed to in the settlement. It should be understood that the following analysis is not being submitted to prove that Neuriva does not work as represented (though it's readily apparent that it does not) but instead to show that defendant has not even answered the Court's queries; at a

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and allows defendant to continue to market Neuriva with its brain health representations, the Court should require that defendant submit proof that Neuriva is not digested.

minimum, serious questions still remain as to the value of the injunctive relief and whether its approval would merely substitute one fraudulent representation for another.

i. Study-by-study analysis of the studies submitted by Defendant.

(a) Studies on coffee cherry extract (CCE)

Exhibit 2 (Dkt 62-2) – *Cognitive short – and long-term effects of coffee cherry extract in older adults with mild cognitive decline,* Robinson et al. Aging, Neurophychology, and Cognition December 2019. The study's authors did not state definitively that the CCE it studied provides cognitive benefits but instead they only concluded that the study showed the "potential" that this CCE formulation might do so. Recognizing that the study was too small (under-powered to provide reliable results), the authors ultimately concluded that larger "well-powered" studies were needed to determine whether in fact the results actually occur in the real world. *Id.* at p. 14.

Exhibit 3 (Dkt. 62-3): Neurophysiological Effects of Whole Coffee Cherry Extract in Older Adults with Subjective Cognitive Impairment: A Randomized, Double-Bling, Placebo-Controlled, Cross-Over Pilot Study, Robinson et al. MDPI January 20, 2021. The title itself demonstrates that this study cannot be relied upon to support Defendant's labeling claims as it admits to being a "Pilot Study."

> A pilot study is defined as "A small-scale test of the methods and procedures to be used on a larger scale" (Porta, *Dictionary of Epidemiology*, 5th edition, 2008). *The goal of pilot work is not to test hypotheses about the effects of an intervention, but rather, to assess the feasibility/acceptability of an approach to be used in a larger scale study. Thus, in a pilot study you are not answering the question "Does this intervention work?" Instead you are gathering information to help you answer "Can I do this?"*

NIH in its "Pilot Studies: Common Uses and Misuses" at 1 (Attached as Ex. F).

The NIH further states that "[D]ue to smaller sample sizes used in pilot studies, they are not powered to answer questions about efficacy." *Id.* Thus, Exhibit 3, the 2021 Robinson pilot study does not constitute reliable scientific support for Defendant's labeling claims about CCE. And the fact that a pilot study was still being performed in 2021 raises other questions "Why are pilot studies still being conducted on CCE and cognition as late as 2021 if, as Defendant claims, CCE has been proven to help support brain performance?" Even the authors of this study noted the limitation of it being a

pilot study in that there were only 8 subjects and thus the report states, "Additional well-powered studies should be conducted for a full assessment of WCCE's effects and mechanisms of action."

Tellingly, this appears to be the only study involving "Neurofactor," the CCE formulation used in Neuriva.[5] Yet, not one well-powered larger study is cited by defendant regarding Neurofactor, and no study at all concerns it in combination with Neuriva's other key ingredient, PS. In fact, indicative of the fact that there is insufficient scientific evidence to support brain performance claims about Neurofactor CCE, on June 7, 2019, FutureCeuticals submitted a GRAS (Generally Recognized as Safe) submission to the FDA for its Neurofactor CCE seeking its approval as a safe food. (Attached as Ex. G). In its discussion of what the use would be of its Neurofactor CCE there is no mention of marketing or using it as a brain performance substance and instead the maker of Neurofactor states to the FDA it "is intended to be used as a food ingredient and as an antioxidant in selected conventional food products, such as Flavored Water/Energy Drink; Coffee/Tea …" And this is so, even though it cites to the FDA the two Reyes studies cited by Defendant not for efficacy reasons, but instead to prove that it was safe. Ex. C. at pp. 3 (table of proposed uses) and pp. 28-29. The words "brain," "memory," "cognition," or "cognitive" are not to be found in this submission to the FDA.

Exhibit 4 (Dkt. 62 – 4) – Acute Low and Moderate Doses of a Caffeine-Free Polyphenol-Rich Coffeeberry Extract Improve Feelings of Alertness and Fatigue Resulting from the Performance of Fatiguing Cognitive Tasks, Journal of Cognitive Enhancement, Reed et al., November 2018. This study also cannot be used to support defendant's labeling claims for several reasons (1) it was an acute study—meaning that only one dose was administered and only short-term effects were measured such that to rely upon this as proof of what happens with the long-term use of Neuriva, violates the FDA guideline requiring that the study follow the recommend dosage regimen on the labeling, which in the case of Neuriva is an extended/long-term dosing regimen and (2) the study group was small and comprised primarily of college-aged and graduate students such that even the authors noted that "our results may not be generalizable to other groups" and this is particularly so since the target market for Neuriva is older persons with mild cognitive decline (See FDA Example 10 discussed above). Most

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[5] *See* https://www.schiffvitamins.com/pages/neuriva-brain-health-supplement-research?gclsrc=aw.ds&ds_rl=1279704?cb= (Defendant refers to Neurofactor as a "Rockstar" ingredient as well as the PS it uses called SharpPS.).

important, however, **this study showed that CCE did not affect memory or cognitive performance**: "The coffeeberry extract beverages had no effect on self-reported motivation to complete the cognitive tasks or either memory or sustained attention performance." Id. at p. 29 - Reckitt 000067). In fact, if anything, this larger, perhaps properly powered study, indicates that CCE does not affect memory or cognition.

Exhibit 5 (Dkt. 62-5) – *Modulatory effect of coffee fruit extract on plasma level in brain-derived neurotrophic factor in health subjects*. Reyes-Izquiredo et al. British Journal of Nutrition, October 2012. This is another "pilot" study (*id.* at p1. – Reckitt000070). The title itself shows that it is not directed at the question of whether or not the whole coffee fruit concentrate powder (WCFC) it studied (different from the Neurofactor extract in Neuriva) provides any of the represented benefits of Neuriva. It merely studied whether ingesting CCE raised the levels of blood levels of brain-derived neurotrophic factor (BDNF) and even then it did not study whether the increased levels could improve memory or cognition. Like Exhibit 4, Exhibit 5 is an "acute"/single dose study and again, whatever the results, they are not relevant to whether Neuriva provides its represented benefits.

And its final result was that "WCFC increased the blood level of BDNF during the first 60 min after treatment with a dose of 100mg." Thus, as per the FDA guidance discussed above the study was not aligned with the represented benefits on the Neuriva labeling as no representations are made about BDNF on the label. And like the other studies, the authors concluded, "In order to confirm the results of the present pilot study, further clinical testing in a larger group is required." *Id.* at p. 194 – Reckitt000073.

Exhibit 6 (Dkt. 62-6) – Stimulatory Effect of Whole Coffee Fruit Concentrate Powder on Plasma Levels of Total and Exosomal Brain-Derived Neurotrophic Factor in Healthy Subjects: An Acute Within-Subject Clinical Study, Reyes-Izquierdo et al. July 2013. This is another acute dose study. Again, the endpoints it studied—whether CCE increases BDNF in the bloodstream—did not address whether any purported increase in BDNF from taking this product produced any of Defendant's brain performance claims. Other than suggesting that "it would be interesting to study the effect of WCFC [a different CCE than in Neuriva] on BDNF-mediated brain functionalities such as cognitive activity…." cognition or memory are not discussed in this report. Id. at 201 – Reckitt000079.

(b) Summary of CCE studies Submitted by Defendant.

The 5 study reports above constitute the entirety of the studies cited by defendant that it claims support the proposition that the CCE in Neuriva provides the represented benefits on its labels. They do nothing of the sort as they (1) do not study CCE in combination with PS and (2) the studies themselves admit that they do not constitute proof of efficacy but instead are merely preliminary to larger studies that would test this question. Defendant does not cite to any larger studies showing that CCE works as it claims, much less in combination with PS. As a result, at best defendant's submissions on CCE do not answer the key question posed by the Court—whether approving this settlement will merely bless a continuing fraud and at worst they strongly indicate that a fraud has been and will continue to be perpetrated if this settlement is approved.

(c) Studies on phosphatidylserine (PS).

Exhibit 7 (Dkt. 62-7) – *Effects of phosphatidylserine in age-associated memory impairment*. Crook at al. Neurology 1991. As a threshold matter this study involved bovine cortex phosphatidylserine, BC-PS—a PS that was derived from cow's brains and which, shortly thereafter was discontinued due to Mad Cow disease (bovine spongiform encephalopathy (BSE)). Thereafter, a different form of PS was used derived from soy. As such, this study does not test the ingredient contained in Neuriva and per the FDA is not applicable. But again, at best, this study was a pilot study as even the study's authors are only willing to conclude that "the results suggest" that BC-PS may help treat memory loss later in life. Moreover, this study was effectively a negative study because 14 out of 20 endpoints measured were negative such that all the authors could say was the results were "encouraging" but that "many questions" remain to be answered about BC-PS.[6]

Exhibit 8 (Dkt. 62-8) – *Treatment of age-related decline in cognitive capacities The effects of phosphatidylserine*. Crook 1998. This appears to be a review of prior studies, including a summary of one that Crook claims to have performed in 1997 on soy derived PS. As discussed above, Dr. Crook initially notes "following our study, [Defendant's Exhibit 7 discussed above] the research on the effect of PS produced from cow's brains (BC-PS) on the brains of humans unfortunately succumbed to the

[6] *See also*, discussion *infra* of Exhibit C, where it is noted that the FDA makes clear that when multiple endpoints are studied, such as is the case in many if not most of the studies cited by Defendant, statistical corrections must be made to account for this.

outbreak of bovine spongiform encephalopathy (BSE)." He then discusses a 1997 study he claims to have conducted on soy-based PS but there is no citation to it in this review document and at least circumstantially it would appear that this study did not even merit publication in a peer-reviewed journal as defendant has not cited a peer-reviewed report of this 1997 study. That in itself is odd, as one would have thought that the defendants would have cited a so-called positive study to the Court. Yet, defendant's expert uncritically treats this 1997 study as if it were a reported study in his report to the Court, but then only cites to the 1998 review article (Defendant's exhibit 8) that merely summarizes its claimed results. This is not a technical problem but an extremely material one as peer-review of published studies, prior to publication, is critical for peer-reviewers who are experts in the field to be able to scrutinize such things as the actual statistical analyses of the data as opposed to summaries of the data as presented in Defendant's Exhibit 8.

Finally, the FDA makes clear that reviews such as Defendant's Exhibit 8 cannot be relied upon to reach efficacy conclusions about dietary supplements but instead can only be used to identify clinical studies that do. Exhibit A at pp. 10-11.

Finally, again the 1997 Crook study summarized in Defendant's Exhibit 8 was only a pilot study involving 12 subjects that even Dr. Crook calls "a very small study." Id. at p. 12 – Reckitt000125. Moreover, this small study was conducted on a proprietary form of PS—Lipamin-PS—not the SharpPS used in Neuriva, and per FDA guidance cannot be applicable to the CCE/PS combination in Neuriva.

Exhibit 9 (Dkt. 62-9) – *Soybean-Derived Phosphatidylserine Improves Memory Function of the Elderly Japanese Subjects with Memory Complaints* – Kato-Kataoka, 2010 J. Clin. Biochem. Nutr. 47, 246-255, Nov. 2010. This study was conducted in Japan on elderly Japanese subjects on a different proprietary PS formulation from that in Neuriva. Here several of the memory and cognitive tests were only validated in Japan and are not ones used in the US. (See for example p. 230 where HDS-R is discussed). As for cognitive function, this study was a negative one as ***PS was no better than placebo*** at any evaluation point even though oddly all study groups' scores increased (the subjects were supposedly suffering from memory decline but this result would seem to indicate that they were actually remembering the tests and performing better as they took them over time). Either way, the authors noted, "The scores significantly increased against the baseline in all three groups, with no difference between Soy-PS and

placebo groups at any evaluation point." *Id.* at p. 5 – Reckitt000131. In other words, the PS studied here was no better than placebo or – ineffective. Dr. Small makes no mention of the above conclusions and instead discusses some sub-group analyses that were not pre-specified as endpoints to be studied. Dr. Small effectively ignores the main endpoints that were studied and instead focuses on what are known as "post-hoc" analyses - which came up negative in favor of benchmarks that the study's authors decided to look at after the fact.

Exhibit 10 (Dkt. 62-10) – *Research on human memory enhancement by phosphatidylserine fortified milk*. Yong (date unknown). Again, the title disqualifies this study from reaching any conclusions about PS because in this study the PS is mixed with fortified milk, and as per FDA guidelines cannot be relied upon to reach conclusions about PS alone because the effects of the numerous substances contained in fortified milk confound any possible conclusions about PS alone. Furthermore, the study subjects were Chinese high school students preventing extrapolation of the results to older adults in the United States.

(d) Summary of PS studies submitted by Defendants.

Only three of the articles cited by defendant attempt to support its claim that any form of PS alone provides benefits, and not one of them found positive results for a PS formulation similar to the soy-derived PS used in Neuriva. Further, two of them were conducted on populations that differed from the intended users of Neuriva. Thus, these four articles do not and cannot answer the Court's queries because they do not provide any basis to conclude that PS alone provides any of the represented benefits on the labels of Neuriva—let alone the combination of PS and CCE.

(e) Melon Juice Extract

For purposes of the question as to whether the proposed injunctive relief is of any value going forward, if defendant's current web site is accurate the Neuriva product containing melon juice is no longer being sold.[7] As such, whether or not melon juice provides any brain health benefits is a moot point with regard to the questions posed by the Court regarding the value of any future injunctive

[7] *See* https://www.schiffvitamins.com/pages/neuriva-brain-health-supplement-research?gclsrc=aw.ds&ds_rl=1279704?cb=.

relief. That said, defendant have not shown that its melon juice extract claims were "clinically studied" either, let alone clinically proven.

Exhibit 11 (Dkt. 62-11) – Effect of an oral supplementation with a proprietary melon juice concentrate (Extramel" on stress and fatigue in healthy people; a pilot, double-blind, placebo-controlled trial. Milesi et al. Nutrition Journal Sept. 2009. While this study deals with an ingredient in only one of the three Neuriva products, melon juice extract, again the title on its own shows that it cannot be used to support the Neuriva labeling claims. It's a pilot study that studies endpoints (stress and fatigue) unrelated to the brain performance claims on the Neuriva product containing melon juice and the melon juice extract studied is a proprietary product that does not appear to be contained in the (apparently discontinued) Neuriva version containing melon juice extract.

Exhibit 12 (Dkt. 62-12) – Dietary Supplementation with a Superoxide Dismutase-Melon Concentrate Reduces Stress, Physical and Mental Fatigue in Healthy People: A Randomized, Double-Blind, Placebo-Controlled Trial. Carrillon et al. Nutrients June 2014. The endpoints studied—stress and fatigue—are not related to the Neuriva labeling claims. And even if they were, this is another small under-powered pilot study with only 32 subjects in the treatment group and 29 in the placebo group.

ii. The Small Report raises more questions than answers.

While Dr. Small's declaration provides many general discussions about memory, cognitive decline and other related subjects such as the effect of BDNF on the brain, when it comes to studies on PS and CCE for the most part he is limited to the studies discussed above.[8] And one elementary but serious problem with what Dr. Small presents to the Court is that not once does he mention that any of one of the studies he and defendant cites are "pilot" studies when, in fact, the vast majority are. Instead, he misleadingly presents these to the Court as if they are studies upon which efficacy conclusions can be reached.

Moreover, the turgidity of his analysis is automatically suspect because he fails to address the serious questions regarding the digestion of the Neuriva ingredients and whether they can pass the blood-brain barrier even if they survive digestion. Thus, while he may nakedly conclude that the label

[8] He tries to bolster this with citation to early studies on BC-PS as well as studies on diseased populations, which per the FDA Guidance are not germane.

representations are supported by the same studies discussed above, the studies upon which he relies clearly do not. Thus, unless he is subject to the crucible of cross-examination, the true meaning and validity or lack thereof behind his report is at best oblique and is highly suspect given the clinical trials he cites and his misleading treatment thereto.[9]

3. Neither Dr. Small's Report nor Defendant's cited studies come close to supporting the Neuriva labeling claims and as such do not answer the Court's third query.

The Court requested the parties submit evidence that the Court would not be giving its blessing to a worthless product and replacing one fraudulent statement with another, allowing a fraud to continue. As the above discussion demonstrates, none of the clinical trials submitted to the Court come close to supporting the labeling claims. Dkt. 58 at 2. These studies, none of which were actually done using Neuriva, simply do not constitute reliable clinical evidence on their face and when they are run through the litmus tests set forth by the FDA in its guidelines for dietary supplement manufacturers they sorely miss the mark.

Finally, and perhaps just as important, the FDA makes clear in its guidelines that a dietary supplement manufacturer cannot merely search out studies that it believes supports it labeling claims and ignore other studies that conclude that the labeling claims are false. "To determine whether the available scientific evidence is adequate to substantiate a claim, it is important to consider all relevant research, both favorable and unfavorable. Ideally, the evidence used to substantiate a claim agrees the surrounding body of evidence. Conflicting of inconsistent results raise serious questions as to whether a particular claim is substantiated… the strength of the total body of scientific evidence is the critical factor in assessing whether a claim is substantiated." Exhibit A at p. 14. Yet, Dr. Small fails to perform the required "totality of the evidence analysis" as not one negative study on PS or CCE is cited even though such studies exist. For example, in 2010, in discussing both BC-PS and soy-based PS, the European Food Safety Authority, after conducting a totality of the evidence analysis of PS and memory and cognitive functioning in the elderly concluded "[A] cause and effect relationship cannot

[9] And it is not as if Dr. Small can claim that he does not know what a pilot study is as he cites 4 abstracts of his that contain the phrase "pilot study" in his CV (A197, A213, A222, and A234).

be established between the consumption of phosphatidyl serine and the claimed effects considered in this opinion." (Exhibit H attached).

Likewise, there is at least one well-conducted larger study on PS that concludes that PS does not affect memory or other cognitive functions in older individuals. *See* Jorissen et al. *The Influence of Soy-derived Phosphatidylserince on Cognition in Age-Associated Memory Impairment, Nutritional Neuroscience,* 2001:Vol.4, pp. 121-134 ("In conclusion, a daily supplement of S-PS does not affect memory or other cognitive functions in older individuals with memory complaints.") (Attached as Exhibit I). Yet, no mention of this study can be found in either Dr. Small's report or cited by Defendant.

Finally, in 2002 and 2004, the FDA was requested to consider granting what is known as a qualified health claim for PS for its use in, among other things, the reduction of cognitive dysfunction in the elderly. In so doing, the FDA performed a plenary review of clinical trials conducted on the elderly and PS. Most important, after conducting this plenary review in its 2002 letter the FDA concluded, "After reviewing the scientific evidence in your petition and other relevant scientific evidence, FDA concludes that most of the evidence does not support a relationship between phosphatidylserine and reduced risk of dementia or cognitive dysfunction, and that the evidence that does support such a relationship is very limited and preliminary…".

Because only preliminary evidence existed, the FDA allowed claims to be made on PS product labeling ***only if the label prominently stated in bold print*** immediately following any brain health representations that "Very limited and preliminary scientific research suggests that phosphatidylserine may reduce the risk of cognitive dysfunction in the elderly. **FDA concludes that there is little scientific evidence supporting this claim**." Exhibit G (emphasis added). In light of this, at a minimum, if Defendant continues to insist on making similar claims on its labels, similar qualifying language should be required in any injunctive relief approved going forward.

In 2004, FDA responded to a subsequent request that it review studies of PS. The FDA concluded that all of these studies (one of which was the 1991 study conducted by Crook and cited by defendant and Dr. Small to this Court) were also unreliable. Thus, in response to this letter the FDA concluded, "Although these four studies were all double-blind, placebo-controlled intervention studies, their scientific reliability is limited by flaws in design and analysis." Exhibit C at 7. And one of the flaws identified by the FDA was one that is replete throughout all of the studies cited by

defendant here—be they PS or CCE studies—having multiple endpoints "without applying appropriate statistical corrections to reduce the possibility of finding statistically significant relationships by chance alone…" (singling out among others Defendant's Exhibit 7, Crook 1991.) It also noted that one study, Jorrisen 2001, was a negative study as it showed no benefit from S-PS. Exhibit I ("a daily supplement of S-PS does not affect memory or other cognitive functions in older individuals with memory complaints").

Yet, neither Dr. Small nor defendant cited this study, even though the FDA requires manufacturers to perform a totality of the evidence analysis. Exhibit A at p. 14.

Finally, after considering this "new" evidence, including Crook 1991, the FDA reached the same conclusion it did in 2002 and required the same qualifying language anywhere on the label where such brain health benefit claims were made. Exhibit J at 6, 8.

Many of the studies cited in these publicly available documents published by the FDA about PS are not mentioned by Dr. Small or defendants, and in particular, negative studies such as Jorissen 2001. That the FDA documents and the studies discussed therein are not discussed at all by either in turn raises serious questions about Dr. Small's analysis as well as to the completeness of what the defendant has submitted to the Court.

Thus, with regard to the Court's queries, defendant has failed to answer or assuage its concern that it may very well be approving the settlement of a product that is worthless and allowing a fraud to continue for four reasons: (1) the clinical studies defendant has submitted do not answer the question, (2) none of the documents submitted, including the report of Dr. Gary Small address the serious problems posed by digestion and the BBB, (3) neither defendant nor Dr. Small have presented the totality of the evidence to the Court, and (4) from the science discussed above it is more likely than not that Neuriva does not work as represented—let alone that it was "clinically tested" to show it works as represented.

B. The proposed languages change is meaningless to the reasonable consumer as the message is still the same—clinical studies have (purportedly) "shown" that Neuriva works as represented.

Whether a product label claims it was clinically *proven* or "merely" clinically *tested* and *shown* to work is of no consequence to the reasonable consumer. Consumers want a product that works as

represented because that's why they buy a product in the first place. So, in evaluating the proposed injunctive relief, changing "clinically proven" to "clinically tested" is meaningless. The Seventh Circuit has noted that "clinically tested" imparts the same message—that clinical studies have proven that the product works as represented:

> Direct Digital's objection fails because it has mischaracterized Mullins's theory of liability. Mullins does not claim that Instaflex was ineffective, ergo defendant is liable. He alleges that Direct Digital's statements representing that Instaflex has been *"clinically tested"* and "scientifically formulated" to relieve joint discomfort, improve flexibility, increase mobility, and repair cartilage are false or misleading *because they imply there was scientific support for these claims*…

Mullins v. Direct Digital, LLC, 795 F.3d 654, 673 (7th Cir. 2015).

Thus, changing the labeling claim to "clinically tested" does nothing to substantively change the message being imparted to consumers. In fact, it is more misleading as while it may be literally true as to the ingredients, consumers will read it as meaning that the product is "clinically proven" to work as represented. It's common sense, and is reinforced by the fact that the Defendant can choose to use "shown" language in lieu of "clinically tested."

Plaintiffs' response to the Court's queries about the purported value of injunctive relief rests entirely on the notion that the word "proven" implies scientific consensus, while a "tested" claim could rest on thin evidence. Dkt. 61 at 7. But other courts rightly reject this gamesmanship. *See Removatron Int'l Corp. v. Federal Trade Comm.*, 884 F.2d 1489, 1497 (1st Cir. 1989) ("petitioners have offered no basis for us to find that lay people would make such a fine distinction."). And in drawing this distinction, plaintiffs ignore their own complaint because ***Neuriva has not been studied***. Defendant cites only studies of (mostly dissimilar) ingredients. "No public studies have been conducted of any of the Neuriva Products and, therefore, there is no scientific or clinical evidence that the two active ingredients, when combined in any of the Neuriva Products, improve brain function or are safe for concurrent consumption." Dkt. 36 at 28. This remains true! Yet under the proposed settlement, the Defendant need not limit its claims to say that *ingredients* in their product have been clinically tested. The front panel of the packaging will continue to state "brain performance" and the back panel will continue to claim that Neuriva—which has not been the subject of a single publicly-available clinical study—in fact "fuels" indicators of brain performance.

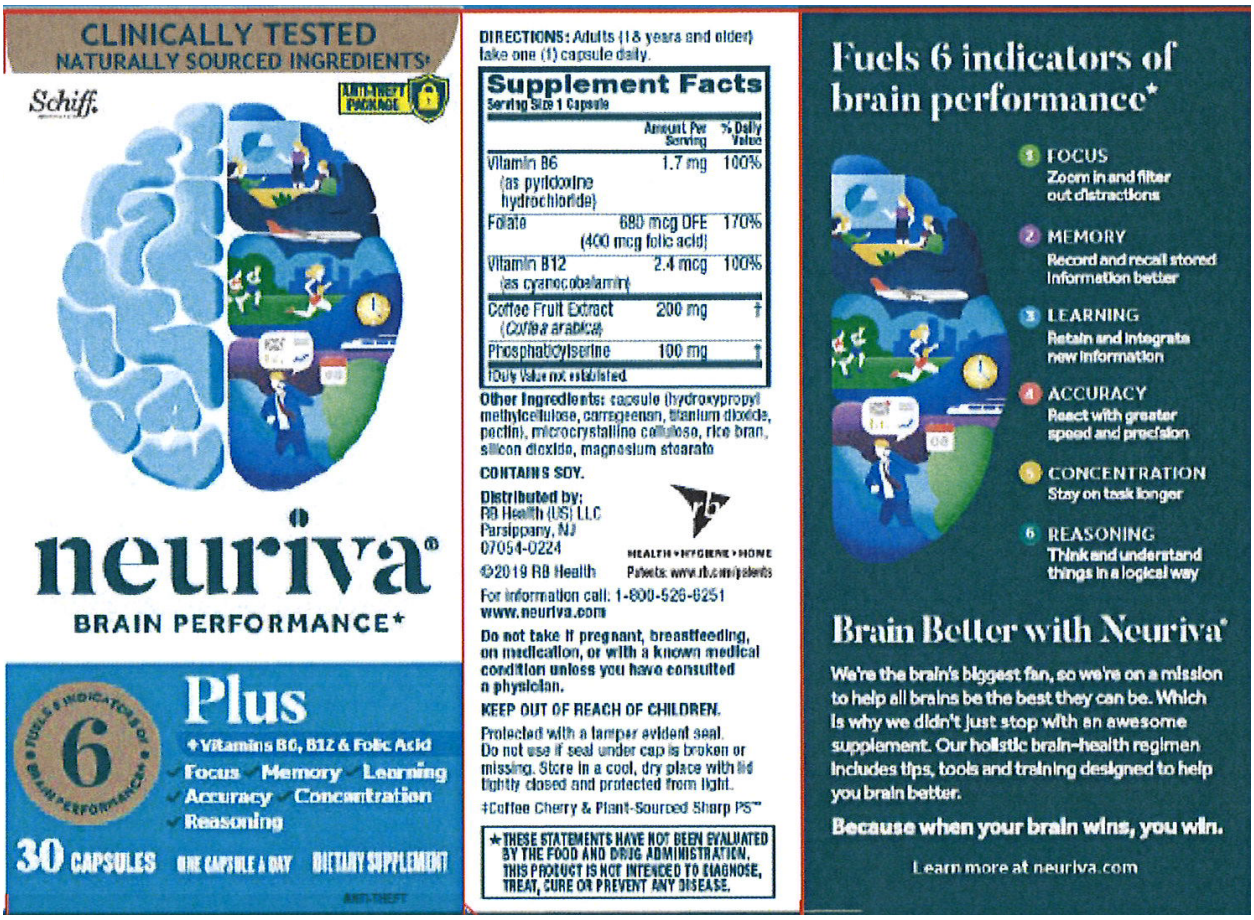

Figure 1: From Exhibit E2 of settlement, Dkt. 52-1

The question with regard to what the phrase "clinically tested" means is a binary one—either it means that the product has been clinically tested *and* proven to work as represented or the product has been clinically tested *and* those clinical trials have failed to prove that the product works as represented. But by using this phrase in the overall context of the brain performance representations made on the front of the labeling there can only be one conclusion reached by a reasonable consumer—that the product has been clinically tested and those studies have proven that the product works as represented.

Moreover, common sense dictates that from a consumer's perspective when they see the phrase "clinically tested" it says to them that (1) the product has been tested in scientifically reliable clinical trials, and (2) that those clinical trials have proven that the product works as represented. For, to the reasonable consumer why else would the phrase "clinically tested" be stated on the labeling? Particularly when they are made smack dab in the context of defendant's brain performance

representations. Defendant cannot claim that "scientifically studied" means only that it was *studied*, not that the other claims actually have support. *See Rexall Sundown, Inc. v. Perrigo Co.*, 651 F. Supp. 2d 9, 35 (E.D.N.Y. Sept. 10, 2009) (rejecting similar argument).

Certainly, it cannot be concluded that consumers would parse the words on the labeling like the lawyers who have promoted this settlement to the Court and conclude that the phrase is limited solely to meaning that the product has been clinically tested as opposed to clinically proven. To hold otherwise, the Court would be finding that in reading "clinically tested" the reasonable consumer would be sophisticated enough to parse through this ambiguity and conclude that this means that Defendant was not sufficiently confident about the results of these clinical trials to affirmatively state that the trials proved the labeling claims or, in other words, the consumer would read "clinically tested" to not mean "clinically proven." "Those assertions are premised upon a fictive world." *Pampers*, 724 F.3d at 721.[10]

Moreover, common sense dictates that from a consumer's perspective when they see the phrase "clinically tested" it says to them that (1) the product has been tested in scientifically reliable clinical trials and (2) that those clinical trials have proven that the product works as represented. For, to the reasonable consumer why else would the phrase "clinically tested" be stated on the labeling?

C. The "exemplars" submitted by defendant actually show (1) why the injunctive relief here is meaningless, and (2) what appropriate injunctive relief should include.

Other than the *Collins* settlement (Exhibit 13, Dkt. 62-13) no other settlement cited by Defendant comes close to this settlement agreement. While the Court approved the *Collins* settlement, the results of the settlement are not encouraging. The settling defendant in *Collins*, Quincy Bioscience, still blitzes the airwaves with false representations about a product that is completely digested into amino acids as Quincy admitted to the FDA in 2012. *Racies v. Quincy Bioscience, LLC*, No. 15-cv-00292-HSG, 2016 U.S. Dist. LEXIS 136197, at *6 (N.D. Cal. Sep. 30, 2016). But even the *Collins* settlement included a token requirement requiring the settling Defendant to possess "competent and reliable

[10] Even if the injunction somehow had value, class members with strictly past damages like Objector Frank (Frank Decl. ¶ 7) could never be compensated by the label change. Fed. R. Civ. P. 23(a)(4).

scientific evidence substantiating the that the representation is true…" before it could again make similar claims. Here, Defendant is effectively being allowed to continue to sell Neuriva without qualification—proclaiming to consumers that it provides brain performance benefits when there are absolutely no competent and reliable scientific evidence to support such claims. All it has to do is switch from "clinically proven" to "clinically tested."

The next settlement cited by Defendant, the *Dennis* settlement, Exhibit 14 (Dkt. 62-14) could not be more different. First, the settlement barred the Defendant, Kellogg, from making any affirmative statement that its cereal product "is clinically shown to improve attentiveness by 20%." In its place, Kellogg could say the truth—that "Clinical studies have shown that kids who eat a filling breakfast like Frosted Mini-Wheats have an 11% better attentiveness in school than kids who skip breakfast." Nothing was allowed to be said about Frosted Mini-Wheats improving attentiveness on its own. Here, after the cosmetic change is made switching "proven" to "tested" Defendant is still being permitted to state, without qualification, that Neuriva provides the represented brain performance benefits, when as set forth above it has no competent and reliable clinical evidence to support those claims. Unlike here, the *Dennis* settlement also included a non-reversionary cash fund of $4 million, with only one-quarter of that allocated to attorneys' fees.

And the same is true about the *Genelas* settlement (Exhibit 15, Dkt. 62-15). First, the settlement provided for the defendant to actually pay $35 million into a settlement fund to be distributed out to class members. And material substantive changes to the Dannon pro-biotic labeling and advertising were agreed to such as that the (1) product was clinically proven to provide a digestive benefit if it was directly qualified that it had to be eaten daily for two weeks and even then only assisted in slow intestinal transit; (2) the Defendant would remove the word "immunity" from the product labeling as well as "they have a positive effect on your digestive tract's immune system." And these are just some of the numerous labeling and claims changes Dannon agreed to. And what should not be missed is that this settlement, unlike the current settlement, required changes to the substantive claims made about the product as opposed to changing one word "proven" to "tested."

And the same is true for the Walgreens settlement (Exhibit 16, Dkt. 62-16). First off Walgreens agreed to send out refund checks and flu shot vouchers directly to class members. Likewise, Walgreens agreed to stop making the benefit representations unless it had competent and reliable scientific

evidence to demonstrate same. Walgreens also agreed to stop making 7 different statements about how its product helped defend against the common cold, requiring that all the prohibited representations be removed from shelves within 4 months. Here no such requirements are made and instead Defendant will be allowed to continue to make all of its brain performance representations.

Exhibit 17, Dkt. 62-17 does not further Defendant's cause either. The Defendant agreed to remove all "germ kill" representations from its labeling. Yet again, another substantive change to the overall benefit representations were required where here there are none. The same is true for Exhibit 18, Dkt. 62-17 as the settling defendant agreed to materially change its benefit representations including refraining from claiming that its product strengthened muscles or prevents injury unless the defendant possessed competent and reliable scientific evidence where here it is already clear that no such evidence exists for Neuriva.

Exhibit 19, Dkt. 62-19 may present the starkest contrast as in this settlement was required to remove "clinically proven" unless *subsequently* reported clinical trials supported such claims and reliable scientific evidence "shall mean… evidence that was not originally relied on by [Defendant] to support" its clinically proven labeling claims. Applied here that would require Defendant to remove all brain performance claims unless and until it possesses new clinical study evidence that is competent and reliable.

Finally, Exhibit 20, Dkt. 62-20 is the so-called amendment to the current settlement agreement. The only change appears to be that "clinically tested" must be limited to referring to the individual ingredients and not the product as a whole. But as noted above this is even more misleading, as the FDA has made clear that clinical testing is only relevant and permitted to be referred on the labeling if (1) the product as whole was tested and (2) the testing constituted competent and reliable scientific evidence that the product works as represented. That is not the case here and if anything, allowing Defendant to link the clinically tested to the ingredients and not the product as a whole is further misleading because it at least implies that clinical testing of individual ingredients is relevant when, in fact, the FDA has made clear it is not.

IV. The Settlement Benefits Attorneys More Than Their Putative Clients, a Violation of Rule 23.

Plaintiffs do not report how many claims have been received from class members, and the $2.9 million request almost certainly exceeds the amount. This Court cannot answer whether the Rule 23(e) standards are met without information about the claims rate. *See In re Baby Products Antitrust Litig.*, 708 F.3d 163, 174 (3d Cir. 2013); *Briseño*, 998 F.3d at 1024-26; *In re Samsung Top-Load Washing Machine Mktg., Sales Practices & Prods. Liab. Litig.*, 997 F.3d 1077, 1094 (10th Cir. 2021). Contrary to plaintiffs' claims, no class settlement fund exists. While the settlement hypothetically obligates defendant to pay *up to* $8 million, the claims-made nature of the fund means that the defendant will only pay a fraction of this amount. No $8 million common fund exists; just a legal fiction, and one that plaintiffs' counsel agreed to in order to better insulate their fee request from scrutiny.

The claims-made payments and attorneys' fees are segregated and compartmentalized. This segregation requires consideration of the "constructive common fund," which comprises the "sum" of the class's benefit and the "agreed-on fee amount." *In re Home Depot Inc., Customer Data Sec. Breach Litig.*, 931 F.3d 1065, 1080 (11th Cir. 2019) ("*Home Depot*") (Tjoflat, J.) (quoting Manual for Complex Litigation (Fourth) § 21.7 (2004)); *see also Dennis v. Kellogg Co.*, 697 F.3d 858, 862-63 (9th Cir. 2012) (evaluating a similar "constructive common fund" settlement); *GM Trucks*, 55 F.3d at 820 (A severable fee structure "is, for practical purposes, a constructive common fund."); *Johnson v. Comerica*, 83 F.3d 241 (8th Cir. 1996) ("[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 package deal."). "[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." *GM Trucks*, 55 F.3d at 821. Because the settlement agreement here contains a $2.9 million cap on fees, *see* Dkt. 52-1, at 13, the payment to the class and counsel is a "package deal" that effectively reduces "the payment to the class to account for the expected payment to counsel." *Home Depot*, 931 F.3d at 1092.

A constructive common fund structure such as this is inferior for one principal reason: the segregation of parts means that the Court cannot remedy any allocation issues by reducing fee awards and or named representative payments. *See Bluetooth*, 654 F.3d at 949; *Pearson*, 772 F.3d at 786-87. Because "the adversarial process" between the settling parties cannot safeguard "the manner in which that [settlement] amount is *allocated* between the class representatives, class counsel, and unnamed class

members," it is no surprise that the most common settlement defects are ones of allocation. *Pampers*, 724 F.3d at 717 (emphasis in original); *see also Holmes*, 706 F.2d at 1147 (noting the importance of review of the fairness of allocation and not just the adequacy of settlement sum). Thus, a segregated fund structure prevents the Court from exercising its discretion, in furtherance of its fiduciary duty (one that is heightened as a result of the coupon component), to cure the most endemic settlement ailment: a malapportioned fund.

Settling parties have designed the compartmentalized settlement to benefit class counsel and the defendant, all at the expense of benefitting the class. It is this very concern that animated the Seventh Circuit to vacate the settlement in *Pearson*, the Sixth Circuit to vacate the settlement in *Pampers*, and the Ninth Circuit to vacate the settlement in *Roes*. In any class action settlement, it's a foundational principle that class members should be "the foremost beneficiaries" of the accord. *Baby Prods.*, 708 F.3d at 179. The parties ask the Court to invert this bedrock axiom, and approve a settlement that consigns absent class members to an afterthought.

A. Recent amendments to Rule 23 confirm that courts in this circuit should look to the ratio of fees to actual class recovery.

The settling parties may argue that fees may be calculated from the amount of money allegedly "made available" by the settlement, and many district courts have misread *Poertner v. Gillette Co.* this way. 618 F. App'x 624 (11th Cir. 2015). In fact, *Poertner* did not endorse this view because the *Poertner* district court explicitly rejected it. There, plaintiffs sought payment of "only 10%" from a hypothetical $50 million fund, but the district court noted "the $50 million calculation is somewhat illusory, because the parties never expected that Gillette would actually pay anything close to that amount" *Poertner v. Gillette Co.*, 2014 WL 4162771, 2014 U.S. Dist. LEXIS 116616, *14 (M.D. Fla. Aug. 21, 2014).

So too here, and this interpretation of *Poertner*—that it requires looking at actual class recovery and not fictional sums—has been confirmed by the new 2018 Amendments to Rule 23. *Briseño*, 998 F.3d at 1024. The Court must consider the entire settlement agreement, including "the effectiveness of any proposed method of distributing relief to the class" and "the terms of any proposed award of attorney's fees, including timing of payment." Rule 23(e)(2)(C)(ii)-(iii). This is important for "assessing the fairness of the proposed settlement" because "the relief actually delivered to the class can be a

significant factor in determining the appropriate fee award." 2018 Advisory Committee Notes on Rules.

B. Counsel's fee is unfairly insulated by the combination of "clear sailing" and "kicker" provisions.

It is not merely that the negotiated fee is out of proportion with the class's recovery. The preferential treatment arises from the fact that class counsel has negotiated for a segregated fee fund (the "kicker") and defendant's agreement not to oppose the request (the "clear sailing"). "Provisions for clear sailing clauses 'decouple class counsel's financial incentives from those of the class, increasing the risk that the actual distribution will be misallocated between attorney's fees and the plaintiffs' recovery.'" *Vought v. Bank of Am.*, 901 F. Supp. 2d 1071, 1100 (C.D. Ill. 2012) (quoting *Int'l Precious Metals Corp. v. Waters*, 530 U.S. 1223, 1224 (2000) (O'Connor, J., respecting the denial of certiorari)). It indicates that the class attorneys have negotiated "red-carpet treatment" to protect their fee award while urging class settlement "at a low figure or less than optimal basis." *Pampers*, 724 F.3d at 718 (quoting *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991)). "[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." *Briseño*, 998 F.3d at 1024.

As such, a clear-sailing clause must be considered a "questionable feature" that "at least in a case…involving a non-cash settlement award to the class…should be subjected to intense critical scrutiny." *Redman v. RadioShack Corp.*, 768 F.3d 622, 637 (7th Cir. 2014); *see also* William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 TUL. L. REV. 813, 816 (2003) (courts should "adopt a per se rule that rejects all settlements that include clear sailing provisions.").

Clear-sailing is reinforced by the presence of a "kicker" clause whereby class counsel's fee fund is segregated from the class benefit such that any unawarded fees revert to the defendant rather than going to benefit the class. *Briseño*, 998 F.3d at 1027. In this case, the unawarded fees never leave defendants' pocket. A segregated fee structure is an inferior settlement structure for one principal reason: the segregation of parts means that the Court cannot remedy any allocation issues by reducing fee awards and/or named representative payments. *See Pearson*, 772 F.3d at 786; *Bluetooth*, 654 F.3d at 949 ("clear sailing… reveals the defendant's willingness to pay, but the kicker deprives the class of

that full potential benefit if class counsel negotiates too much for its fees."). Fee segregation thus has the self-serving effect of protecting class counsel by deterring scrutiny of the fee request. *See Pearson*, 772 F.3d at 786 (calling it a "gimmick for defeating objectors"). A court and potential objectors have less incentive to scrutinize a request because the kicker combined with the clear-sailing agreement means that any reversion benefits only the defendant that had already agreed to pay that initial amount. Charles Silver, *Due Process and the Lodestar Method*, 74 TUL. L. REV. 1809, 1839 (2000) (such a fee arrangement is "a strategic effort to insulate a fee award from attack"); Lester Brickman, LAWYER BARONS 522-25 (2011) (arguing that reversionary kicker is per se unethical). For these reasons, a "kicker" clause should be subject to a "strong presumption of…invalidity." *Pearson*, 772 F.3d at 787.

C. Any fee award should be based on true class benefits and cross-checked with class counsel's lodestar, which they do not provide.

Plaintiffs neither requests, nor submits sufficient information, for the Court to award fees on a lodestar basis. Plaintiffs fee application does not even contain the words "hours," "rates," or "lodestar," much less explain why the Court should not even consider the work actually performed in the case. This fails to meet the bare minimum of "identify[ing] the general subject matter of [their] time expenditures." *Hensley v. Eckerhart*, 461 U.S. 424, 437 n.12 (1983). "Generalized statements that the time spent was reasonable or unreasonable of course are not particularly helpful and not entitled to much weight… [T]he district court must be reasonably precise in excluding hours thought to be unreasonable or unnecessary…" *Norman v. Housing Auth. of Montgomery*, 836 F.2d 1292, 1301 (11th Cir. 1988) (abrogated on other grounds by *Perdue v. Kenny A.*, 559 U.S. 542, 130 S. Ct. 1662 (2010)). Would class counsel have submitted such deficient records were defendants afforded the opportunity to challenge the fees? Doubtful. Where there is clear-sailing—an agreement not to challenge fees, as in this case—plaintiffs have a tendency to "handicap[]" objectors by not submitting "the details of class counsel's hours and expenses." *Redman*, 768 F.3d at 638 (holding that such a procedure violated Rule 23(h)).

Likely, billing information would confirm that class counsel negotiated for themselves an excessive $2.9 million fee request that dwarfs both class recovery and time spent on the case. The first complaint was filed in June and an agreement-in-principle was reached on November 30, 2020 before formal discovery or resolution of a single contested motion. Dkt. 69 at 4. To the extent that the $2.9

million fee request (which Defendant agreed not to challenge) rivals or exceeds actual class recovery, the Court should independently reject the settlement because it put class counsel ahead of their putative clients.

If the Court nevertheless approves the settlement, it may defer the fee award until after disclosure of payable claims and lodestar information.

CONCLUSION

The settlement proposes injunctive relief that does not correct Defendant's misrepresentations and provides no benefit to class members like Objector Frank who may not even purchase Neuriva in the future. To the extent that the proposed settlement blesses Defendant's false advertising while providing an unopposed fee award of $2.9 million to class counsel, it disadvantages the class and final approval should be denied.

Date: July 26, 2021

Respectfully submitted,

/s/ Matthew Seth Sarelson

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Attorneys for Objector Theodore H. Frank

Pursuant to § 2.A of the Settlement Agreement, I declare under penalty of perjury that I am a member of the Class and separately sign this objection.

Date: July 26, 2021

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.

/s/ Matthew Seth Sarelson
Matthew Seth Sarelson

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.

DECLARATION OF THEODORE H. FRANK

I, Theodore H. Frank, declare as follows:

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

2. My business address is Hamilton Lincoln Law Institute, 1629 K St. NW, Suite 300, Washington, DC 20006. My telephone number is (703) 203-3848. My email address is ted.frank@hlli.org. I am a 1994 graduate of the University of Chicago Law School and an elected member of the American Law Institute.

3. Hamilton Lincoln Law Institute and its attorneys, of which I am one, along with local counsel Matthew Sarelson, represent me in this matter.

Class Membership

4. On February 2, 2021, during the class period, I purchased a 30-count bottle of Neuriva Original from Amazon (sold by Pharmapacks) for $21.95 for personal consumption for delivery in the United States. I am not within any of the classes of persons excluded from the settlement. I have not opted out. A true and correct copy of a receipt showing my purchase is attached as Exhibit 1.

5. On July 25, 2021, I filed a claim in this case on the settlement website using my home mailing address, submitting a similar copy of my receipt. The website stated that my Submitted Claim ID was RBS5037510, and that my Confirmation Code was an eight-digit code ending in 105.

6. I therefore am a member of the putative settlement class as defined in the Settlement Agreement and Release and Court's Preliminary Approval Order with standing to object.

7. The proposed injunctive relief is prospective, and I currently have no plans to purchase any Neuriva Product in the future. The injunctive relief provides me no benefit.

8. I bring this objection in good faith. I have no intention of settling this objection for any sort of side payment. Unlike objectors who threaten or attempt to disrupt a settlement unless plaintiffs' attorneys buy them off with a share of attorneys' fees, neither I nor my counsel engage in *quid pro quo* settlements and will not withdraw an objection or appeal in exchange for payment.

9. Thus, if contrary to CCAF's recommendation, I agree to withdraw my objection or any subsequent appeal for a payment by class counsel or defendants paid to me or any person or entity

related to me in any way without court approval, I hereby irrevocably waive any and all defenses to a motion seeking disgorgement to the class of any and all funds paid in exchange for dismissing my objection nor appeal. In addition, if the Court has any skepticism about my motives, I am happy to stipulate to an injunction forbidding me from seeking compensation for settling my objection at any stage without court approval.

10. The specific reasons for my objection and a detailed statement of the legal basis for such objection is set forth in my contemporaneously filed objection.

11. My objection applies to the entire class.

Center for Class Action Fairness

12. I founded the non-profit Center for Class Action Fairness ("CCAF"), a 501(c)(3) non-profit public-interest law firm based out of Washington, DC, in 2009. In 2015, CCAF merged into the non-profit Competitive Enterprise Institute ("CEI") and became a division within their law and litigation unit. In January 2019, CCAF became part of the Hamilton Lincoln Law Institute ("HLLI"), a new non-profit public-interest law firm I co-founded with Melissa Holyoak in 2018.

13. CCAF's mission is to litigate on behalf of class members against unfair class action procedures and settlements. *See, e.g., Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (praising CCAF's work); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 716-17 (6th Cir. 2013) (describing CCAF's client's objections as "numerous, detailed and substantive") (reversing settlement approval and certification); *Richardson v. L'Oreal USA, Inc.*, 991 F. Supp. 2d 181, 205 (D.D.C. 2013) (describing CCAF's client's objection as "comprehensive and sophisticated" and noting that "[o]ne good objector may be worth many frivolous objections in ascertaining the fairness of a settlement") (rejecting settlement approval and certification). The Center has won over 200 million dollars for class members and received national acclaim for its work. *See, e.g.*, Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. Times, Aug. 13, 2013 ("the leading critic of abusive class action settlements"); Roger Parloff, *Should Plaintiffs Lawyers Get 94% of a Class Action Settlement?*, Fortune, Dec. 15, 2015 ("the nation's most relentless warrior against class-action fee abuse"); The Editorial Board, *The Anthem Class-*

Action Con, Wall St. J., Feb. 11, 2018 (opining "[t]he U.S. could use more Ted Franks" while covering CCAF's role in exposing "legal looting" in the Anthem data breach MDL).

14. The Center has been successful, winning reversal or remand in over twenty federal appeals decided to date in courts of appeals and the Supreme Court. *E.g., Frank v. Gaos*, 139 S. Ct. 1041 (2019); *Briseño v. Henderson*, 998 F.3d 1014 (9th Cir. 2021); *Berni v. Barilla S.P.A*, 964 F.3d 141 (2d Cir. 2020); *Pearson v. Target Corp.*, 968 F.3d 827 (7th Cir. 2020); *In re Lithium Ion Batteries Antitrust Litig.*, 777 Fed. Appx. 221 (9th Cir. 2019) (unpublished); *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 934 F.3d 316 (3d Cir. 2019); *In re EasySaver Rewards Litig.*, 906 F.3d 747 (9th Cir. 2018); *In re Subway Footlong Mktg. Litig.*, 869 F.3d 551 (7th Cir. 2017); *In re Target Corp. Customer Data Sec. Breach Litig.*, 847 F.3d 608 (8th Cir. 2017); *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718 (7th Cir. 2016); *In re EasySaver Rewards Litig.*, 599 Fed. Appx. 274 (9th Cir. 2015) (unpublished); *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060 (8th Cir. 2015); *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014); *Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014); *In re MagSafe Apple Power Adapter Litig.*, 571 Fed. Appx. 560 (9th Cir. 2014) (unpublished); *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013); *In re HP Inkjet Printer Litigation*, 716 F.3d 1173 (9th Cir. 2013); *In re Baby Products Antitrust Litigation*, 708 F.3d 163 (3d Cir. 2013); *Dewey v. Volkswagen*, 681 F.3d 170 (3d Cir. 2012); *Robert F. Booth Trust v. Crowley*, 687 F.3d 314 (7th Cir. 2012); *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011). While, like most experienced litigators, we have not won every appeal we have litigated, CCAF has won the majority of them.

15. CCAF has represented clients in the following objections to settlements or fee requests, which I color-code as green for successful or partially successful; red for unsuccessful; and white for pending without interim success. While the Preliminary Approval Order only requires this information for the past 5 years, I provide this information for all CCAF objections, including cases where I or another CCAF attorney objected *pro se*, so there is no dispute over whether we have complied with the disclosure requirements. Note that some cases involve multiple objections to multiple iterations of the settlement. Unless otherwise indicated, we did not receive payment. In the interests of disclosure, I am identifying all objections where HLLI and CCAF attorneys have appeared

as counsel or *pro se* even if those attorneys have not yet worked or will not work on this objection. (For example, former CCAF attorney Melissa Holyoak is now Utah Solicitor General, and will not work on this objection for CCAF.) This list does not include class-action settlement cases where we were appointed or sought amicus status on behalf of class interests without representing an objecting class member, or cases where we sought to be appointed guardian ad litem on behalf of the class.

Case	Result
In re Bluetooth Headset Products Liability Litigation, Case No 2:07-ML-1822-DSF-E (C.D. Cal.)	District court approved the settlement and fee request. On appeal, the Ninth Circuit vacated, 654 F.3d 935 (9th Cir. 2011). On remand, the district court approved the settlement and reduced fees from $800,000 to $232,000. We did not appeal again, and received no payment.
In re TD Ameritrade Account Holder Litigation, Case No C 07-2852 VRW (N.D. Cal.)	The objection was successful and the district court rejected the settlement. 2009 U.S. Dist. LEXIS 126407 (N.D. Cal. Oct. 23, 2009). A substantially improved settlement was approved.
Fairchild v. AOL, Case No 09-cv-03568 CAS (PLAx) (C.D. Cal.)	The trial court approved the settlement and fee request. The Center appealed and in November, 2011, the Ninth Circuit reversed, sustaining the Center's objection to the improper *cy pres*. *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011). On remand, the parties cured the abusive *cy pres*.
In re Yahoo! Litigation, Case No 06-cv-2737 CAS (FMOx) (C.D. Cal.)	The district court approved the settlement and fee request. I withdrew from representations of my clients during the appeal, and my former clients chose to voluntarily dismiss their appeal. I received no payment. I believe the appeal was meritorious and would have prevailed and that the plaintiffs' tactic of buying off my clients at the expense of the class was unethical.
True v. American Honda Motor Co., Case No. 07-cv-00287 VAP (OPx) (C.D. Cal.)	The objection was successful and the district court rejected the settlement. 749 F. Supp. 2d 1052 (C.D. Cal. 2010). The parties negotiated a substantially improved settlement in California state court, winning the class millions of dollars more in benefit. CCAF attorney Frank Bednarz appeared for the objector *pro hac vice*.
Lonardo v. Travelers Indemnity, Case No. 06-cv-0962 (N.D. Ohio)	The parties in response to the objection modified the settlement to improve class recovery from $2.8M to $4.8M while reducing attorneys' fees from $6.6M to $4.6M and the district court approved the modified settlement and awarded CCAF about $40,000 in fees. 706 F. Supp. 2d 766 (N.D. Ohio 2010). The "Court is convinced that Mr. Frank's goals are policy-oriented as opposed to economic and self-serving." *Id.* at 804. We did not appeal, and received no payment beyond that ordered by the court.

Case	Result
In re Motor Fuel Temperature Sales Practices Litigation, Case No. 07-MD-1840-KHV (D. Kan.)	We objected to the settlement with Costco; the district court rejected the settlement, but approved a materially identical one after our renewed objection. The district court approved several other settlements that CCAF objected to (including several with me as the objector). The Tenth Circuit affirmed and denied our petition for rehearing *en banc*.
Bachman v. A.G. Edwards, Cause No: 22052-01266-03 (Mo. Cir. Ct.)	The district court approved the settlement and fee request, and the decision was affirmed by the intermediate appellate court. The Missouri Supreme Court declined further review.
Dewey v. Volkswagen, Case No. 07-2249(FSH) (D.N.J.)	We objected on behalf of multiple class members, including a law professor. The district court approved the settlement, but reduced the fee request from $22.5 million to $9.2 million. CCAF appealed and the settling parties cross-appealed the fee award. On appeal, the Third Circuit sustained CCAF's objection to the Rule 23(a)(4) determination and vacated the settlement approval. 681 F.3d 170 (3d Cir. 2012). On remand, the parties modified the settlement to address CCAF's objection and make monetary relief available to hundreds of thousands of class members who had been frozen out by the previous settlement. The district court awarded CCAF $86,000 in fees. Other objectors appealed and we defended the district court's settlement approval on appeal. The Third Circuit affirmed the settlement approval and the Supreme Court denied *certiorari*. We received no payment beyond that authorized by the court.
In re Apple Inc. Securities Litig., Case No. C-06-5208-JF (N.D. Cal.)	As a result of CCAF's objection, the parties modified the settlement to pay an additional $2.5 million to the class instead of third-party *cy pres*. The district court awarded attorneys' fees to CCAF and approved the settlement and fee request. We did not appeal and received no payment beyond that authorized by the court.
Robert F. Booth Trust v. Crowley, Case No. 09-cv-5314 (N.D. Ill.) (Rule 23.1) (*pro se* objector)	The district court denied my motion to intervene and dismiss abusive shareholder derivative litigation that sought $930,000 in fees, and then rejected the proposed settlement. I appealed. On appeal, the Seventh Circuit agreed (1) that my motion to intervene should have been granted and (2) my motion to dismiss should have been granted, and remanded with orders to dismiss the litigation. 687 F.3d 314 (7th Cir. 2012). As a result, Sears shareholders saved $930,000 in attorneys' fees. CCAF was awarded a few hundred dollars in costs.

Case	Result
In re Classmates.com Consolidated Litigation, Case No. 09-cv-0045-RAJ (W.D. Wash.)	We objected on behalf of law professor Michael Krauss. The district court granted CCAF's objection and rejected the settlement. The parties proposed an improved settlement, and the district court sustained our renewed objection to the settlement. The parties modified the settlement again to pay class members over $2 million more than the original settlement, and the district court agreed with CCAF that the fee request was excessive, reducing the fee request from $1.05 million to $800,000. The district court praised CCAF's work and sanctioned plaintiffs $100,000 (awarded to the class) for its abusive discovery of objectors. 2012 U.S. Dist. LEXIS 83480 (W.D. Wash. Jun. 15, 2012). CCAF did not appeal and did not receive any payment.
Ercoline v. Unilever, Case No. 10-cv-1747 (D. N.J.) (*pro se* objector)	The district court approved the $0 settlement and fee request. I did not appeal, and neither I nor CCAF received any payment.
In re HP Inkjet Printer Litigation, Case No. 05-cv-3580 (N.D. Cal.) (*pro se* objector)	The district court approved the settlement and reduced the fee request from $2.3 million to $1.5 million. On appeal, the Ninth Circuit vacated the settlement approval and fee award. 716 F.3d 1173 (9th Cir. 2013). On remand, the district court again approved the settlement and reduced the fee request to $1.35 million. We did not appeal, and received no payment.
In re HP Laserjet Printer Litigation, Case No. 8:07-cv-00667-AG-RNB (C.D. Cal) (*pro se* objector)	The trial court approved the settlement, while lowering the attorneys' fees from $2.75M to $2M. We did not appeal, and received no payment.
In re New Motor Vehicles Canadian Export Antitrust Litigation, No. MDL 03-1532 (D. Me.) (I was objector represented by CCAF counsel Dan Greenberg)	The trial court agreed with my objection that the *cy pres* was inappropriate, and the parties modified the settlement to augment class recovery by $500,000. The court affirmed the fee request, but awarded CCAF about $20,000 in fees.
Sobel v. Hertz Corp., No. 06-cv-545 (D. Nev.) (CCAF attorney Dan Greenberg)	The district court agreed with our objection and refused to approve the coupon settlement. The parties litigated, and the district court granted partial summary judgment in the amount of $45 million, and awarded CCAF fees of $90,000. Hertz won reversal on appeal, and CCAF received nothing.

Case	Result
Cobell v. Salazar, Case No. 1:96-cv-1285 (TFH) (D.D.C.)	The district court approved the settlement, but reduced the requested fees from $224 million to $99 million, and reduced the proposed incentive award by several million dollars, creating over $130 million of additional benefit to the class. On appeal, the D.C. Circuit affirmed the settlement approval. 679 F.3d 909. CCAF's client retained other counsel and petitioned the Supreme Court to hear the case. The Supreme Court denied the writ of certiorari. We received no payment.
Stetson v. West Publishing, Case No. CV-08-00810-R (C.D. Cal.) (CCAF attorney Dan Greenberg)	The district court sustained our objection and rejected the coupon settlement. The parties proposed a modified settlement that improved class recovery by several million dollars. We did not object to the new settlement, and neither sought nor received payment.
McDonough v. Toys "R" Us and *Elliott v. Toys "R" Us*, Case Nos. 2:06-cv-00242-AB, No. 2:09-cv-06151-AB (E.D. Pa.)	The district court approved the settlement and fee request. CCAF appealed, and the Third Circuit vacated the settlement approval and fee award. *In re Baby Prods Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013). On remand, the parties negotiated an improved settlement that improved class recovery by about $15 million. We did not object to the settlement but objected to the renewed fee request. The district court awarded CCAF $742,500 in fees and reduced class counsel's fees by the same amount. CCAF appealed, but voluntarily dismissed the appeal without receiving any payment beyond what was ordered by the court.
Trombley v. National City Bank, Case No. 10-cv-232 (JDB) (D.D.C.)	We objected to an excessive fee request of ~$3000/hour for every partner, associate, and paralegal in a case that settled in a reverse auction shortly after a complaint was filed; we further objected to an arbitrary allocation process that prejudiced some class members at the expense of others. The district court approved the settlement and fee request. CCAF did not appeal, and received no payment. Later, CCAF won appeals in the Third and Seventh Circuits on some of the issues we raised in this case.
Blessing v. Sirius XM Radio Inc., Case No. 09-cv-10035 (S.D.N.Y.)	The district court approved the settlement and fee request, and the Second Circuit affirmed in an unpublished order. CCAF petitioned for *certiorari*. The Supreme Court denied *certiorari*, but Justice Alito wrote separately to indicate that, while *certiorari* was inappropriate, the Second Circuit erred in holding CCAF's client did not have standing to challenge the improper class counsel appointment. *Martin v. Blessing,* 134 S. Ct. 402 (2013).

Case	Result
Weeks v. Kellogg Co., Case No. CV-09-08102 (MMM) (RZx) (C.D. Cal.) (CCAF attorney Dan Greenberg)	The district court sustained CCAF's objection and refused settlement approval. The parties modified the settlement to largely address CCAF's concerns, creating extra pecuniary benefit to the class. The Center sought and was awarded attorneys' fees as a percentage of the benefit conferred, and received no other payment beyond that awarded by the court.
In re Dry Max Pampers Litig., Case No. 1:10-cv-00301 TSB (S.D. Ohio)	The district court approved the settlement and fee request. On appeal, the Sixth Circuit vacated both orders. 724 F.3d 713 (6th Cir. 2013). On remand, plaintiffs dismissed the meritless litigation, benefiting the class that would not have to pay the higher costs from abusive litigation. We received no payment.
In re Mutual Funds Investment Litig., No. 04-md-15862 (D. Md.)	The trial court approved the settlement and fee award. CCAF did not appeal, and received no payment.
Barber Auto Sales, Inc. v. UPS, No. 5:06-cv-04686-IPJ (N.D. Ala.) (CCAF attorney Dan Greenberg)	The trial court approved the settlement and fee award. CCAF did not appeal, and received no payment.
Brazil v. Dell, No. C-07-1700 RMW (N.D. Cal.) (CCAF attorney Dan Greenberg)	The trial court approved the settlement and fee award. CCAF appealed. After CCAF filed its opening brief in the Ninth Circuit, the trial court modified its opinion approving the settlement and fee award. CCAF chose to voluntarily dismiss its appeal and received no payment.
Fogel v. Farmers, No. BC300142 (Super. Ct. Cal. L.A. County)	The trial court approved the settlement and reduced the fees from $90M to $72M. The Center was awarded fees and expenses for its objection, and did not appeal, and received no payment beyond what the court ordered.
Walker v. Frontier Oil, No. 2011-11451 (Harris Cty. Dist. Ct. Tex.)	The trial court approved the settlement and fee award. On appeal, the Texas Court of Appeals agreed that the $612,500 fee award violated Texas law, saving shareholders $612,500. *Kazman v. Frontier Oil,* 398 SW 3d 377 (Tex. App. 2013). We neither sought nor received payment.
In re MagSafe Apple Power Adapter Litig., No. C. 09-1911 JW (N.D. Cal.)	We objected on behalf of law professor Marie Newhouse. The trial court approved the settlement and fee award. On appeal, the Ninth Circuit in an unpublished decision vacated both orders and remanded for further proceedings. The Center renewed its objection and the district court approved the settlement but reduced fees from $3 million to $1.76 million. We did not appeal, and received no payment.

Case	Result
In re Online DVD Rental Antitrust Litig., No 4:09-md-2029 PJH (N.D. Cal.)	I was the objector. The district court approved the settlement and fee award, and the Ninth Circuit affirmed in an appeal I briefed and argued. 779 F.3d 934 (9th Cir. 2015). On remand, class counsel attempted to distribute over $2 million to *cy pres*. I objected to the *cy pres* proposal, and the court agreed with my objection and ordered distribution to the class. We did not seek attorneys' fees.
In re Nutella Marketing and Sales Practices Litig., No 11-1086 (FLW)(DEA) (D. N.J.) (CCAF attorney Dan Greenberg)	The district court approved the settlement, but reduced the fee award by $2.5 million. We did not appeal, and received no payment.
In re Groupon, Inc., Marketing and Sales Practices Litig., No. 3:11-md-2238-DMS-RBB (S.D. Cal.) (pro se objection; separately retained in private capacity on appeal)	The district court sustained the objection to the settlement; the parties presented a materially identical settlement and the district court approved that settlement and fee award. I did not appeal and received no payment. Other objectors appealed. After briefing was complete, I was retained by one of the appellants in my private capacity to argue the appeal on a flat-fee basis, and the Ninth Circuit agreed with me in an unpublished order that the district court's settlement approval applied the wrong standard of law, and vacated and remanded. On remand, the parties proposed a new settlement, and I did not object.
In re Johnson & Johnson Derivative Litig., No. 10-cv-2033-FLW (D.N.J.)	The district court approved the settlement. CCAF appealed and successfully moved to stay the appeal while the fee request was litigated. The district court reduced the fee request from $10.45 million to about $5.8 million, saving shareholders over $4.6 million. CCAF voluntarily dismissed its appeal, and received no payment.
Pecover v. Electronic Arts Inc., No. C 08-02820 CW (N.D. Cal.) (I objected, represented by CCAF attorney Melissa Holyoak)	The district court honored our objection to the excessive *cy pres* and encouraged modifications to the settlement that addressed my objection. As a result of the Center's successful objection, the class recovery improved from $2.2 million to $13.7 million, an improvement of over $11.5 million. The Center did not appeal the decision. The district court awarded $33,975 in attorneys' fees to the Center. The Center received no payment not ordered by the Court.

Case	Result
In re EasySaver Rewards Litigation, No. 3:09-cv-2094-AJB (WVG), No. 3:09-cv-2094-BAS (S.D. Cal.)	The district court approved the settlement and the fee request. On appeal, the Ninth Circuit vacated the settlement approval and remanded for further consideration. We renewed our objection, and the district court approved the settlement and fee request again. On appeal, the Ninth Circuit vacated and remanded the fee award, but affirmed the settlement approval. We sought *certiorari* on the settlement approval, but a defendant obtained a bankruptcy stay, and the Supreme Court denied *certiorari* after plaintiffs argued that *certiorari* should be denied because of the stay. Our client objected to the renewed fee request, and the district court upheld the objection, denying the motion without prejudice. We objected to a new fee request, and the district court substantially reduced fees. The district court then granted our request for attorneys' fees.
In re Citigroup Inc. Securities Litigation, No. 07 Civ. 9901 (SHS) (S.D.N.Y.) (*pro se* objection; then represented by CCAF attorneys)	The parties agreed to correct the defective notice. Upon new notice, I restricted my objection to the excessive fee request. The district court agreed to reduce the fee request (and thus increase the class benefit) by $26.7 million. 965 F. Supp. 2d 369 (S.D.N.Y. 2013). I was awarded costs. I appealed the fee decision, but voluntarily dismissed my appeal without further payment. My objection to the *cy pres* proposal was overruled; I won a stay of the *cy pres* order and appealed. While the appeal was pending, in 2017, class counsel agreed to distribute the proposed *cy pres* to the class, and the appeal was remanded to district court after a Rule 62.1 indicative ruling. The district court granted our request for attorneys' fees.
City of Livonia Employees' Retirement System v. Wyeth, No. 1:07-cv-10329 (RJS) (S.D.N.Y.)	The district court approved the settlement and reduced fees (and thus increased class benefit) by $3,037,500. Though the court ultimately agreed in part with our objection to fees, it was critical of our objection, though it mischaracterized the argument we made. The district court criticized the objection as "frivolous" but the First Circuit recently held in a non-CCAF case that the issue of a minimum distribution threshold does indeed make a settlement problematic. We did not appeal, and received no payment.
In re Bayer Corp. Combination Aspirin Prods. Mktg. and Sales Practices Litig., No. 09-md-2023 (BMC) (JMA) (E.D.N.Y.) (I objected, represented by CCAF attorney Adam Schulman)	Upon my objection, the parties modified the settlement to provide for direct distribution to about a million class members, increasing class recovery from about $0.5 million to about $5 million. The district court agreed with my objection to one of the *cy pres* recipients, but otherwise approved the settlement and the fee request. CCAF was awarded attorneys' fees. I did not appeal, and neither I nor CCAF received any payment not awarded by the court.

Case	Result
In re Southwest Airlines Voucher Litig., No. 11-cv-8176 (N.D. Ill.)	The district court approved the settlement, but reduced fees by $1.67 million. We appealed, and the plaintiffs cross-appealed; the Seventh Circuit affirmed, but reduced fees further. On remand, class counsel asserted rights to additional fees, and we objected again. The court denied the fee request in part, and, on motion for reconsideration, vacated the fee order on the grounds notice was required. We negotiated a settlement that tripled relief to the class. We moved for attorneys' fees, which the district court denied. We appealed the denial and won reversal and attorneys' fees.
Fraley v. Facebook, Inc., No. 11-cv-01726 (RS) (N.D. Cal.) (*pro se* objection)	The district court approved the settlement, which was modified after our objection by increasing class distributions by 50%. The district court further reduced fees by $2.8 million, which increased the *cy pres* distribution by the same amount. We did not appeal the settlement approval or fee award, and did not receive any payment. Our request for attorneys' fees was denied, and our appeal of that decision was denied. We did not seek *certiorari*.
Pearson v. NBTY, No. 11-CV-07972 (N.D. Ill) (I objected, represented by CCAF attorneys Melissa Holyoak and Frank Bednarz)	The district court approved the settlement, but reduced fees by $2.6 million. On appeal, the Seventh Circuit reversed the settlement approval, praising the work of the Center. 772 F.3d 778 (7th Cir. 2014). On remand, the settlement was modified to increase class recovery from $0.85 million to about $5.0 million. The second settlement was approved, and CCAF was awarded attorneys' fees of $180,000. Other objectors appealed; we cross-appealed to protect our rights. When the other objectors dismissed their appeals, we dismissed our cross-appeal without any payment beyond that ordered by the court. We moved the district court for relief requiring other objectors who received under-the-table payments to be required to disgorge those payments to the class, an action that was covered by the *Wall Street Journal*. The district court held it did not have jurisdiction over the action, and we appealed that decision and won in the Seventh Circuit. The district court denied the motion to disgorge extortionate objector fees, and we appealed that decision and won again in the Seventh Circuit. 968 F.3d 827 (7th Cir. 2020).

Case	Result
Marek v. Lane, 134 S. Ct. 8, 571 US – (2013).	In 2013 an objector retained the Center to petition the Supreme Court for a writ of *certiorari* from *Lane v. Facebook*., 696 F.3d 811 (9th Cir. 2012), *rehearing denied* 709 F.3d 791 (9th Cir. 2013), a case we had not previously been involved in. Although the Supreme Court declined to hear the case, Chief Justice Roberts wrote an opinion respecting denial of *certiorari* declaring the Court's interest in the issue of *cy pres* that has been influential in improving many settlements for class members.
Dennis v. Kellogg, Inc., No. 09-cv-01786 (IEG) (S.D. Cal.)	On remand from a Ninth Circuit decision, the district court approved a modified settlement and the fee request. Law professor Todd Henderson was the objector to the modified settlement. The district court initially issued an opinion erroneously criticizing CCAF, but vacated and corrected that opinion. CCAF did not appeal or receive any payment.
Berry v. LexisNexis., No. 11-cv-754 (JRS) (E.D. Va.) (CCAF attorney Adam Schulman *pro se*)	The district court approved the settlement and the fee request. The Fourth Circuit affirmed, and the Supreme Court denied *certiorari*.
In re BankAmerica Corp. Secs. Litig., No. 13-2620 (8th Cir.)	CCAF was retained as appellate counsel on behalf of a class representative objecting to a *cy pres* distribution and supplemental fee award, and prevailed. 775 F.3d 1060 (8th Cir. 2015). As a result, the class will receive an extra $2.6 to $2.7 million, plus any proceeds from pending collateral litigation against third parties. CCAF did not seek or receive any payment beyond costs.
Redman v. Radioshack Corp., No. 11-cv-6741 (N.D. Ill.)	The district court approved the settlement and the fee request. On appeal, the Seventh Circuit reversed, upholding our objection. 768 F.3d 622 (7th Cir. 2014). The case is pending on remand, but is presumably extinguished by RadioShack's bankruptcy. We were awarded costs.
Richardson v. L'Oreal USA, No. 13-cv-508-JDB (D.D.C.) (CCAF attorney Adam Schulman)	The district court sustained our objection to the settlement. 991 F. Supp. 2d 181 (D.D.C. 2013). We received no payment.
Gascho v. Global Fitness Holdings, LLC, No. 2:11-cv-436 (S.D. Ohio)	We represented law professor Josh Blackman. The district court approved the settlement and fee request. The Sixth Circuit affirmed in a 2-1 decision, and denied *en banc* review. The Supreme Court denied *certiorari*.
Steinfeld v. Discover Financial Services, No. 3:12-cv-01118-JSW (N.D. Cal.)	We withdrew the objection upon assurances from the parties about the interpretation of some ambiguous settlement terms. We received no payment.

Case	Result
In re Aetna UCR Litigation, No. 07-3541, MDL No. 2020 (D.N.J) (I was a *pro se* objector with assistance from local counsel)	While our objection was pending, the defendant invoked its contractual right to withdraw from the settlement. The litigation is pending.
Poertner v. The Gillette Co., No. 6:12-cv-00803 (M.D. Fla.) (I objected, represented by CCAF attorney Adam Schulman)	The district court approved the settlement and the fee award, and the Eleventh Circuit affirmed in an unpublished order, and the Supreme Court denied *certiorari*, despite the circuit split with *Pearson*.
In re Google Referrer Header Privacy Litigation, No. 10-cv-04809 (N.D. Cal.) (I was a *pro se* objector and also represented HLLI attorney Melissa Holyoak)	The district court approved the settlement and the fee award. The Ninth Circuit affirmed in a 2-1 decision. On April 30, 2018, the Supreme Court granted *certiorari* for the October 2018 Term in *Frank v. Gaos*, No. 17-961. I argued the case in the Supreme Court October 31, 2018. In 2019, the Supreme Court vacated the decision and remanded for consideration of the question of Article III standing. The Ninth Circuit remanded to the district court. The parties withdrew the settlement and are litigating in the district court.
Delacruz v. CytoSport, Inc., No. 4:11-cv-03532-CW (N.D. Cal.) (I was a *pro se* objector)	I joined in part the *pro se* objection of William I. Chamberlain. The district court approved the settlement and the fee award. We did not appeal, and received no payment.
In re American Express Anti-Steering Rules Antitrust Litigation, No. 11-md-2221 (E.D.N.Y.)	We objected and the district court rejected the settlement. We have neither sought nor received payment.
In re Capital One Telephone Consumer Protection Act Litigation, 12-cv-10064 (N.D. Ill.)	Our objection was only to the fee request, and the district court agreed to a reduction of about $7 million in fees. We appealed seeking further reductions of fees, but plaintiffs offered to pay our client $25,000 to dismiss his appeal, and he accepted the offer against our recommendation and his earlier promise to us. Ethics rules prohibited us from interfering with the client's decision. CCAF received no payment. Seventh Circuit law requires the court to investigate before granting a motion to voluntarily dismiss an appeal of a class action settlement approval, but no investigation was performed, despite extensive press coverage of our protest of class counsel's unethical behavior.

Case	Result
Lee v. Enterprise Leasing Company-West, LLC, No. 3:10-cv-00326 (D. Nev.) (CCAF attorney Melissa Holyoak)	The district court approved the settlement and the fee request. CCAF did not appeal, and received no payment.
Jackson v. Wells Fargo, No. 2:12-cv-01262-DSC (W.D. Pa.)	The district court approved the settlement and the fee request. CCAF did not appeal, and received no payment. CCAF attorney Adam Schulman represented the objector.
In re Transpacific Passenger Air Transp. Antitrust Litig., No. 3:07-cv-05634-CRB (N.D. Cal.)	The district court approved the settlement, but reduced the Rule 23(h) request for fees and expenses by over $5.1 million, for the benefit of the class. The district court awarded CCAF fees. In a 2-1 decision, the Ninth Circuit affirmed settlement approval. CCAF attorney Anna St. John argued at the district court and appellate level.
Careathers v. Red Bull N. Am., Inc., No. 1:13-cv-0369 (KPF) (S.D.N.Y.) (I objected, represented by CCAF attorney Erin Sheley)	The district court approved the settlement, but reduced the fee request by $1.2 million. We did not appeal, and received no payment.
In re Riverbed Securities Litigation, Consolidated C.A. No. 10484-VCG (Del. Ch.)	CCAF assisted *pro se* objector Sam Kazman, a CEI attorney, before CCAF merged with CEI. The court approved the settlement and reduced the fee request. We did not seek further review, and received no payment.
In re Target Corp. Customer Data Security Breach Litig., MDL No. 14-2522 (PAM/JJK) (D. Minn.)	The district court denied our objection. We successfully appealed to the Eighth Circuit. On limited remand, the district court denied our objection again. We appealed to the Eighth Circuit, which ordered supplemental briefing, and then affirmed.
In re Polyfoam Antitrust Litig., No. 10-MD-2196 (N.D. Ohio) (CCAF attorney Anna St. John)	We objected to the fees and the *cy pres* proposal, and the district court reduced fees and rejected plaintiffs' proposed *cy pres* recipient. We did not appeal and received no payment. Our request for attorneys' fees was denied, and we did not appeal.
Hays v. Walgreen Co., No. 14-C-9786 (N.D. Ill.)	We objected to a $0 settlement that provided only worthless disclosures to the shareholder class. Our appeal in the Seventh Circuit was successful, and plaintiffs voluntarily dismissed their case on remand.
In re Subway Footlong Sandwich Mktg. & Sales Pract. Litig., No. 2:13-md-2439-LA (E.D. Wisc.)	I objected, represented by CCAF attorney Adam Schulman. The district court approved the settlement and fee request over my objection. Our appeal in the Seventh Circuit was successful, and plaintiffs voluntarily dismissed their case on remand.

Case	Result
In re Colgate-Palmolive SoftSoap Antibacterial Hand Soap Mktg. & Sales Pract. Litig., No. 12-md-2320 (D.N.H.)	CCAF attorney Anna St. John objected *pro se*. The district court approved the settlement and fee request over her objection. She filed an appeal relating to the *cy pres* provision of the settlement and dismissed the appeal without payment once the *cy pres* issue became moot.
Doe v. Twitter, Inc., No. CGC-10-503630 (Cal. Sup. Ct. S.F. Cty.)	The district court approved the settlement over our objection, but reduced attorneys' fees. We did not appeal and received no payment.
Rodriguez v. It's Just Lunch Int'l, No. 07-cv-9227 (SHS)(SN) (S.D.N.Y.)	CCAF attorney Anna St. John successfully represented an objector to an abusive settlement; the court rejected the settlement. An improved settlement was approved. We appealed the settlement approval, and, upon further evaluation, chose to voluntarily dismiss the appeal. We received no payment.
Rougvie v. Ascena Retail Group, No. 15-cv-724 (E.D. Pa.)	CCAF attorney Adam Schulman appeared on behalf of two objectors; the parties modified the settlement in part, and district court agreed with our objection that CAFA applied and governed attorneys' fees. We did not appeal, but other objectors appealed. The appeals were voluntarily dismissed. We were ultimately awarded $78,000 in attorneys' fees for our work improving the settlement that provided $702,640 in additional class benefit.
Allen v. Similasan Corp., No. 3:12-cv-0376-BAS (JLB) (S.D. Cal.)	CCAF's objection on behalf of an objector to a $0 settlement was upheld. The parties negotiated a new settlement proposing to pay about $500,000 to the class. We did not object to the new settlement, and neither sought nor received payment.
In re PEPCO Holdings, Inc., Stockholder Litig., C.A. No. 9600-VCMR (Del. Ch.)	In response to our proposed objection on *Walgreen* grounds, class counsel voluntarily dismissed the lawsuit and proposed settlement, saving the shareholders a substantial amount of money. We were awarded attorneys' fees by the Court.
In re Pharmacyclics, Inc. Shareholder Litig., No. 1-15-CV-278055 (Santa Clara County, Cal.)	Law professor Sean J. Griffith, an objector with an unsuccessful objection to a $0 shareholder settlement, retained CCAF for the appeal. The California Court of appeal affirmed, and the California Supreme Court denied further review.
Williamson v. McAfee, Inc., No. 5:14-cv-00158-EJD (N.D. Cal.)	CCAF attorney Anna St. John represented an objector. After we objected, the parties disclosed that the settlement claims rate was higher than we anticipated, and the district court approved the settlement. We did not appeal, and did not receive any payment.
Edwards v. National Milk Producers Fed'n, No. 11-cv-04766-JSW (N.D. Cal.)	CCAF attorney Anna St. John represented an objector who objected to fees only. The district court reduced the requested fees by over $4.3 million, to be distributed to the class. We were awarded attorneys' fees by the court. We did not appeal.

Case	Result
In re Google Inc. Cookie Placement Consumer Privacy Litig., No. 12-MD-2358 (D. Del.)	I objected in this case, represented by CCAF attorney Adam Schulman. The district court overruled our objection to the settlement, but reduced attorneys' fees. Our appeal to the Third Circuit was successful, vacating the settlement and remanding. 936 F.3d 316 (3d Cir. 2019). The case is pending in district court.
Saska v. The Metropolitan Museum of Art, No. 650775/2013 (Sup. Ct. N.Y. Cty., N.Y.)	CCAF attorney Anna St. John objected *pro se*. The court approved the settlement and attorneys' fee award over her objection. We did not appeal, and have neither sought nor received payment.
Birbrower v. Quorn Foods, Inc., No. 2:16-cv-01346-DMG (AJW) (C.D. Cal.)	I objected on behalf of a class member to a claims-made settlement and fee request. The district court approved the settlement and fee award over the objection. We did not appeal, and received no payment.
Aron v. Crestwood Midstream Partners L.P., No. 16-20742 (5th Cir.)	An unsuccessful *pro se* objector retained us to prosecute his appeal of approval of a $0 settlement where the court refused to follow *Walgreen*. The Fifth Circuit dismissed the appeal for lack of appellate jurisdiction because the objector filed his objection past the deadline in the district court.
Kumar v. Salov N. Am. Corp., No. 14-cv-02411-YGR (N.D. Cal.)	Represented by CCAF attorneys, I objected to a lop-sided settlement and fee request. The district court approved the settlement, and the Ninth Circuit affirmed.
Campbell v. Facebook, Inc., No. 13-cv-5996-PJH (N.D. Cal)	Former CCAF attorney William Chamberlain represented a class member, CCAF attorney Anna St. John, objecting to an abusive settlement and fee request. The district court overruled the objection and approved the settlement. We appealed and the Ninth Circuit affirmed. 951 F.3d 1106 (9th Cir. 2020). We did not petition the Supreme Court.
Knapp v. Art.com, Inc., No. 16-cv-00768-WHO (N.D. Cal.)	Another CCAF attorney and I represented a class member objecting to a settlement and fee request. The district court approved the settlement but agreed with us that fees should be awarded only after the redemption rate of the coupon relief was known. We objected to the resubmitted attorney fee request and won a reduction in attorneys' fees.

Case	Result
In re Lithium Ion Batteries Antitrust Litig., No. 13-md-02420 YGR (DMR)	On behalf of class member Frank Bednarz, I objected to a settlement and fee request. The court overruled the objection and approved the settlement, but reduced the attorneys' fees. We appealed the class certification and settlement approval to the Ninth Circuit and won remand. 777 Fed. Appx. 221, 223 (9th Cir. 2019). The parties improved the settlement. We then objected to the class attorneys' fees only. The district court overruled our objection to the class attorneys' fees, but awarded us and co-counsel fees of $250,000 for our role in improving the settlement. Our appeal to the Ninth Circuit on the fee issues is pending.
Ma v. Harmless Harvest, Inc., No. 16-cv-7102 (JMA) (SIL) (E.D.N.Y.)	CCAF attorney Adam Schulman appeared on behalf of objector Anna St. John to a $0 settlement. The district court rejected the settlement. We did not seek fees.
In re Anthem Inc. Data Breach Litigation, 15-md-02617-LHK (N.D. Cal)	I represented an objector, CCAF attorney Adam Schulman, who objected to fees and asked the court to investigate overbilling. The district court agreed and appointed a special master to investigate, and ultimately reduced fees. In response to our objection to *cy pres* provisions in the settlement, the parties agreed to increase recovery to the class. We did not seek fees and did not appeal.
Leung v. XPO Logistics, Inc., No. 15-cv-03877 (N.D. Ill.)	On behalf of a class member, CCAF attorney Frank Bednarz objected to the fee request. The district court reduced fees slightly. We did not appeal.
Cannon v. Ashburn Corp, No. 16-cv-1452 (D.N.J.)	On behalf of an objector, CCAF attorney Adam Schulman objected to an abusive settlement through local counsel. The parties agreed to modify the settlement to improve class recovery, and the district court rejected the modified settlement. We did not seek fees
Farrell v. Bank of Am., N.A., No. 3:16-cv-00492-L-WVG (S.D. Cal.)	I represent an objector who objected to fees, a *cy pres* provision, and the class certification in the alternative. The attorneys reduced their fee request in response to our objection, and the court approved the modified fee request and settlement. Our appeal to the Ninth Circuit was rejected in a split decision, and we have just filed a petition for certiorari with the Supreme Court.
In re Petrobras Securities, Litigation, No. 14-cv-9662 (S.D.N.Y.).	CCAF represented an objector who objected to fees and class certification. The district court reduced fees by over $96 million and affirmed the settlement. We did not appeal. CCAF requested attorneys' fees, which were granted in part and denied in part. We appealed the denial of our attorneys' fees in the Second Circuit and won. On remand, the court again granted in part CCAF's request for fees, which we appealed to the Second Circuit; that appeal was denied.

Case	Result
Berni v. Barilla, No. 16-cv-4196 (E.D.N.Y.)	CCAF attorney Adam Schulman objected *pro se* to a $0 class-action settlement. The district court approved the settlement. On appeal, the Second Circuit vacated settlement approval. 964 F.3d 141 (2d Cir. 2020)
In re Domestic Airline Travel Antitrust Litigation, No. 15-mc-1404 (D.D.C.)	CCAF attorney Ted Frank represented class members and CCAF attorneys Ted Frank and Frank Bednarz in objecting to the lack of a distribution plan and a class notice suggesting that the settlement proceeds would go to *cy pres*. The district court approved the settlement and deferred any ruling on fees. The D.C. Circuit held that it does not have jurisdiction over an appeal because the district court declined to enter a Rule 54(b) final judgment while litigation was pending against two non-settling defendants.
Cowen v. Lenny & Larry's, No. 17-cv-1530 (N.D. Ill.) (I objected, represented by CCAF attorney Frank Bednarz)	CCAF attorney Frank Bednarz represented class member and CCAF attorney Ted Frank in objecting to the disproportion in this coupon settlement. The parties modified the settlement to make relief more proportional to attorneys' fees, providing $537,950 more to the class (over original cap of $350,000) and mooting our objection. The district court granted our motion for $20,000 in attorneys' fees on August 20, 2019.
In re Samsung Top-Load Washing Machine Marketing Sales Practices and Prod. Liability Litig., No. 17-ml-2792-D (W.D. Okla.)	CCAF attorney Frank Bednarz represented a class member objecting to the disproportion attorneys' fees and actual relief, which consists of duplicative injunctive relieve and a claims-made settlement that provides only coupons to most class member. The district court reduced attorneys' fees by about $2.1 million and approved the settlement. The Tenth Circuit affirmed. We did not seek or obtain any payment.
Littlejohn v. Ferrara Candy Co., No. 17-cv-1530 (S.D. Cal.)	CCAF attorney Ted Frank represented a class member objecting to this $0 settlement. The district court approved the settlement, and the Ninth Circuit affirmed.
In re Wells Fargo & Co. Shareholder Derivative Litigation, No. 3:16-cv-05541-JST (N.D. Cal.)	CCAF attorney Ted Frank objected to the fee request on behalf of a class member. The district court reduced the attorneys' fee award by $15.2 million. The court awarded us attorneys' fees of $98,473. We did not appeal.
In re Stericycle Securities Litigation, No. 16-cv-7145 (N.D. Ill.)	CCAF attorneys represent a shareholder class member objecting to the fee request in this settlement. The district court approved the settlement and awarded a reduced attorneys' fee award. Our appeal of the fee award to the Seventh Circuit is pending.

Case	Result
In re Volkswagen Clean Diesel MDL, No. 3:15-md-02672-CRB (N.D. Cal.)	CCAF attorneys objected to the settlement and fee request on behalf of a client in this case; the district court approved both. We appealed the fee award, but did not appeal the settlement approval. The Ninth Circuit dismissed the appeal on the grounds that our client's acceptance of the benefits of the settlement included the signature of a release that released him from any further claims and deprived him of appellate standing, and we did not appeal further.
In re ConAgra Foods, Inc., No. 2:11-cv-05379-CJC-AGR (C.D. Cal.)	CCAF attorney Ted Frank represented a class member objecting to the disproportion attorneys' fees and actual relief including worthless injunctive relief. The district court approved the settlement. On appeal, the Ninth Circuit reversed settlement approval and remanded.
Mckinney-Drobnis v. Massage Envy Franchising, LLC, No. 16-cv-6450-MMC (N.D. Cal.)	CCAF attorney Ted Frank represented a class member objecting to this coupon settlement. The district court approved the settlement and attorney's fee request. Our appeal to the Ninth Circuit is pending.
Rael v. The Children's Place, No. 3:16-cv-00370-GPC-LL (S.D. Cal.)	CCAF attorney Ted Frank represented CCAF attorney Anna St. John in objecting to this coupon settlement. The district court agreed with our objection regarding certain deficiencies in the settlement approved the settlement with modifications, while holding jurisdiction over the fee request until coupons are redeemed. That process is still pending.
Exum v. National Tire and Battery, No. 9:19-cv-80121 (S.D. Fla.)	CCAF attorney Melissa Holyoak objected to the settlement and attorneys' fee award. The district court approved the settlement and fee request. We did not appeal
Gold v. Lumber Liquidators, No. 14-cv-05373 (N.D. Cal.)	CCAF attorneys represented a class member objecting to this coupon settlement. Plaintiffs amended their attorneys' fee request following our objection. The case is pending in district court.
In re Google LLC Street View Electronic Communications Litigation, No. 10-md-02184 (N.D. Cal.)	CCAF attorney Ted Frank represented a class member objecting to this *cy pres* settlement. The district court approved the settlement, and our appeal to the Ninth Circuit is pending.
In re Equifax, Inc. Customer Data Breach Litigation, No. 17-md-2800-TWT (N.D. Ga.)	CCAF attorney Melissa Holyoak represented CCAF attorney Ted Frank and another class member in objecting to an unfair settlement, inadequate representation of the class, and the fee request. The Eleventh Circuit affirmed. Our petition for *en banc* review is pending.
Hyland v. Navient Corp., No. 1:18-cv-09031-DLC (S.D.N.Y.)	CCAF attorney Anna St. John represented a class member objecting to this *cy pres* settlement and attorneys' fee award. The district court approved the settlement but denied the entire fee request. Our appeal to the Second Circuit is pending

Case	Result
In re Apple, Inc. Device Performance Litigation, No. 18-md-02827-EJD (N.D. Cal.)	CCAF attorney Ted Frank represented CCAF attorney Anna St. John objecting to the attorneys' fee request accompanying this settlement. The district court awarded less than plaintiffs requested. Our appeal to the Ninth Circuit is pending.
Jones v. Monsanto Co., No. 19-cv-0102-BP (W.D. Mo.)	CCAF attorney Adam Schulman represented CCAF attorney Anna St. John objecting to this settlement and accompanying attorneys' fee award. The district court approved the settlement and fee request. Our appeal to the Eighth Circuit is pending.
In re Flint Water Cases, No. 5:16-cv-10444-JEL-MKM (E.D. Mich.)	CCAF attorney Michael Frank Bednarz represented class members objecting to the attorneys' fee request in this settlement. The objection is pending in district court.
Fruitstone v. Spartan Race, Inc., No. 1:20-CV-20836-BLOOM/Louis (S.D. Fla.)	CCAF represented a class member objecting to the proposed settlement and requesting deferment of the fee award until the settlement vouchers were redeemed. The district court approved the settlement and fee request. We did not appeal.

8. As the chart shows, HLLI and CCAF achieve success or partial success in the vast majority of their objections, and have won hundreds of millions of dollars for class members, as well as numerous landmark appeals. We regularly represent law professors in court, and have been appointed *amicus* in district court and appellate court proceedings where there was no adversary presentation.

9. I've also objected at times or represented objectors outside of my work at CCAF. In 2008, before I started CCAF, I objected *pro se* (after dismissing the attorney I initially retained) to the class action settlement in *In re Grand Theft Auto Video Game Consumer Litigation*, No. 1:06-md-1739 (SWK) (S.D.N.Y.) because of the disproportionate recovery it gave to class counsel against the class. The district court refused to certify the class and approve the settlement. 251 F.R.D. 139 (S.D.N.Y. 2008). In the six cases which I list below, I was retained in my private capacity to represent appellants or objectors in cases where CCAF did not have a client. In each case, my retainer was for a flat fee with a right to a percentage of court-awarded fees, and if the lead attorney or client chose to settle an appeal or objection, I received no additional payment. I would only accept the work if I believed the appeal was meritorious. I have a 2-0 record in these cases where my clients chose to see the appeal

through to its conclusion. One of these appeals was in the *Groupon* case in the Ninth Circuit listed above.

Case	Result
Eubank v. Pella Corp., 753 F.3d 718 (7th Cir. 2014).	I was retained on a flat-fee basis for briefing and argument of the appeal. The Seventh Circuit reversed settlement approval and ordered the reinstatement of defrocked class representatives. On remand, the settlement was substantially improved. I retained counsel to seek fees on my behalf, and the court awarded me fees in 2019.
In re Toyota Motor Corp. Unintended Acceleration Litigation, Nos. 13-56458 (L), 13-56468 (9th Cir.)	I was retained on a flat-fee basis to participate in the appeal and assist with the successful opposition to a motion for an appeal bond. The objecting client chose to voluntarily dismiss his appeal in response to a settlement offer, and I withdrew from representation before the dismissal. I received no payment from the plaintiffs or defendants. I believe the appeal was meritorious, and the arguments that I planned to make on behalf of the objector were later adopted by the Eighth Circuit in *BankAmerica Corp.*
In re Deepwater Horizon Economic and Property Settlement Appeals (No. 13-30095) and *In re Deepwater Horizon Medical Settlement Appeals* (No. 13-30221) (5th Cir.)	I was retained by counsel for five appellants on a flat-fee basis while the appeals were pending. After oral argument in 13-30095 and after briefing in 13-30221, three of the appellants retained new counsel who voluntarily dismissed their appeals; I do not know what deal they made, and I received no payment. The two remaining appellants chose to move to voluntarily dismiss their appeals without recompense. I received no payment from the plaintiffs or defendants or objectors. I believe the appeals were meritorious, and many of the arguments I made in the briefing were adopted by the Seventh Circuit in *Eubank*.
In re CertainTeed Fiber Cement (No. 14-1882) (3d Cir.)	I was retained on a flat-fee basis to work on the appeal after assisting counsel for the objector in the district court on an hourly basis. (In response to the district-court objection, the parties modified the settlement to bar reversion to the defendant, which was worth some amount of money to the class, but the district court denied a motion for attorneys' fees for the objector.) As cross-motions were pending in the Third Circuit, the parties settled, and I withdrew from representation, and the objectors dismissed their appeal. I received no payment from the plaintiffs or defendants. I believe the appeal was meritorious because the district court failed to comply with *Baby Products Antitrust Litigation*'s requirement to determine the actual payment to the class. The settlement approved by the district court was akin to that rejected by the Seventh Circuit in *Eubank*.

Case	Result
Fladell v. Wells Fargo Bank, No. 13-cv-60721 (S.D. Fla.)	I was retained on an hourly-fee basis to provide a draft objection to the attorneys for a pair of objectors, and then a declaration in support of the objection. After I submitted the declaration, a current CCAF client contacted me and suggested that I had a conflict of interest, and asked me to withdraw from the *Fladell* case. I disagreed that there was a conflict of interest, but received permission to withdraw to avoid any collateral dispute with my clients, and waived my hourly fee. I believe the objection was meritorious, and the district court's decision approving the settlement and overruling objections without determining actual benefit to the class contradicted *In re Baby Products* and *Pearson v. NBTY*, among other decisions. I did not participate in the appeal, and did not receive any money from its settlement.
In re Groupon, Inc., Marketing and Sales Practices Litig., No. 3:11-md-2238-DMS-RBB (S.D. Cal.)	Discussed above. After appellate briefing was complete, I was retained by one of the appellants in my private capacity to argue the appeal on a flat-fee basis, and the Ninth Circuit agreed with me in an unpublished order that the district court's settlement approval applied the wrong standard of law, and vacated and remanded.

10. There were several other cases where CCAF did not have a client where I consulted in my private capacity with attorneys representing objecting class members in cases about legal strategy for objections on an hourly basis or flat-fee basis, sometimes providing draft objections or outlines or draft briefs or draft responses to motions for appeal bonds or sanctions, sometimes providing copies of relevant public filings I had previously made, sometimes recommending that no objection be pursued. Because I did not file an objection as either counsel or objector in those cases, because I had no attorney-client relationship with the objector, because I was not the ultimate legal decisionmaker in those cases, because the ultimate legal decisionmaker in those cases did not always follow my advice or keep me apprised of the status of the case, because I withdrew from continued participation in several pending cases in June 2015, and because of contractual confidentiality obligations, I do not list them in this declaration. I similarly do not list numerous cases where objectors or attorneys or settling parties or experts have discussed pending settlements, client representations, objections, appeals, or collateral litigation with me and/or I have provided copies of public CCAF filings as a favor without payment or creating an attorney-client relationship. State attorneys general offices and the Department

of Justice occasionally telephone me or meet with me from time to time to discuss class action settlements or certifications, and I do not track or list those cases either.

11. I no longer accept paid representation in such cases in my private capacity with attorneys who do not agree in advance to avoid dismissing appeals for *quid pro quo* payment because CCAF engages in litigation to create precedent requiring objectors and their counsel to equitably disgorge payments received without court approval for withdrawing objections or appeals, and I want to avoid conflicts of interest while CCAF engaged in such litigation. I note that it would be simple enough for the settling parties to stipulate to settlement procedures definitively deterring bad-faith objectors by including an order forbidding payment to objectors without disclosure and court approval. Instead they have imposed abusively burdensome requirements on objection that will do little to deter bad-faith objectors while forcing attorneys for good-faith objectors to waste untold hours on a declaration of dozens of pages. I have expressed a willingness to be bound by an injunction barring us from settling this objection for payment without court approval if there is any doubt as to our good-faith intentions in objection to an unfair settlement and fee request.

12. A website purporting to list other cases where I acted as an attorney or objector is inaccurate, listing me in several cases where I had no role, made no appearances, and had no attorney-client relationship with the objector, and falsely attributing to me filings I had nothing to do with. The website is further inaccurate in omitting dozens of my successful objections, falsely characterizing successful objections as having been overruled entirely, and misrepresenting the substance of court filings and testimony. Though I have notified the website of its errors, and though I frequently submit declarations such as this one providing a full resume of my cases and results, they refuse to provide accurate information about my record.

13. A number of objectors I have no affiliation with have filed briefs plagiarizing my work or CCAF's work in other cases without consulting with me. At least one objector has incorrectly represented to a court that I have agreed to represent him before a retainer agreement was signed.

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

15. CCAF has won more than $200 million dollars for class members by driving the settling parties to reach an improved bargain or by reducing outsized fee awards. Andrea Estes, *Critics hit law firms' bills after class-action lawsuits*, Boston Globe (Dec. 17, 2016) (more than $100M at time). *See also, e.g., McDonough v. Toys "R" Us*, 80 F. Supp. 3d 626, 661 (E.D. Pa. 2015) ("CCAF's time was judiciously spent to increase the value of the settlement to class members") (cleaned up); *In re Citigroup Inc. Secs. Litig.*, 965 F. Supp. 2d 369 (S.D.N.Y. 2013) (reducing fees, and thus increasing class recovery, by more than $26 million to account for a "significantly overstated lodestar"); *In re Apple Inc. Sec. Litig.*, No. 5:06-cv-05208-JF, 2011 U.S. Dist. LEXIS 52685 (N.D. Cal. May 17, 2011) (parties nullify objection by eliminating *cy pres* and augmenting class fund by $2.5 million).

Pre-empting *Ad Hominem* Attacks

16. In my experience, class counsel often responds to CCAF objections by making a variety of *ad hominem* attacks, often wildly false. The vast majority of district court judges do not fall for such transparent and abusive tactics. Because the objection deadline is so close to the fairness hearing, we might not have a chance to supplement the record if class counsel engages in such tactics to distract from the merits of the objection. In an effort to anticipate such attacks and to avoid collateral litigation over a right to file a reply, I discuss and refute the most common *ad hominems* below. If the Court is inclined to disregard the *ad hominem* attacks, it can avoid these collateral disputes entirely and the discussion below will be irrelevant.

17. Class counsel often try to tar CCAF as "professional objectors" or "serial objectors" and then cite court opinions criticizing for-profit attorneys who threaten to disrupt a settlement unless plaintiffs' attorneys buy them off with a share of attorneys' fees. But this is not the non-profit CCAF's *modus operandi*, so the court opinions class counsel rely upon to tar CCAF are inapposite. *See* Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. Chi. Legal F. 403, 437 n. 150 (public interest groups are not professional objectors); Paul Karlsgodt & Raj Chohan, *Class*

Action Settlement Objectors: Minor Nuisance or Serious Threat to Approval, BNA: Class Action Litig. Report (Aug. 12, 2011) (distinguishing CCAF from professional objectors). CCAF refuses to engage in *quid pro quo* settlements and has never withdrawn an objection in exchange for payment. Instead, it is funded entirely through charitable donations and court-awarded attorneys' fees. The difference between a for-profit "professional objector" and a public-interest objector is a material one. As the federal rules are currently set up, "professional objectors" have an incentive to file objections regardless of the merits of the settlement or the objection. In contrast, a public-interest objector such as myself has to triage dozens of requests for pro bono representation and dozens of unfair class action settlements, loses money on every losing objection (and most winning objections) brought, can only raise charitable donations necessary to remain afloat by demonstrating success, and has no interest in wasting limited resources and time on a "baseless objection." CCAF objects to only a small fraction of the number of unfair class action settlements and fee requests it sees.

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

19. In *In re Equifax, Inc. Customer Data Breach Litigation*, No. 17-md-2800-TWT (N.D. Ga.), the district court's approval order stated that I am a "serial objector" who objected merely to benefit myself or my attorney. It further accused me of making "misleading" statements about the settlement. The order did not cite any evidence or reason to support this finding, and I have reason to believe the court used this language only because it adopted nearly verbatim a proposed order that was submitted *ex parte* by plaintiffs' counsel, without exercising independent judgment to make these findings. The allegation made by the district court is false. I still believe that our objection in *Equifax* was meritorious, similar to successful objections we've made elsewhere that have won millions of dollars for class members, and supported on appeal by an amicus brief by a prominent plaintiffs' attorney that agreed

with our analysis. I did not make any false or misleading statements about the settlement, and on appeal, plaintiffs failed to identify any false or misleading statements I made and admitted that I have never engaged in extortion. The Eleventh Circuit recognized that the district court did not draft these findings, which, because they were *dicta*, it did not opine upon.

20. In *Exum v. National Tire and Battery*, No. 9:19-cv-80121 (S.D. Fla.), one of HLLI's attorneys mistakenly misconstrued the release clause in the settlement agreement and filed an objection with an argument that relied on that erroneous reading. Once she became aware of the error, she withdraw that portion of the objection and has publicly expressed contrition and embarrassment that her work did not live up to the high standards we set for ourselves. The district court issued an order to show cause why she should not be sanctioned, stating that the "false statements and representations" "appear[] to be reckless or negligent." The court also referred to the HLLI attorney as a "serial" or "professional" objector but made no finding that she or any other HLLI attorney has ever withdrawn an objection in exchange for payment. HLLI filed a response to the order explaining that this error was made in good faith, with no intent to delay or otherwise interfere with the court proceedings and again expressing contrition. The court subsequently issued an order discharging the order to show cause in which it stated that "it is clear to the Court that [the HLLI attorney] does hold herself to high standards" and the court was "satisfied and impressed" by HLLI's "prompt and candid response." The court found that the HLLI attorney "did not engage in bad faith conduct and did not knowingly or intentionally make a false statement or misrepresentation to the Court."

21. CCAF feels strongly enough about the problem of bad-faith objectors profiting at the expense of the class through extortionate means that it successfully initiated litigation to require such objectors to disgorge their ill-gotten gains to the class. *See Pearson v. Target Corp.*, 968 F.3d 827 (7th Cir. 2020); *see generally* Jacob Gershman, *Lawsuits Allege Objector Blackmail in Class Action Litigation*, Wall St. J., Dec. 7, 2016.

22. Before I joined CEI, I had a private practice unrelated to my non-profit work. One of my former clients, Christopher Bandas, is a professional objector who has settled objections and withdrawn appeals for cash payments. I withdrew from representation of Mr. Bandas in 2015 when

he undertook steps that interfered with my non-profit work. Mr. Bandas was criticized by the Southern District of New York after I ceased to represent him, and class counsel in other cases often cites that language and attempts to attribute it to me. Class counsel in multiple cases, using boilerplate language, has tried to make it seem like my paid representation of Mr. Bandas was somehow scandalous, using language like "forced to disclose" and "secret." The sneering is false: my representation of Mr. Bandas was not secret, as I filed declarations in my name on his behalf in multiple cases, noting under oath that I was being paid to perform legal work for him; I filed notices of appearances in cases where he had previously appeared; and my declaration in the *Capital One* case ending the relationship was filed voluntarily at great personal expense to myself, as I had been offered and refused to take a substantial sum of money to accede to a Lieff Cabraser fee award of over $3400/hour. I only worked for Mr. Bandas in cases where I believed there was a meritorious objection to be made, had no role in any negotiations he made to settle appeals, and my pay was flat-rate or by the hour and not tied to his ability to extract settlements. I argued two appeals for Mr. Bandas, and won both of them. There is nothing scandalous about that, unless one believes it is scandalous for an attorney to be paid to perform successful high-quality legal services for a client. CCAF had no attorney-client relationship with Mr. Bandas, and Mr. Bandas never paid CCAF, other than for his share of printing expenses when he was an independent co-appellant representing clients unrelated to CCAF.

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

24. Adversaries frequently cite a decade-old case, *Lonardo v. Travelers Indemnity Co.*, 706 F. Supp. 2d 766, 804 (N.D. Ohio 2010), where the district court criticized a policy-based argument by CCAF as supposedly "short on law"; however, CCAF ultimately was successful in the Seventh and Ninth Circuits on that same argument. *See In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011) (agreeing that reversionary clauses are a problematic sign of self-dealing); *Pearson v. NBTY,*

Inc., 772 F.3d 778 (7th Cir. 2014) (same). Moreover, the court in *Lonardo* stated its belief that "Mr. Frank's goals are policy-oriented as opposed to economic and self-serving" and even awarded CCAF about $40,000 in attorneys' fees for increasing the class benefit by $2 million. *Lonardo*, 706 F. Supp. 2d at 813-17.

25. CCAF has no interest in pursuing "baseless objections," because every objection we bring on behalf of a class member has the opportunity cost of not having time to pursue a meritorious objection in another case. We are confronted with many more opportunities to object (or appeal erroneous settlement approvals) than we have resources to use, and make painful decisions several times a year picking and choosing which cases to pursue, and even which issues to pursue within the case. CCAF turns down the opportunity to represent class members wishing to object to settlements or fees when CCAF believes the underlying settlement or fee request is relatively fair. This is especially true now that HLLI has expanded into successful litigation over other issues that our attorneys care about, such as freedom of speech and regulatory abuse. *See, e.g., Greenberg v. Haggerty*, No. 20-cv-3822, 2020 U.S. Dist. LEXIS 229731 (E.D. Pa. Dec. 8, 2020) (preliminarily enjoining rule of professional conduct that would chill free speech, which the defendant appealed but subsequently dismissed).

26. While I am often accused of being an "ideological objector," the ideology of CCAF's objections is merely the correct application of Rule 23 to ensure the fair treatment of class members. Likewise, I have often seen class counsel assert that I oppose all class actions and am seeking to end them, not improve them. The accusation—aside from being utterly irrelevant to the legal merits of any particular objection—has no basis in reality. I have been writing and speaking about class actions publicly for nearly a decade, including in testimony before state and federal legislative subcommittees, and I have never asked for an end to the class action device, just proposed reforms for ending the abuse of class actions and class-action settlements. That I oppose class action abuse no more means that I oppose class actions than someone who opposes food poisoning opposes food. As a child, I admired Ralph Nader and consumer reporter Marvin Zindler (whose autographed photo was one of my prized childhood possessions), and read every issue of *Consumer Reports* from cover to cover. I have focused my practice on conflicts of interest in class actions because, among other reasons, I saw a

need to protect consumers that no one else was filling, and as a way to fulfill my childhood dream of being a consumer advocate. I have frequently confirmed my support for the principles behind class actions in declarations under oath, interviews, essays, and public speeches, including a January 2014 presentation in New York that was broadcast nationally on C-SPAN and in my briefing in *Frank v. Gaos*. On multiple occasions, successful objections brought by CCAF have resulted in new class-action settlements where the defendants pay substantially more money to the plaintiff class without CCAF objecting to the revised settlement. And I was the putative class representative in a federal class action, represented by a prominent plaintiffs' firm. *Frank v. BMOCorp., Inc.*, No. 4:17-cv-870 (E.D. Mo.).

27. On October 1, 2015, after consultation with its board of directors and its donors, CCAF merged with the much larger Competitive Enterprise Institute ("CEI"). Prior to its merger with CEI, CCAF never took or solicited money from corporate donors other than court-awarded attorneys' fees. CEI, which is much larger than CCAF, does take a percentage of its donations from corporate donors. As part of the merger agreement, I negotiated a commitment that CEI would not permit donors to interfere with CCAF's case selection or case management. In the event of a breach of this commitment, I was permitted to treat the breach as a constructive discharge entitling me to substantial severance pay. CCAF attorneys made several filings in several cases opposed by CEI donors.

28. CEI was willing to merge with CCAF because it supported CCAF's pro-consumer mission and success in challenging abusive class-action settlements and fee requests. But it is a large organization affiliated with dozens of scholars who take a variety of controversial positions. Neither I nor CCAF's clients agree with all of those positions, and they should not be ascribed to me, my clients, or this objection, any more than my support for a Pigouvian carbon tax should be ascribed to CEI scholars who have publicly opposed that position.

29. CCAF has since left CEI, and is now part of the Hamilton Lincoln Law Institute, which receives no corporate funding. We did not consult any of our donors about our objection to this settlement.

30. Some class counsels have accused us of improper motivation because CCAF has on occasion sought attorneys' fees. While CCAF is funded entirely through charitable donations and

court-awarded attorneys' fees, the possibility of a fee award never factors into the Center's decision to accept a representation or object to an unfair class-action settlement or fee request.

31. CCAF's history in requesting attorneys' fees reflects this approach. Despite having made dozens of successful objections and having won over $200 million on behalf of class members, CCAF has not requested attorneys' fees in the majority of its cases or even in the majority of its appellate victories. CCAF regularly passes up the opportunity to seek fees to which it is legally entitled. In *Classmates*, for example, CCAF withdrew its fee request and instead asked the district court to award money to the class; the court subsequently found that an award of $100,000 "if anything" "would have undercompensated CCAF." *In re Classmates.com Consol. Litig.*, No. 09-cv-0045-RAJ, 2012 WL 3854501, at *11 (W.D. Wash. June 15, 2012). In other cases, CCAF has asked the court for a fraction of the fees to which it would be legally entitled based on the benefit CCAF achieved for the class and asked for any fee award over that fractional amount be returned to the class settlement fund. In *Petrobras*, despite winning tens of millions of dollars for the class, we requested less than $200,000 in fees. In *Wells Fargo*, our good-faith objection on behalf of a shareholder aided the court in increasing benefit to shareholders by $15 million, and we requested only $250,000 (and received under $100,000) in fees through a court approval process—even though a fellow objector in the same case negotiated and received a payment of $1.75 million from Wells Fargo directly for settling his objections.

32. Moreover, under federal non-profit law, attorney fees cannot be used to support more than 50% of our program expenses. None of our attorneys' salaries are tied to fee awards in any case, and all of our attorneys have salaries that are a fraction of what they could make in private practice.

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

Executed on July 25, 2021, in Houston, Texas.

Theodore H. Frank

EXHIBIT 1

Search Amazon

View order details

Order date	Feb 2, 2021
Order #	114-5165564-4265822
Order total	$21.95 (1 item)

Shipment details

Standard Shipping

Delivered

Delivery Estimate

Saturday, February 6, 2021 by 8pm

Brain Support Supplement - Neuriva Original (30 count in a bottle),... $21.95

Qty: 1

Sold By: Pharmapacks

Contact Seller

Payment information

Payment Method

Amazon.com Visa Signature ending in 8210