

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 0:21-md-03015-SINGHAL/Valle

IN RE:

JOHNSON & JOHNSON SUNSCREEN
MARKETING, SALES PRACTICES AND
PRODUCTS LIABILITY LITIGATION

MDL CASE NO. 3015

Theodore H. Frank,

Objector

Objector Frank's Opposition to Motion for Final Approval of Settlement (Dkt. 130)

Table of Contents

Table of Contents i

Table of Authorities iii

Introduction..... 1

Background..... 3

 A. Valisure discovers benzene in J&J sunscreen products and plaintiffs file suit. 3

 B. The parties agree to a coupon settlement. 4

 C. Frank objects to the settlement allocation. 5

 D. This Court approves the settlement and fee request, but does not address several Frank objections. 7

 E. Intervening precedent helps Frank prevail on appeal. 9

 F. Plaintiffs file a Third Amended Complaint that materially changes the playing field, and seek final approval for the same settlement without any settlement modification. 10

Argument 10

I. The Third Amended Complaint does not satisfy Article III’s standing requirements to seek injunctive relief. 11

II. Plaintiffs fail to make the case for class certification after changing the allegations in the complaint. 13

 A. The Third Amended Complaint demonstrates different facts about different products and different claims for different class representatives, yet plaintiffs make no argument for class certification. 13

 B. Even if some of the class representatives have standing, Article III principles preclude Rule 23(b)(3) certification when members of a class lack standing..... 16

III. Plaintiffs cite the wrong legal standard for settlement approval, and fail to make the case for approval under Rule 23(e)(2). 17

 A. Rule 23(e)(2)(C) requires courts to be wary of the allocation of a class-action settlement. 18

 B. The coupon relief is the only relief *class members* receive for releasing their claims; it is error to value the other putative components of the settlement as settlement benefits. 20

C.	Even if the injunction created prospective duties for J&J, the mismatch between the class’s waiver of damages claims and the injunctive relief precludes valuing it as a settlement benefit.	24
D.	The coupons will not have a 100% redemption rate.	25
E.	The settlement flunks Rule 23(e)(2)(C)(iii) because class counsel negotiated \$2.6 million for themselves in a settlement that provides the class likely less than \$1 million of redeemed value in coupon relief.	27
IV.	Plaintiffs ignore critical language in <i>Drazen</i>	32
V.	<i>Johnson</i> controls this class action because it is governed by federal procedure; Eleventh Circuit law thus precludes incentive awards.	33
VI.	The 2023 approval opinion makes several errors.	33
	Conclusion	36

Table of Authorities

Cases

Alyeska Pipeline Serv. Co. v. Wilderness Soc’y,
421 U.S. 240 (1975)..... 25

Amchem Products, Inc. v. Windsor,
521 U.S. 591 (1997)..... 13, 36

In re Aqua Dots Prod. Liab. Litig.,
654 F.3d 748 (7th Cir. 2011) 21

Arkin v. Pressman,
38 F.4th 1001 (11th Cir. 2022) 29, 34

Ault v. Walt Disney World Co.,
692 F.3d 1212 (11th Cir. 2012) 26

Avritt v. Reliastar Life Ins. Co.,
615 F.3d 1023 (8th Cir. 2010) 17

Bennett v. Behring Corp.,
737 F.2d 982 (11th Cir. 1984) 17, 34

In re Bluetooth Headset Prods. Liab. Litig.,
654 F.3d 935 (9th Cir. 2011) 18-20, 25, 29-31, 34

Briseño v. Henderson,
998 F.3d 1014 (9th Cir. 2021) 2, 4, 6, 9, 18-20, 23, 27-36

Carriuolo v. Gen. Motors Co.,
823 F.3d 977 (11th Cir. 2016) 14-15

Chambers v. Whirlpool Corp.,
980 F.3d 645 (9th Cir. 2020) 30

City of Los Angeles v. Lyons,
461 U.S. 95 (1983)..... 11

Clapper v. Amnesty Int’l USA,
568 U.S. 398 (2013)..... 11

*In re Cmty. Bank of N. Va. & Guar. Nat’l Bank of Tallahassee Second Mortg.
Litig.*,
418 F.3d 277 (3d Cir. 2005)..... 28

Cooper v. Southern Co.,
390 F.3d 695 (11th Cir. 2004) 15

Cordoba v. DIRECTV, LLC,
942 F.3d 1259 (11th Cir. 2019) 16-17

In re Corrugated Container Antitrust Litig.,
643 F.2d 195 (5th Cir. 1981) 35

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006)..... 11

Denney v. Deutsche Bank AG,
443 F.3d 253 (2d Cir. 2006)..... 17

Drazen v. Pinto,
108 F.4th 1302 (11th Cir. 2024) 2, 10, 32

In re Dry Max Pampers Litig.,
724 F.3d 713 (6th Cir. 2013)18-19, 24-29, 31, 34

In re Equifax Customer Data Sec. Breach Litig.,
999 F.3d 1247 (11th Cir. 2021) 17, 34

Faught v. Am. Home Shield Corp.,
668 F.3d 1233 (11th Cir. 2011) 17-18, 25

Figueroa v. Sharper Image Corp.,
517 F. Supp. 2d 1292 (S.D. Fla. 2007) 18

Frank v. Gaos,
139 S. Ct. 1041 (2019)..... 11

Gold v. Lumber Liquidators, Inc.,
No. 3:14-cv-05373-RS (N.D. Cal. Feb. 3, 2025)..... 26

In re Groupon Mktg. & Sales Practices Litig.,
593 F. App'x 699 (9th Cir. 2015) 21

Hanlon v. Chrysler Corp.,
150 F.3d 1011 (9th Cir. 1998) 25

Hensley v. Eckerhart,
461 U.S. 424 (1983)..... 32

Holmes v. Cont'l Can Co.,
706 F.2d 1144 (11th Cir. 1983) 18

In re HP Inkjet Printer Litig.,
716 F.3d 1173 (9th Cir. 2013) 32-33

Johnson v. NPAS Sols., LLC,
975 F.3d 1244 (11th Cir. 2020) 8-9, 33

Kim v. Allison,
8 F.4th 1170 (9th Cir. 2021) 19

Koby v. ARS Nat. Svcs., Inc.,
846 F.3d 1071 (9th Cir. 2017) 21, 23-24

Kurtz v. Kimberly-Clark Corp.,
__ F.4th __ (2d Cir. Jul. 1, 2025)..... 28, 36

Labcorp v. Davis,
No. 24-304, __ U.S. __ (Jun. 5, 2025)..... 17

Linneman v. Vita-Mix Corp.,
970 F.3d 621 (6th Cir. 2020) 30

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992)..... 11, 13

McKinney-Drobnis v. Oreshack,
16 F.4th 594 (9th Cir. 2021) 26

Mirfasihi v. Fleet Mortg. Corp.,
356 F.3d 781 (7th Cir. 2004) 25

Pearson v. NBTY, Inc.,
772 F.3d 778 (7th Cir. 2014)2, 9, 19-20, 25, 27-32, 34, 36

Piambino v. Bailey,
757 F.2d 1112 (11th Cir. 1985) 17, 18, 29-30

Prado-Steiman v. Bush,
221 F.3d 1266 (11th Cir. 2000) 14

Redman v. RadioShack Corp.,
768 F.3d 622 (7th Cir. 2014)19, 30-32, 35-36

Reynolds v. Beneficial Nat’l Bank,
288 F.3d 277 (7th Cir. 2002) 21

Richardson v. L’Oreal United States,
991 F. Supp. 2d 181 (D.D.C. 2013)..... 28

Roes 1-2 v. SFBSC Mgmt., LLC,
944 F.3d 1035 (9th Cir. 2019) 28-29, 31

Serota v. Johnson & Johnson Consumer Inc.,
No. 21-cv-61103 (S.D. Fla.) 3-4

Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.,
559 U.S. 393 (2010)..... 24, 33

Smith v. Miorelli,
93 F.4th 1206 (11th Cir. 2024) 13

Spokeo, Inc. v. Robins,
578 U.S. 330 (2016)..... 11

Swinton v. Squaretrade, Inc.,
454 F. Supp. 3d 848 (S.D. Iowa. 2020) 26

Synfuel Tech., Inc. v. DHL Express (USA), Inc.,
463 F.3d 646 (7th Cir. 2006) 24-25

In re Target Corp. Customer Data Sec. Breach Litig.,
847 F.3d 608 (8th Cir. 2017) 35

Tech. Training Assocs., Inc., v. Buccaneers Ltd. P’ship,
874 F.3d 692 (11th Cir. 2017) 29

U.S. v. Amodeo,
916 F.3d 967 (11th Cir. 2019) 11

Vought v. Bank of Am.,
901 F. Supp. 2d 1071 (C.D. Ill. 2012) 29

Williams v. Reckitt-Benckiser,
65 F.4th 1243 (11th Cir. 2023) *passim*

Constitutional Provisions, Statutes, and Rules

28 U.S.C. § 1712..... 6, 8-10, 30, 37

28 U.S.C. § 1712(c) 3, 32

Fed. R. Civ. P. 23 3, 24

Fed. R. Civ. P. 23(a)(3)..... 15-16

Fed. R. Civ. P. 23(b) 36

Fed. R. Civ. P. 23(b)(2)..... 25

Fed. R. Civ. P. 23(b)(3)..... 15-16, 35

Fed. R. Civ. P. 23(e) 25, 27, 33, 35

Fed. R. Civ. P. 23(e)(1)..... 35

Fed. R. Civ. P. 23(e)(2)..... 8, 9, 17, 25, 29, 34, 36

Fed. R. Civ. P. 23(e)(2)(A) 17

Fed. R. Civ. P. 23(e)(2)(B) 17-19, 29

Fed. R. Civ. P. 23(e)(2)(C) 2-3, 6-9, 17-18, 27, 36

Fed. R. Civ. P. 23(e)(2)(C)(i)..... 17, 19

Fed. R. Civ. P. 23(e)(2)(C)(ii)..... 5, 8, 9, 17, 20, 29

Fed. R. Civ. P. 23(e)(2)(C)(iii) 5, 8, 17, 19, 27, 29, 32, 34

Fed. R. Civ. P. 23(h) 4, 32

U.S. Const., art. III..... 1, 6, 9, 11, 13, 16, 21, 23

Other Authorities

Brickman, Lester,
LAWYER BARONS (2011)..... 31

Federal Judicial Center,
MANUAL FOR COMPLEX LITIGATION, § 21.312 (4th ed. 2008) 21

Hantler, Steven B. & Robert E. Norton,
Coupon Settlements: The Emperor’s Clothes of Class Actions, 18 GEO. J.
LEGAL ETHICS 1343 (2005)..... 27

Henderson, William D.,
*Clear Sailing Agreements: A Special Form of Collusion in Class Action
Settlements*,
77 TUL. L. REV. 813 (2003) 30

McKinney-Drobnis v. Massage Envy,
No. 3:16-cv-06450-MMC,
Motion for Fees, Dkt. 186 (N.D. Cal. Feb. 8, 2024)..... 26

S. Rep. 109-14 (2005)..... 24, 28

Schwartz, Victor E. & Christopher E. Appel,
*Government Regulation and Private Litigation: The Law Should Enhance
Harmony, Not War*,
23 B.U. PUB. INT. L.J. 185, 198-99 (2014) 24

Silver, Charles,
Due Process and the Lodestar Method, 74 TUL. L. REV. 1809 (2000)..... 30-31

Tharin, James & Brian Blockovich,
Coupons and the Class Action Fairness Act, 18 GEO. J. LEGAL ETHICS 1443
(2005)..... 26-27

Introduction

The parties bring back to this Court the exact same coupon settlement that Frank previously objected to. The crux of Frank's objection, both now and then, is that this is an upside-down settlement where the attorneys will receive \$2.6 million, but the class gets only coupons with a face value of \$1.75 million and 97% of the class will receive nothing new. To be clear: Frank is not complaining that the settlement is for \$4.35 million instead of \$43.5 million or even \$5.35 million. If class counsel believes the most value they can extract from J&J is \$4.35 million, so be it. The fatal flaw is the *allocation* of that \$4.35 million between the attorneys and the class. Class counsel is compromising the class's claims for a nuisance value, but wants its full lodestar. A reallocation of that money between class counsel and the class would make the settlement fair—but class counsel has included a self-serving clause segregating the attorneys' fees from the class fund, so that any reduction in fees will redound to the defendant's benefit. This clause is unfair under the circumstances.

The Court previously approved this settlement, but there are major developments between now and then that preclude simply repeating its earlier analysis.

First, in the round-trip between the Court's initial approval and today, Frank won two Eleventh Circuit cases—not just the unpublished decision in this case, but *Williams v. Reckitt-Benckiser*, 65 F.4th 1243 (11th Cir. 2023). *Williams* establishes that Article III precludes settling damages claims for injunctive relief if plaintiffs lack Article III standing to seek injunctive relief. *Id.* at 1254-56 (vacating settlement approval). Plaintiffs purport to establish that there will be future purchases of sunscreen, but they fail to establish any likelihood of future injury, precluding standing to seek injunctive relief. Under *Williams*, the Court does not have jurisdiction to approve this particular settlement. *See* Section I below.

Second, the plaintiffs amended their complaint again, but the new allegations preclude class certification under Eleventh Circuit law. Not only do plaintiffs fail to address that Eleventh Circuit law, they *make no case for settlement class certification at all*, though the settlement cannot be approved without such certification. This is fatal. *See* Section II below.

Third, in *Williams*, objector Frank argued (as here in Dkt. 83) that *Briseño v. Henderson*, 998 F.3d 1014 (9th Cir. 2021); *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014) (Posner, J.); and Rule 23(e)(2)(C) preclude settlement approval. *Williams* agreed that it was error for a district court to fail to “consider the points raised by Frank” with respect to *Briseño*, *Pearson*, and Rule 23(e)(2)(C) in deciding whether to approve a similar lopsided settlement. 65 F.4th at 1261. Nevertheless, in fifty pages of briefing, with the benefit of Frank’s appellate briefs in this case and the benefit of *Williams*, the settling parties do not mention *Briseño*, do not mention *Pearson*, and do not even mention the correct legal standard for adjudicating the fairness of class-action settlements. For good reason: all three preclude settlement approval here. Furthermore, *Williams* reversed a district-court settlement approval that this Court previously relied upon in approving this settlement. *See* Section III below.

Fourth, the injunctive-relief component of the settlement is now a dead letter: the settlement’s mandates expired in 2023, obligate J&J to do nothing in the future, and thus has no value to the class. The Court previously asserted that Frank had no evidence that the injunctive relief merely required J&J to do something it was already doing (despite the fact J&J admitted it during the fairness hearing). Frank’s argument has now been empirically vindicated: though the Settlement never had an “Effective Date,” J&J has voluntarily engaged in the testing program, and the Third Amended Complaint alleges that J&J is, even after the requirements of the settlement expired, still engaging in the testing program and benzene limits imposed by it. Separately, plaintiffs fail to present any legitimate evidence for the redemption rate other than a self-serving accounting entry. But in settlements with larger coupons with longer expiration dates than the coupons here, the redemption rate has been 30 to 40%. Sections III.B, III.C, and III.D explore the appropriate valuation of the settlement.

Fifth, the Eleventh Circuit decided *Drazen v. Pinto*, 108 F.4th 1302 (11th Cir. 2024). And plaintiffs misrepresent *Drazen*, which expressly holds it an abuse of discretion to award attorneys’ fees purely on lodestar without considering the redemption rate and assessment of the settlement

as a whole. Section 1712(c) does not override the requirements of Rule 23(e)(2)(C). *See* Section IV.

Eleventh Circuit precedent precludes granting objector incentive awards, which are a question of Rule 23 federal procedure, rather than state law. *See* Section V below.

In Section VI below, Frank takes issue with some of the inapposite arguments the earlier settlement approval opinion made.

Background

A. Valisure discovers benzene in J&J sunscreen products and plaintiffs file suit.

Defendant Johnson & Johnson Consumer Inc. sells Neutrogena and Aveeno branded sunscreen lotions and sprays.

On May 24, 2021, Valisure, an independent laboratory, filed a citizen petition with the Food & Drug Administration alleging certain J&J sunscreens contained high levels of benzene, and requested recalls. Dkt. 95 at 2. The next day, plaintiffs filed a putative nationwide class-action complaint alleging consumer fraud injuries and unjust enrichment based on the alleged adulteration and mislabeling of Neutrogena products. *Serota* Dkt. 1. Other plaintiffs filed other class-action complaints in multiple jurisdictions. Dkt. 95 at 3.

On July 14, 2021, J&J announced it was voluntarily recalling all lots of five Neutrogena and Aveeno aerosol sunscreen product lines because benzene was detected in samples of the recalled products. The same day, J&J announced it would offer full cash refunds for the average retail selling price of the affected products. It did not set a deadline for the refund program. Plaintiffs amended their complaint, asking for a broader recall and adding other consumer-law claims. *Serota* Dkt. 4.

The United States Judicial Panel on Multidistrict Litigation centralized the various consumer actions that didn't allege personal injury in this Court. Dkt. 1; Dkt. 95 at 4.

Plaintiffs' amended complaint repeatedly alleged that no level of benzene was safe. *E.g.*, *id.* at 15. Though the complaint alleged wrongdoing with both aerosol and lotion sunscreens, it did not expressly allege that any named plaintiff was injured by the purchase of lotion products. *Serota*

Dkt. 4 at 3-10. Plaintiffs acknowledged that the claims against aerosol products were materially different from the claims against non-aerosol products. Dkt. 55 at 30-31.

B. The parties agree to a coupon settlement.

Before the consolidation and any substantive litigation, the parties began mediation, and quickly settled in October 2021. Dkt. 95 at 4-5. The parties executed the settlement and moved for “preliminary approval” on December 17, 2021. Dkt. 55; Dkt. 55-9.

The settlement releases the injunctive and economic loss claims of a single nationwide class of aerosol and non-aerosol product purchasers. Dkt. 55-9 at 10, 12-13, 21-22. As relief, the settlement would distribute to claiming non-aerosol product purchasers “Vouchers” with a total face value of \$1.75 million that can be used towards Neutrogena and Aveeno products and expire after twelve months (*id.* at 18-20 ¶¶53-55, 14 ¶42, 26 ¶82); and, for aerosol product purchasers, J&J agreed to an “extension” of the preexisting aerosol product refund program to January 14, 2022. *Id.* at 17-18 ¶51.

The settlement provided class counsel the right to seek \$2.6 million in a Rule 23(h) award without objection from defendants; any reduction in the award from the \$2.6 million J&J allocated would redound to defendants, rather than the class. Dkt. 55-9 at 20-21 ¶¶60-64. Such protections for class counsel’s Rule 23(h) request are known as “clear sailing” and “kicker” or “reverter” clauses. *E.g., Williams*, 65 F.4th at 1261 (quoting *Briseño*, 998 F.3d at 1026-27).

While class notice promised the coupons would have a face value of \$10.59, the actual face value of the coupons was only \$4.98; the parties have submitted no evidence about likely redemption rates. Dkt. 87 at 11; Dkt. 94-1 at 6.

J&J refunded aerosol customers about \$9.53 million; but J&J had paid at least \$9.28 million of that through its voluntary recall before the December 17 settlement. Dkt. 82-1 at 10; Dkt. 55-2 at 6. The parties still have never given a precise accounting of the before and after. There is no evidence of when J&J would have shut down the voluntary refund program in the absence of the settlement. The court ordered notice to the class in March 2022—after the settlement’s putative “extension” of the refund program to January 14 had expired. Dkt. 68.

The settlement agreement also provided what would have been prospective injunctive relief: forbidding J&J from selling any aerosol products they had already voluntarily recalled; and establishing for two years (until 2023) standards and procedures for the testing of raw materials for benzene, with a limit of one ppm (part per million). Dkt. 55-9 at 16-17 ¶¶46-49. (There was also a putative injunction obligating J&J to test finished products, but that obligation expired in January 2022, before the settlement notice or any court orders regarding the settlement. *Id.*) The settlement and supporting papers did not reconcile this 1 ppm benzene limit with the complaint's allegation that no level of benzene is safe.

At first class counsel acknowledged that the settlement was worth only a few million dollars. Dkt. 77 at 2. But two weeks later, in making their fee request, Plaintiffs asserted they were entitled to a percentage of \$80 million, because that was the "financial impact" of its litigation on J&J, including the value of discarded recalled retail products and lost future sales; plaintiffs did not attempt to value the benefit of this deadweight loss to the class. Dkt.82-1 at 10-11. The latest motion (Dkt. 130) makes no claim about the settlement value.

C. Frank objects to the settlement allocation.

In July 2022, Theodore H. Frank objected to the proposed settlement and fee request. Dkt. 83. Frank was a class member who bought Neutrogena-branded sunscreen in both aerosol and lotion forms during the class period; he filed a timely claim under the settlement procedure. Dkt. 83-1 at 2; Dkt. 83-2; Dkt. 83-3. There is no dispute Frank is a class member.

In his objection, Frank argued the settlement was unfair because most of the purported settlement value was illusory: the injunction provided no marginal benefit to class members not available to the world at large; contrary to appellate precedent, class counsel wanted to take credit for \$9 million in refunds and \$80 million in voluntary recall expenses that predated the settlement and would not be clawed back whether or not the court approved the settlement and its release; J&J's recall expenses were not by themselves class benefits; and empirical data, including from previous settlements, showed that class members were unlikely to redeem the coupons. Because of this, the settlement did not satisfy the requirements of Rule 23(e)(2)(C)(ii) and (iii): the fee

request was disproportionate to the relief that class members would receive, but self-serving “red flag” provisions in the settlement such as the clear-sailing clause and reverter to the defendant shielded that fee request from objection. Frank objected that this was especially problematic because the “vouchers” were coupons by another name, and the fee request flouted CAFA’s restrictions on fee awards in coupon settlements. Dkt. 83 at 14-22. Frank asked the Court to apply CAFA to the fee request in the alternative. *Id.* at 24-25.

Plaintiffs’ response relied mostly on *ad hominem* attacks on Frank and ignored the precedents he cited. Dkt. 87; Dkt. 90 at 3. The latest motion continues to ignore those precedents. Dkt. 130.

At the August 12 fairness hearing, Frank’s counsel argued that the settlement could be approved only if the parties fixed its disproportionality. Tr. 32, 38, 42. “[T]he real question is what are they asking for in relation to what the class is receiving. And that here is \$2.6 million in cash to the plaintiffs’ lawyer, and \$1.75 million, at best, in coupons to the class, with 97 percent of the class receiving nothing.” *Id.* at 32. When asked by the court how the settlement could be better, Frank noted that he was not complaining about the size of the relief, but its misallocation; and that the \$4 million or so of settlement value should be reallocated to give the class a larger share. *Id.* at 38. He suggested the district court should apply *Briseño* and Rule 23(e)(2)(C). *Id.* at 42.

At the August 12 fairness hearing, J&J acknowledged that it incurred the expenses of the recall voluntarily.

Johnson & Johnson Consumer took corrective action in recalling those products from the marketplace, announcing that very thoroughly in the month of July, and then *voluntarily* offering refunds to all the consumers who had purchased those products and were instructed to discard them.

See Tr. 21:8-22:21 (emphasis added).

Frank submitted a detailed proposed order after the fairness hearing. Dkt. 94-1. That proposed order noted the Article III problems with the complaint and suggested that the Court order the parties to amend the complaint. The parties did not voluntarily amend the complaint.

D. This Court approves the settlement and fee request, but does not address several Frank objections.

After the fairness hearing, the district court approved the settlement on February 27, 2023. Dkt. 95. The Court opens with this anecdote about Frank’s objection and the fairness hearing: “The problem arises when in answer to the Court’s question of what would make this settlement and award better or acceptable to the objector, the objector answered with a conclusory and somewhat flippant response of ‘a better settlement.’” *Id.* at 2. The court’s quoted flippant language appears nowhere in the fairness hearing transcript. Rather, as discussed above, Frank’s counsel proposed reallocating the disproportionate settlement amount to be consistent with Rule 23(e)(2)(C) so that the class would receive more and the attorneys would receive less. Tr. 38. The opinion never addresses this proposed solution, instead recounting an exchange that never happened, calling Frank’s argument “conclusory” without discussing the appellate decisions and reasoning that had adopted it, and concluding that “complaining about a problem without posing a solution is called whining.” Dkt. 95 at 25.

The “Court finds that Mr. Frank’s objection does not merit rejection of the Settlement.” Dkt. 95 at 24. The court found it “nearly dispositive” that Frank was the only objector. *Id.* at 23-24 (quotation and citation to district-court precedent omitted). The Court was also impressed by the fact that there was “no opposition to Settlement Plaintiffs’ motion for preliminary approval” decided without any notice to individual class members. *Id.* at 29-30.

As for Frank’s argument (Dkt. 83 at 18-21) that appellate precedent precluded including actions already taken as part of the valuation of settlement benefit, the opinion called this a “conclusory statement” with “zero evidence.” Dkt. 95 at 24.

For valuation, the opinion asserted without explanation that class counsel’s \$2.5 million fee request “will represent approximately one-third of the common fund,” noting that putative one-third figure reasonable under Circuit precedent. Dkt. 95 at 28 (citing cases). The Court gave no explanation why it held the common fund to be worth around \$7.5 million or why it rejected Frank’s valuation arguments. The number does not appear in class counsel’s papers either. The

Court did not explain how it valued each of the component coupon relief, refund, and injunctive relief. The opinion was impressed that the \$2.6 million award was a fraction of what it would cost for the 209,000 claimants to each hire an individual attorney to bring their own suit—and less than what Elizabeth Holmes paid her attorneys who “deserved to be paid.” Dkt. 95 at 25. “Claimants availed themselves of top lawyers without leaving their homes or even spending one dime.” *Id.*

The district court noted the settlement’s prospective injunctive relief (though incorrectly described it as establishing a 0.1 ppm benzene limit, and did not mention that some obligations of the injunctive relief had expired before the fairness hearing). *Compare* Dkt. 95 at 7 *with* Dkt. 55-9 at 16-17.

According to the opinion, “[t]he requested award is inclusive of not only all Class Counsel’s fees, but also reimbursement of all litigation expenses (other than the cost of administration and notice, which [J&J] is paying directly) as well as the value of the non-monetary/injunctive relief obtained on behalf of the Class.” Dkt. 95 at 27. The opinion then cited the district-court opinion that *Williams* vacated; its parenthetical implies that the court included the injunctive relief as “part of the settlement pie.” *Id.* The opinion also noted the “significant value of the changed business practices” as justifying the fee award. *Id.* at 29.

The Court noted its duty to assess the settlement under Rule 23(e)(2), Dkt.95 at 19, but when it came to the Rule 23(e)(2)(C) factors, the opinion failed to address Frank’s arguments about (C)(ii) or (iii). *Id.* at 19-23.

The district court noted with apparent exasperation that its order “was a long time coming” and would have been issued sooner “[w]ere it not for the sole objection” by Frank, and spoke of the voluminous materials it reviewed (Dkt. 95 at 2, 10), but it did not address many issues raised in Frank’s objection. In addition to the arguments mentioned immediately above, the court’s opinion did not apply CAFA. Nor did it address Frank’s argument about class certification other than to say that Frank’s objection was “overruled.” Dkt. 95 at 30.

Citing the Eleventh Circuit’s rejection of lead-plaintiff incentive awards, the district court “retain[ed] jurisdiction to allow Plaintiffs to renew the request for incentive awards if [*Johnson v.*

NPAS Sols, LLC, 975 F.3d 1244 (11th Cir. 2020)] ultimately is overruled.” Dkt. 95 at 29 n.8. The district court administratively closed the case and issued an order of dismissal on April 5. Dkt. 97; Dkt. 98. The Supreme Court later denied the *Dickenson v. Johnson certiorari* petition. No. 22-517 (Apr. 17, 2023). *Johnson* remains the law of this Circuit.

The opinion did not address the Article III issues raised in the proposed order.

Frank timely appealed, and plaintiffs cross-appealed on the *Johnson* issue.

E. Intervening precedent helps Frank prevail on appeal.

While Frank’s appeal in this case was pending, the Eleventh Circuit decided *Williams*, an appeal raising many of the same issues Frank raised in this case, in Frank’s favor. Vacating settlement approval, *Williams* instructed that on remand:

the district court should be sure to consider the points raised by Frank in this appeal when considering whether any settlement agreement is “fair, reasonable, and adequate” under Rule 23(e)(2). See Br. for Appellant at 14-37. Thus, the district court should consider the impact of Congress’ 2018 amendments to Rule 23(e)(2)(C) on its analysis of the fairness of a class-action settlement, including “the effectiveness” of the settlement’s “method of distributing relief to the class,” Fed. R. Civ. P. 23(e)(2)(C)(ii), and whether the proposed attorneys’ fees are disproportionately large compared to the amount of relief reasonably expected to be provided to the class. See, e.g., *Briseño v. Henderson*, 998 F.3d 1014, 1026-27 (9th Cir. 2021) (holding that class settlement was not “fair, reasonable, and adequate” because 2018 amendments to Rule 23 require courts to “scrutiniz[e] the fee arrangement for potential collusion or unfairness to the class,” and settlement at issue gave plaintiffs’ counsel a disproportionate distribution of the settlement, the parties agreed to a “clear sailing arrangement,” and the agreement contained a “‘kicker’ or ‘reverter’ clause”); cf. also *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (reversing approval of class-action settlement that provided “a meager recovery for the class but generous compensation for the lawyers” because it “s[old] out the class,” prior to 2018 amendments).

Frank’s appeal in this case raised the Article III problems *Williams* identified; the amended Rule 23(e)(2)(C) issues identified in his objection and *Williams*; the settlement valuation of \$7.6 million; the failure to comply with 28 U.S.C. § 1712’s strictures on coupon settlements; and

some of the legal errors the Court’s opinion made in approving the settlement. While *Williams* was pending, the Eleventh Circuit decided *Drazen*, resolving the § 1712 question in Frank’s favor. Plaintiffs asked the Eleventh Circuit to reverse and remand on the *Drazen* issue, and the Court did so in an unpublished order without addressing any of Frank’s other arguments (except a minor one about standing). The order requires this Court to address § 1712 and *Drazen*, and to address the standing of the plaintiffs to seek injunctive relief under *Williams*.

F. Plaintiffs file a Third Amended Complaint that materially changes the playing field, and seek final approval for the same settlement without any settlement modification.

The settling parties chose to continue to proceed in this district.

The plaintiffs filed a Third Amended Complaint this June. Dkt. 128; (“TAC”). The TAC adds allegations about some class representatives’ future purchases, and mediates its original assertions that no level of benzene is safe. While the First Amended Complaint alleged that all Sunscreen Products are unsafe because no level of benzene is safe, the Third Amended Complaint alleges that only some products had an “unsafe level” of benzene, and further alleges that *no* products currently have an unsafe level of benzene. TAC ¶¶ 1 n.1, 21-22. It acknowledges that J&J has already taken remedial measures. The TAC makes different allegations about different products. But the parties did not amend the settlement, though the injunctive relief in that settlement is moot. The plaintiffs’ motion for final approval does not ask for class certification or address how changes in the complaint allegations affect the certification decision; does not address any of Frank’s appellate arguments except the standing argument; and, as discussed below, gives the wrong legal standard for settlement approval under the Federal Rules and Eleventh Circuit precedent.

Argument

As discussed in his first objection (Dkt. 83), Objector Ted Frank is a class member who purchased J&J sunscreen products during the class period (including before the recall) and has filed a claim here. Dkt. 83-1 ¶¶ 5-8. His objection applies to the entire class.

I. The Third Amended Complaint does not satisfy Article III’s standing requirements to seek injunctive relief.

Article III of the Constitution limits federal courts to deciding “Cases” and “Controversies.” A plaintiff must thus demonstrate that she has “[s]tanding to sue,” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016), “throughout all stages of litigation,” *U.S. v. Amodeo*, 916 F.3d 967, 971 (11th Cir. 2019) (citation omitted). Federal courts’ “obligation to assure [them]selves of litigants’ standing under Article III ... extends to court approval of proposed class action settlements.” *Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019); *Williams v. Reckitt Benckiser LLC*, 65 F.4th 1243, 1254 (11th Cir. 2023).

Article III standing requires (1) an injury-in-fact that is concrete, particularized, and actual or imminent; (2) a causal connection between the injury and the conduct complained of; and (3) a likelihood that a favorable decision will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). “[A] plaintiff must demonstrate standing separately for each form of relief sought.” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006). For injunctive relief specifically, plaintiffs must also demonstrate a “real and immediate threat of future injury” that is not merely conjectural or hypothetical. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 105 (1983); *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013); *Williams*, 65 F.4th at 1253. If plaintiffs “lack Article III standing to pursue their claims against [J&J] for injunctive relief,” the district court lacks jurisdiction to approve a settlement of those claims. *Williams*, 65 F.4th at 1254, 1256.

To seek injunctive relief, plaintiffs must show a real and immediate threat of future harm. *Lyons* established that past injury alone does not confer standing for injunctive relief unless there is a sufficient likelihood of future harm. The *Lyons* plaintiff, who had been subjected to a chokehold by police, lacked standing to seek an injunction against future chokeholds because he could not show a likelihood of being subjected to one again. 461 U.S. at 105-06. Similarly, *Clapper* held that speculative fears of future harm from potential government surveillance were insufficient for standing, because plaintiffs needed to show that the harm was “certainly impending.” 568 U.S. at 410-14.

The Third Amended Complaint (ECF 128; “TAC”), filed in June 2025, does not meet this standard.

The plaintiffs allege past economic injuries from purchasing Sunscreen Products that were adulterated with benzene, a known carcinogen, without disclosure on the labels. They seek injunctive relief to prevent J&J from continuing to market and sell sunscreen products that may contain unsafe levels of benzene and to ensure compliance with labeling and safety standards. TAC 68 (Prayer for Relief). But the complaint acknowledges that J&J recalled affected products in July 2021 and implemented corrective measures, including new testing protocols to ensure benzene levels do not exceed 1 ppm. TAC ¶ 42. This is not an “unsafe” level according to the complaint. TAC ¶ 1 n.1. Several plaintiffs (*e.g.*, Harper, Rudy, Salter, Casaliggi, Granda, Harrell, Grisham) also state they have resumed purchasing the products post-recall and intend to continue doing so, believing the products are now safe. TAC ¶¶ 7-9, 11-14.

The critical question is whether these plaintiffs demonstrate a real and immediate threat of future harm. The complaint asserts that plaintiffs may be harmed if they purchase sunscreen products in the future that still contain benzene, particularly if J&J terminates its enhanced testing protocols. TAC ¶¶ 44, 255. Specifically, plaintiffs like Brennan and Mang express a desire to purchase the products again if assured they are unadulterated, but fear being misled by labeling if benzene remains present. TAC ¶ 255.

But this is the very epitome of speculative future harm. The complaint confirms that J&J has implemented corrective measures, and plaintiffs have not alleged specific facts showing that current or future sunscreen products are likely to contain unsafe benzene levels. The possibility that J&J *might* “terminate” its testing protocols (TAC ¶ 44) or “*may*... sell adulterated products” (TAC ¶ 255 (emphasis added)) is by definition conjectural; it is not supported by evidence or even allegations of intent or likelihood of termination. “[*I*]f Plaintiffs encounter Defendant’s Sunscreen Products in the future and [*i*]f there is risk those products still contain benzene, Plaintiffs *may* mistakenly rely on the product’s label to believe that Defendants eliminated benzene when they did not.” TAC ¶ 255 (emphasis added). Hypothetical upon hypothetical upon hypothetical; the

averments of promised future purchases only fix one of those three hypotheticals. “The conditional nature of their allegations compels the conclusion: any alleged harm to the Named Plaintiffs is ‘conjectural [and] hypothetical,’ not ‘actual or imminent,’ as Article III demands.” *Williams*, 65 F.4th at 1255 (quoting *Lujan*, 504 at 560). That the plaintiffs have alleged that they will purchase the products again is *necessary*, but it is far from sufficient under *Williams*.

As in *Smith v. Miorelli*, the named plaintiffs have not alleged “a threat that was real and immediate.” 93 F.4th 1206, 1212 (11th Cir. 2024). The TAC lacks any allegation that current or future products are even *likely* to contain unsafe benzene levels, and there is thus no imminent future injury. *Williams* precludes jurisdiction over the injunctive-relief claims or approving a settlement releasing such claims.

II. Plaintiffs fail to make the case for class certification after changing the allegations in the complaint.

A “district court should determine whether to certify a class and, if so, enter an appropriate certification order before deciding whether to approve class-wide relief.” *Williams*, 65 F.4th at 1250; accord *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620-22 (1997). While this Court previously certified the settlement class, the Eleventh Circuit has vacated that order, and there is no class certification in place. In (unsuccessfully) trying to push down the lumps in the First Amended Complaint that precluded standing, the Third Amended Complaint causes other lumps to arise that preclude a single settlement class certification. The Third Amended Complaint has changed the facts on the ground and the claims being made, and class certification is not appropriate under the new allegations.

A. The Third Amended Complaint demonstrates different facts about different products and different claims for different class representatives, yet plaintiffs make no argument for class certification.

The Third Amended Complaint makes numerous new allegations. For example, the class representatives make new allegations alleging different claims amongst themselves. Serota, Somers, and Barich allege no future injury; while the other nine class representatives do.

The earlier complaint alleged that no level of benzene was safe. The new complaint alleges both that (a) an “unsafe level” of benzene is “above 2 parts per million (ppm)” and (b) the twenty-six different products in this case had different levels of benzene, and only some of them were tested to find what the complaint calls “unsafe levels.” *Compare* TAC ¶ 1 *with id.* ¶¶ 21-22. (Indeed, some of the products at issue in the complaint tested at below 1 ppm, meaning that the J&J’s “changed practices” do not have a material effect on those products. *Compare* TAC ¶ 22 *with* TAC ¶ 42.)

Yet the settlement has not changed and continues to seek certification of a single nationwide settlement class governing all twenty-six products. But the new allegations preclude such certification.

First, the TAC concedes for the first time that there is no evidence of benzene being of unsafe levels in at least some of the twenty-six products (though does not identify which products those are). Because each of the products has a different benzene level (TAC ¶ 22), some allegedly above 2 ppm, some below it, there are no longer common questions of safety and misleading omission across the nationwide settlement class. *Compare* TAC ¶ 49. Some class representatives and class members purchased allegedly unsafe products; others purchased admittedly safe products. At a minimum, subclassing is required. “[B]ecause the class members ha[ve] not all been injured by the same violative conduct... ‘disparate’ injuries suffered by different class members ‘may be better addressed through several subclasses rather than one large class.’” *Williams*, 65 F.4th at 1259-61 (quoting *Prado-Steiman v. Bush*, 221 F.3d 1266, 1280-81 (11th Cir. 2000)). The motion for approval acknowledges that there is not evidence of unsafe levels of benzene in lotion products. Dkt. 130 at 3 n.3.

But with the new allegations in the TAC, commonality is not met for the single class. “Common issues of fact and law predominate if they have a direct impact on every class member’s effort to establish liability and on every class member’s ... entitlement to injunctive and monetary relief,” but “common issues will not predominate over individual questions if, as a practical matter, the resolution of an overarching common issue breaks down into an unmanageable variety of

individual legal and factual issues.” *Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 985 (11th Cir. 2016) (quotation omitted). While the complaint alleges in conclusory fashion that every Sunscreen Product had an unsafe level of benzene, paragraph 22 (and footnote 3 in plaintiffs’ motion) in conjunction with the new definition of “unsafe” in paragraph 1 now contradicts that assertion. No longer is there a common issue with respect to sunscreen products and lotion products. Rule 23(b)(3) commonality is not met, and plaintiffs do not argue otherwise in their motion.

Second, the class representatives no longer satisfy typicality because the complaint acknowledges that some class representatives’ claims are not even typical of other class representatives’ claims. Fed. R. Civ. Proc. 23(a)(3). Under Rule 23(a)(3), a “class representative must possess the same interest and suffer the same injury as the class members.” *Cooper v. Southern Co.*, 390 F.3d 695, 713 (11th Cir. 2004). But the class representatives do not even possess the same interest or suffer the same injury as each other. They purchased different products with different levels of benzene, some safe, some “unsafe” as defined by the complaint. Some allege they have speculative future injury; others do not. Rule 23(a)(3) is no longer met after the amendments to the complaint.

Third, now that the products are acknowledged to be of different levels of safety requiring different proof, several of the products in the nationwide class were never purchased by a class representative. The previous operative complaint made a common allegation regarding all Sunscreen Products: they had some trivial levels of benzene, and no level of benzene was safe. The TAC alleges now, though, that some products had safe levels of benzene and others had unsafe levels of benzene. TAC ¶¶ 1 n.1, 21, 22. Thus, “there is some question as to whether any Named Plaintiff has standing to raise certain claims of misrepresentations regarding” some of the J&J products. *Williams*, 65 F.4th at 1260. The twelve named plaintiffs make *no* explicit allegations about purchasing *twenty* of the twenty-six products. Because the claims “are based on alleged misrepresentations that only apply to” some of the products (TAC ¶¶ 1 n.1, 22), the complaint does

not establish standing to include those twenty products in the class allegations. *Williams*, 65 F.4th at 1260.

Plaintiffs make no effort to reconcile the new allegations in the complaint with the need for class certification, and have forfeited the issue now that they have pleaded themselves out of legal certification.

B. Even if some of the class representatives have standing, Article III principles preclude Rule 23(b)(3) certification when members of a class lack standing.

As discussed in Section I, none of the class representatives have standing to seek injunctive relief. This ends the inquiry. But even assuming *arguendo* the plaintiffs' baseless assertion that the only thing needed to have standing is an intent to purchase a product that has a speculative chance of being harmful in the future, the allegations in the TAC fail to satisfy this Circuit's standards for class certification.

This Circuit holds that only the "named plaintiff must have standing" for a class to be certified. *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1267 (11th Cir. 2019). But while that is necessary, it is not sufficient. The standing of unnamed members is "exceedingly relevant to the class certification analysis" under Rule 23(b)(3). *Cordoba*, 942 F.3d at 1273. If a "large portion" of members lack injury, *id.* at 1277, certification is not appropriate.

Plaintiffs fail to make the case that the class certification satisfies this Circuit's requirements under *Cordoba*; indeed, they do not even mention the case. The forfeiture by itself dooms certification, but the plaintiffs have also pled themselves out of certification with the TAC. Only nine of the twelve class representatives allege a future intent to purchase the products. By the plaintiffs' own admission, the other three class representatives do not have standing to seek injunctive relief. Three out of twelve class representatives—a quarter, and thus a "large portion"—lack future injury. *Cordoba* precludes class certification—either the class lacks commonality under Rule 23(b)(3), or the class representatives' claims are not typical of the class's claims for future injury under Rule 23(a)(3).

This Court is bound by *Cordoba*; Frank reserves the issue of whether *Cordoba* is correctly decided, or whether a stricter certification standard is required. *E.g.*, *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006); *Labcorp v. Davis*, No. 24-304, ___ U.S. ___, ___ (Jun. 5, 2025) (Kavanaugh, J., dissenting).

But even under *Cordoba*, the class cannot be certified.

III. Plaintiffs cite the wrong legal standard for settlement approval, and fail to make the case for approval under Rule 23(e)(2).

The 2018 amendments to Rule 23(e)(2) created a new list of elements district courts must consider before approving a class-action settlement. The Eleventh Circuit has long had a six-factor test for evaluating settlement fairness. *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984). Plaintiffs rely on that test. Dkt. 130 at 32-33. That test generally adheres to the new requirements of Rules 23(e)(2)(A), (B), and (C)(i), which Frank does not claim to be at issue here.

But the 2018 amendments also added, among other things, Rules 23(e)(2)(C)(ii), requiring evaluation of “the effectiveness of any proposed method of distributing relief to the class,” and (C)(iii), requiring evaluation of settlement fairness with respect to “the terms of any proposed award of attorney’s fees.” Even before the 2018 amendments, this Court recognized that satisfying the six-factor *Bennett* test was necessary, but not sufficient, to withstand appellate review. *E.g.*, *Piambino v. Bailey*, 757 F.2d 1112 (11th Cir. 1985). And the Eleventh Circuit has affirmed that a district court must “consider the impact of Congress’ 2018 amendments to Rule 23(e)(2)(C) on its analysis of the fairness of a class-action settlement.” *Williams*, 65 F.4th at 1261. *Accord In re Equifax Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1273 (11th Cir. 2021) (courts must review class settlements for fairness under Rule 23(e)(2) and “several additional factors called the *Bennett* factors”).

Yet plaintiffs never mention Rule 23(e)(2)(C), much less argue that the settlement complies with its requirements. This by itself is fatal: Settling parties “bear the burden of developing a record demonstrating that the settlement distribution is fair, reasonable and adequate.” *Faught v. Am.*

Home Shield Corp., 668 F.3d 1233, 1239 (11th Cir. 2011) (internal quotations omitted). *Accord Briseño*, 998 F.3d at 1030. Plaintiffs have not met their burden of demonstrating validity under Rule 23(e)(2)(C). Nor could they: the settlement flunks.

A. Rule 23(e)(2)(C) requires courts to be wary of the allocation of a class-action settlement.

To protect absent class members, courts have a duty to make sure that class counsel have not bargained away the rights of the class. “The parties to an ordinary settlement bargain away only their own rights—which is why ordinary settlements do not require court approval. In contrast, class-action settlements affect not only the interests of the parties and counsel who negotiate them, but also the interests of the unnamed class members who by definition are not present during the negotiations.” *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013). To combat the omnipresent “danger that the parties and counsel will bargain away the interests of the unnamed class members in order to maximize their own,” the district court must act as a fiduciary of the class and apply zealous scrutiny to the proposed settlement. *Id.* “Careful 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*, 757 F.2d at 1139. 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) (cleaned up).

Every dollar reserved to the class is a dollar defendants cannot pay class counsel, so naturally, a conflict of interest emerges. 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*, 757 F.2d at 1143 (cleaned up); *accord In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 949 (9th Cir. 2011). Because of this indifference, judges must look for not just actual collusion (governed by Rule 23(e)(2)(B)) but also the Rule 23(e)(2)(C) problem: “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 (cleaned up). Thus, while class counsel and defendants have proper incentives to bargain effectively over the size of a settlement, they have no such constraints on allocating it between the payments to class members and the fees for class counsel—unless courts police that allocation. *Bluetooth*, 654 F.3d at 949; *see also Pampers*, 724 F.3d at 717.

The new Rule 23(e)(2) reinforces this. A settlement can be at arm’s length (satisfying Rule 23(e)(2)(B)) and large enough to reflect the fair settlement value of the litigation (satisfying Rule 23(e)(2)(C)(i)). But a settlement must also satisfy Rule 23(e)(2)(C)(iii). When, as here, class counsel use negotiated fee provisions to favor themselves over their clients, a district court has a legal obligation to reject the proposed settlement, even when negotiated at arm’s length. *Piambino*, 757 F.2d at 1139; *Kim v. Allison*, 8 F.4th 1170, 1178 (9th Cir. 2021); *Briseño v. Henderson*, 998 F.3d 1014 (9th Cir. 2021); *see also Pampers*, 724 F.3d at 721; *Pearson v. NBTY, Inc.*, 772 F.3d 778, 786-87 (7th Cir. 2014); *Bluetooth*, 654 F.3d at 948-49.¹

Consider the likelihood of settlement approval if class counsel openly sought approval of a common-fund cash settlement of \$4.35 million that paid the lawyers \$2.6 million but the class collectively only \$1.75 million—as this settlement ultimately does in a best-case scenario. Few judges would approve that allocation, and precedent forecloses that result. *See, e.g., Redman v. RadioShack Corp.*, 768 F.3d 622, 630-32 (7th Cir. 2014) (55%-67% allocation unfair); *Bluetooth*, 654 F.3d at 947-49 (disproportionate fee award is a hallmark of an unfair settlement). For the attorney fee and deal to have any chance of court approval, it must conceal this result. So settling

¹ Courts have sometimes imprecisely referred to disproportional results as a sign of “collusion.” *Briseño*, 998 F.3d at 1026. In fact, adversarial arm’s-length self-dealing can lead to the same impermissible results. “[T]he incentives for the negotiators to pursue their own self-interest ... can influence the result of the negotiations without any explicit expression or secret cabals.” *Roes v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1050 n.13 (9th Cir. 2019) (cleaned up) (district court’s finding that settlement was non-collusive was necessary, but not sufficient for settlement approval where class would not receive most of the purported relief).

parties create hypothetical class recoveries and difficult-to-calculate “benefits” that ultimately have little value to the class but are cheap for defendants to provide. These hypothetical recoveries that the class never receives then get a high price tag that artificially inflates the overall “value” of the settlement package that the judge sees.

When, as here, class counsel favor themselves over their clients, a district court has a legal obligation to reject the proposed settlement. *Bluetooth*, 654 F.3d at 948-49; *see also Pampers*, 724 F.3d at 721; *Pearson*, 772 F.3d at 786-87.

B. The coupon relief is the only relief *class members* receive for releasing their claims; it is error to value the other putative components of the settlement as settlement benefits.

Rule 23(e)(2)(C)(ii) requires the Court to evaluate “the effectiveness of any proposed method of distributing relief to the class.” This means, the *actual* value to the class, rather than a hypothetical or illusory possible value. *E.g.*, *Briseño*, 998 F.3d at 1026 (rejecting valuation of potential class recovery when actual recovery was a small fraction of that); *accord Pearson*, 772 F.3d 778 (pre-2018 amendments). As plaintiffs acknowledge, Dkt. 130 at 24, there are three components of putative “relief” in the settlement:

- The \$1.75 million in face value of \$4.98 coupons.
- The so-called “monetary relief”: refunds already paid by J&J in 2021 and January 2022 before the class notice went out in March 2022.
- The “injunctive relief,” requiring J&J to take action until December 2023 (Dkt. 55-9 ¶ 48) or January 21, 2022 (Dkt. 55-9 ¶ 49).

The chart on the next page makes it obvious which of these are material settlement benefits that act as consideration for the release class members are giving J&J, and which are illusory provisions to make the settlement seem better than it is economically.

Putative Relief	Do non-class members and opt-outs receive the relief?	Will class members receive the relief if the Court rejects settlement approval?
Coupons	No	No
“Monetary” relief	Yes	Yes, they already have as of 2022
Injunctive relief	Yes	Yes, they already have as of 2023

It is “the incremental benefits” from the settlement that count, “not the total benefits” from the litigation. *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 282 (7th Cir. 2002). And as this chart shows, the only incremental benefit to the class from the settlement is the coupons—everything else the class can get without releasing their claims, or even remaining in the settlement.

The monetary relief is not provided by the settlement: it is provided by the refund program J&J established before the settlement was signed. Opt-outs are entitled to keep their refund checks. If the Court rejects the settlement, J&J will not claw back refunds from class members and non-class members that J&J has already paid. Approving the settlement has the effect of releasing class claims, but class members do not get a single dime in cash in exchange for that release. Because almost all consumers who wished for a refund obtained one before settlement, the release of those claims cannot be based on the receipt of something they already have and were given unconditionally. Put differently, whether this Court denies or approves the settlement has no effect on class members’s ability to receive and possess their refunds. Therefore, it cannot be said the refund resulted from the settlement. Indeed, had this Court dismissed the case on January 15, 2022, for lack of Article III standing, J&J would not have had to pay fees to class counsel for the benefit to class members.

The refund program cannot count as a settlement benefit because it was already available to consumers and never depended on the settlement or its approval. Not even the putative “extension” of the refund program is a benefit, because there was never any announced end date

to begin with and nearly every refund was paid before settlement. Nothing in the record suggests that J&J planned to end the refund program before January 14, exactly six months after it began, or that the settlement added anything at the margin. And fewer than 3% of the total claims were made between the settlement date and January 14: class settlement notice couldn't even increase the number of claims, because notice did not go out until after the refund program ended. (Thus, even if the refund program were somehow conceived of as settlement relief, it could not support settlement approval because the class notice failed in its basic function—informing class members how to avail themselves of settlement benefits. Federal Judicial Center, *MANUAL FOR COMPLEX LITIGATION*, § 21.312 (4th ed. 2008).)

This is why multiple courts of appeals reject crediting settlements with the value of preexisting relief such as refunds provided by a defendant before a settlement agreement or any other injunction that “does not obligate” a defendant “to do anything it was not already doing.” *Koby v. ARS Nat. Svcs., Inc.*, 846 F.3d 1071, 1080 (9th Cir. 2017); accord *In re Groupon Mktg. & Sales Practices Litig.*, 593 F. App'x 699, 702 (9th Cir. 2015); cf. *In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011) (class certification inappropriate where defendant already had refund program and plaintiff couldn't achieve additional relief).

J&J voluntarily undertook a recall and refund of all potentially affected sunscreen products on July 14, 2021, some five months before settlement. J&J acknowledged at the fairness hearing that they would have, and did, undertake the recall and refund program in response to the Valisure petition and the public reaction, rather than in response to the litigation. *See* Tr. 20-21, 25-26. In fact, J&J had refunded at least \$9,284,264.58 before there was a settlement. Dkt. 55-2 ¶ 9. (The parties still have not disclosed the precise figure of payments already made as of the December 17 settlement execution date.) Given the total refund at the end of the program was \$9,528,207.62, over 97% of refunds came before there was any settlement. Dkt. 82-1 ¶ 45.

Similarly, the injunctive relief required J&J to take steps between 2021 and 2023. The settlement imposes no obligations on J&J after settlement approval. It is impossible for J&J to violate the injunction, even if they were intentionally contumacious. The injunction in 2025 is

literally meaningless—indeed, there would be no Article III standing to bring a complaint for injunctive relief governing past conduct because there would be no redressability.

Settlements with meaningful injunctive relief are structured so that the injunction lasts either in perpetuity or for a certain number of years after settlement approval. For example, J&J has no obligation to issue coupons until all appeals have concluded in this case. Dkt. 55-9 ¶¶ 18, 102. J&J agreed to the refund program and “injunction” in the settlement precisely because those settlement provisions were superfluous requirements that J&J was doing anyway with or without the settlement, which is why Frank has consistently argued they were illusory settlement benefits. This was true when Frank filed his first objection, but it’s clearer than ever in 2025 now that nothing this Court does will affect whether class members (and non-class members!) receive these so-called settlement benefits.

Briseño is directly on point for the question of illusory injunctive relief. 998 F.3d 1014. The *Briseño* settlement forbade ConAgra from making certain representations on the Wesson Oil brand label. The objector (a law professor represented by Frank) complained: the injunction was meaningless because ConAgra sold the Wesson Oil brand to another conglomerate before the fairness hearing, and the injunction did not apply to the successor. Nevertheless, the district court ascribed “some value” to the injunction in approving a settlement that—like this one—paid the attorneys more than the class, and had clear-sailing and kicker provisions. This was reversible error: the injunction was “worthless.” *Id.* at 1028-29. An injunction is illusory when it “does not obligate the bound party to do anything it was not already doing voluntarily for its own business reasons.” *Id.* at 1028 (cleaned up). So too here.

Koby is another example. Defendant changed its practices after the plaintiff survived a contested motion to dismiss. 846 F.3d at 1073, 1080. Then the parties purported to settle for an injunction reflecting those changed practices. The settling *Koby* parties could not attribute settlement value to voluntary actions the defendant took *after* litigation was instigated against it. *Id.* at 1074-75. The relevant fact was that the injunction did “not obligate” defendant “to do anything it was not already doing.” *Id.* at 1080. A paper promise memorializing J&J’s already-

concluded recall program or already-concluded testing agreement provides no new value to class members. *Cf. Dry Max Pampers*, 724 F.3d at 719 (refusing to credit the reinstatement of defendant’s voluntary refund program).

One can imagine an unambitious state attorney general who claims victory in J&J’s temporary agreement to ensure that its supplier of isobutane reduces benzene contamination to 1 ppm. But under Rule 23, “the concept of class actions serving a ‘private attorney general’ or other enforcement purpose is illegal.” S. Rep. No. 109-14, at 58-59 (2005); *cf. also Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 260-69 (1975) (judiciary cannot award fees on non-legislatively sanctioned “private attorney general” model). “The civil judicial system is designed to compensate people who have been wrongfully injured by another’s conduct; its purpose is not to supplant the administrative and legislative branches of government through regulation.” Victor E. Schwartz & Christopher E. Appel, *Government Regulation and Private Litigation: The Law Should Enhance Harmony, Not War*, 23 B.U. PUB. INT. L.J. 185, 198-99 (2014). Rule 23 is not a substantive bounty-hunting provision that allows class counsel to treat the class as a free-floating entity existing only to permit counsel to operate as a private attorney general. Rule 23 is a procedural joinder device that aggregates real individuals with real claims into a class if certain prerequisites are satisfied. *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010).

The *only* consideration in this settlement that class members receive in exchange for their release are the coupons with a \$1.75 million face value and an agreement to pay \$2.6 million in attorneys’ fees. Everything else a class member has already received, whether they opt out or not, and whether the Court approves the settlement or not.

C. Even if the injunction created prospective duties for J&J, the mismatch between the class’s waiver of damages claims and the injunctive relief precludes valuing it as a settlement benefit.

“The fairness of the settlement must be evaluated primarily on how it compensates class members—not on whether it provides relief to other people.” *Pampers*, 724 F.3d at 720 (quoting

Synfuel Tech., Inc. v. DHL Express (USA), Inc., 463 F.3d 646, 654 (7th Cir. 2006)). The injunction here with a different expiration date would, to the extent it's not superfluous (as J&J's continuing conduct shows), benefit future purchasers, which have some overlap with the class, but only because the injunction applies to the world at large, including opt-outs. Final approval waives the rights of class members, who are *past purchasers* of J&J products. "Future purchasers are not members of the class, defined as it is as consumers who have purchased [the product]." *Pearson*, 772 F.3d at 786. Thus, undirected prospective relief, such as changing the defendants' testing of future supply chains, cannot make a settlement in which a class releases its past damages claims fair.

Even if the injunctions impose significant costs on J&J, those costs are not the measure of compensable value. The standard under Rule 23(e) "is not how much money a company spends on purported benefits, but the value of those benefits to the class." *Bluetooth*, 654 F.3d at 944 (quotation omitted). It is "egocentrism" to assume that the class members are concerned about the costs incurred by J&J. *Pampers*, 724 F.3d at 720; *accord Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (putting defendant out of business not valuable to class members).

Frank does not argue that a class may *never* benefit from prospective injunctive relief. Injunctions can direct relief to a class in many ways. For example, a 23(b)(2) civil-rights claim may seek to change the future behavior of a governmental body or an employer for a class of individuals who have ongoing relationships with the defendant, like prisoners or city residents exercising their speech rights or people wishing to exercise birthright citizenship rights. Consumer class-action settlements sometimes provide injunctive relief that directs relief targeted specifically to class members. For example, injunctions may provide an improved insurance-claims process or replacements for a defective product. *E.g.*, *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1243-44 (11th Cir. 2011); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998).

D. The coupons will not have a 100% redemption rate.

Plaintiffs present no evidence, expert or otherwise, of the likely redemption rate for the coupons. (They note that J&J has "booked" the full face value of the coupons, but Christine

Kraynak’s declaration (Dkt. 130-6) very carefully avoids claiming that the redemption rate will be 100%, or making any claims about expected redemption rates. J&J has other coupon programs and has internal data about redemption and breakage rates. The court can draw the adverse inference.) This is despite the fact that it is the burden of the proponents of the settlement to prove that the voucher “has actual value for consumers.” *Pampers*, 724 F.3d at 719 (citing *Ault v. Walt Disney World Co.*, 692 F.3d 1212, 1216 (11th Cir. 2012)) (internal quotations and other citations omitted).

Empirical evidence from other courts that have required submission of redemption rates in coupon settlements, however, shows that the redemption rate will be nowhere near full value.

For example, a settlement involving Massage Envy provided for coupons with a face value of \$36.28 to \$180.63, compared to the \$4.98 here. *McKinney-Drobnis v. Oreshack*, 16 F.4th 594, 600 (9th Cir. 2021). After a settlement renegotiation on remand, the coupons would last for two years, compared to the one-year expiration date here. Despite the huge value of these coupons, class member claimants redeemed only \$2,880,377.83 out of \$11 million face value in coupons—a 26% redemption rate. *McKinney-Drobnis v. Massage Envy*, No. 3:16-cv-06450-MMC, Motion for Fees, Dkt. 186 (N.D. Cal. Feb. 8, 2024).

The coupons in another nationwide case were worth hundreds of dollars and lasted even longer, three years. But out of \$16 million in coupons, the class redeemed only \$6,412,326.29, barely 40%. *Gold v. Lumber Liquidators, Inc.*, No. 3:14-cv-05373-RS (N.D. Cal. Feb. 3, 2025).

Frank is unaware of any coupon settlement where the redemption rate even approached 60%. So even under generous assumptions applying to much more generous and less restrictive coupons, the \$1.75 million of face value coupons will be worth less than \$1 million to the class.

And the Court could easily make much less generous assumptions from other evidence. *Swinton v. Squaretrade, Inc.*, 454 F. Supp. 3d 848, 866 (S.D. Iowa 2020) (citing white paper showing “coupons delivered via email accessed through a mobile device ... were redeemed at a rate of 2% to 4%.”); James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness*

Act, 18 GEO. J. LEGAL ETHICS 1443, 1445, 1448 (2005) (typically “redemption rates are tiny,” “mirror[ing] the annual corporate issued promotional coupon redemption rates of 1-3%”); Steven B. Hantler & Robert E. Norton, *Coupon Settlements: The Emperor’s Clothes of Class Actions*, 18 GEO. J. LEGAL ETHICS 1343, 1347 (2005) (noting one settlement where only two of more than 96,000 coupons were redeemed). It’s possible that the coupons aren’t even worth \$100,000.

The coupons are not worth full face value.

E. The settlement flunks Rule 23(e)(2)(C)(iii) because class counsel negotiated \$2.6 million for themselves in a settlement that provides the class likely less than \$1 million of redeemed value in coupon relief.

As discussed above, the coupons are not reasonably valued at \$1.75 million. But there’s no redemption rate the Court could assume that would allow the settlement to stand under Rule 23(e)(2)(C)(iii), which requires examining the fee arrangement for potential unfairness. *Briseño*, 998 F.3d at 1026. The “plain language indicates that a court must examine whether the attorneys’ fees arrangement shortchanges the class. In other words, the new Rule 23(e) makes clear that courts must balance the ‘proposed award of attorney’s fees’ vis-à-vis the ‘relief provided for the class’ in determining whether the settlement is ‘adequate’ for class members.” *Id.* at 1024.

[C]lass counsel still has the incentive to [agree] with the defendant to reduce compensation for class members in exchange for a larger fee. A defendant goes along with this ... because it cares only about the total payout, not the division of funds between class and class counsel. After all, a defendant, no matter if a class has been certified, has “no reason to care about the allocation of its cost of settlement between class counsel and class members.” *Pearson v. NBTY, Inc.*, 772 F.3d 778, 783 (7th Cir. 2014) (Posner, J.). Instead, “all it cares about as a rational maximizer of its net worth is the bottom line — how much the settlement is likely to cost it.” *Id.*

Briseño, 998 F.3d at 1025. Disproportionate allocation violates Rule 23(e)(2)(C) even without a showing of actual collusion. Impermissible self-dealing can occur without the settling parties explicitly conniving in a smoke-filled room to unfairly treat the class. Arm’s-length negotiations protect the interests of the class only with respect “to the amount the defendant will pay, not the

manner in which that amount is allocated between the class representatives, class counsel, and unnamed class members.” *Pampers*, 724 F.3d at 717. (And in any event, whether a settlement was at arm’s length just means that it satisfies Rule 23(e)(2)(B), and satisfying Rule 23(e)(2)(C) is a separate inquiry. *Briseño*, 998 F.3d at 1030 (quoting *Roes v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1049 n.12 (9th Cir. 2019)).

Negotiating class benefit and fees separately does not allay the inherent conflict when representatives negotiate their own compensation unless “fee negotiations [are] postponed until the settlement was judicially approved.” *In re Cmty. Bank of N. Va. & Guar. Nat’l Bank of Tallahassee Second Mortg. Litig.*, 418 F.3d 277, 308 (3d Cir. 2005); accord *Pearson*, 772 F.3d at 786-87 (finding implausible that separate negotiation could benefit the class); *Richardson v. L’Oreal U.S.*, 991 F. Supp. 2d 181, 204 (D.D.C. 2013) (separate negotiation cannot cure unfair allocation between class and counsel). In such separate negotiations, the defendant knows that the class counsel will eventually request fees, and that overhang affects the defendant’s willingness to compromise to give relief to the class, because the defendant’s reserve price must account for the expected value of what class counsel will request and then demand clear sailing for. *Pearson*, 772 F.3d at 786-87; *Kurtz v. Kimberly-Clark Corp.*, __ F.4th __, __ (2d Cir. Jul. 1, 2025).

In coupon settlements particularly,

the fairness of the settlement should be seriously questioned by the reviewing court where the attorneys’ fee demand is disproportionate to the level of tangible, non-speculative benefit to the class members. In adopting [28 U.S.C. § 1712(e)’s requirement of a written determination that the settlement is fair, reasonable, and adequate], it is the intent of the Committee to incorporate that line of recent federal court precedents in which proposed settlements have been wholly or partially rejected because the compensation proposed to be paid to the class counsel was disproportionate to the real benefits to be provided to class members.

S. Rep. 109-14, at 31 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 32.

The settlement here will distribute coupons with a face value of \$1.75 million but which will likely provide less than half that to the class; other provisions supposedly worth millions or

tens of millions are illusory as a matter of law because they do not act as consideration for the settlement release. Section III.B and C above. Meanwhile, class counsel negotiated for itself a \$2.6 million payday, shielded by a clear-sailing agreement and a segregated fund. This settlement is a prime example of a “sharp professional practice” of attorneys “us[ing] the class action procedure for their personal aggrandizement.” *Piambino*, 757 F.2d at 1144 (internal quotations and citation omitted); *accord Arkin v. Pressman*, 38 F.4th 1001, 1011 (11th Cir. 2022) (class counsel may not ethically “subordinate[] the interests of the class to its own interests”); *Tech. Training Assocs., Inc. v. Buccaneers Ltd. P’ship*, 874 F.3d 692, 697-98 (11th Cir. 2017) (similar).

Thus, courts “must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests ... to infect the negotiations.” *Bluetooth*, 654 F.3d at 947. Rather than explicit collusion, there need only be acquiescence for such self-dealing to occur: “a defendant is interested only in disposing of the total claim asserted against it” and “the allocation between the class payment and the attorneys’ fees is of little or no interest to the defense.” *Id.* at 949 (internal quotations and citations omitted); *accord Briseño*, 998 F.3d at 1025; *Pearson*, 772 F.3d at 783. To this end, Rule 23(e)(2) has separate subparts to ensure *both* an arms’ length negotiation ((e)(2)(B)) *and* effective and proportionate relief distribution and fee allocation without self-dealing terms ((e)(2)(C)(ii) and (iii)).

Another indication of preferential treatment for counsel present in the settlement is the “clear-sailing” clause—*i.e.*, where defendant consents not to challenge the award of fees to Class counsel. *Roes*, 944 F.3d at 1050-51; see Dkt. 55-9 at 17. “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 shows 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 (internal quotation omitted). The “red carpet treatment” is especially pronounced in coupon cases,

where class counsel have had little success in the face of defendants invoking section 1712's restriction on fees. See *Chambers v. Whirlpool Corp.*, 980 F.3d 645 (9th Cir. 2020); *Linneman v. Vita-Mix Corp.*, 970 F.3d 621 (6th Cir. 2020). Thus, a clear-sailing clause is 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*, 768 F.3d at 637; 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.”). *Williams* favorably cited *Briseño*'s criticism of the clear-sailing clause. 65 F.4th at 1261.

A third indication of preferential treatment here is a “kicker” clause under which class counsel's fee fund is segregated from the class benefit so that any unawarded fees revert to the defendant rather than going to benefit the class. *Bluetooth*, 654 F.3d at 948-49. Here, the unawarded fees never leave Johnson & Johnson's pocket. Dkt. 55-9 at 16-17. As a coupon settlement, Johnson & Johnson does not actually pay out any funds to the class until the claims are made, meaning any unused funds do not revert to Johnson & Johnson, but never leave its accounts.

The self-dealing here not only included a disproportionate fee, and a clear-sailing agreement, but a segregated fund for the proposed attorneys' fees. These are convincing indications of a lawyer-driven settlement. See generally *Williams*, 65 F.4th at 1261; *Briseño*, 998 F.3d at 1026-27; accord *Pearson*, 772 F.3d at 786-87; *Piambino*, 757 F.2d at 1122. Any objection to an excessive fee request would be for the benefit of the defendant, rather than the class member, ensuring along with the clear-sailing agreement that no one would have appellate standing to challenge a fee award—unless that class member challenges the settlement as a whole. The combination is “a strategic effort to insulate a fee award from attack.” Charles Silver, *Due Process and the Lodestar Method*, 74 TULANE L. REV. 1809, 1839 (2000); accord *Briseño*, 998 F.3d at 1027; *Pearson*, 772 F.3d at 786-87. “The clear sailing provision reveals the defendant's willingness to pay, but the kicker deprives the class of that full potential benefit if class counsel negotiates too much for its fees.” *Bluetooth*, 654 F.3d at 949.

And worse, it prevents the court from correcting the misallocation of the settlement relief by returning excessive fees to class members, making the settlement unfair. *See Pearson*, 772 F.3d at 786. There is “no apparent reason the class should not benefit from the excess allotted.” *Roes*, 944 F.3d at 1059-60. 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; an objector will not have appellate standing to complain of an excessive fee award, and the clear-sailing clause knocks out the only party with such appellate standing. Silver, 74 TUL. L. REV. at 1839; 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.

Another coupon settlement, *Redman*, is directly on point, though it is pre-2018 amendment. 768 F.3d 622. Class counsel had clear sailing and a kicker provision for \$1 million in fees for providing the class a face value of \$830,000 in coupons. *Id.* at 629. This was unacceptable because, even generously valuing the coupons at full face value, the upside-down ratio meant attorneys were effectively seeking a 55% contingent fee of the settlement value. *Id.* at 630. Using the *Redman* formula of “the ratio of (1) the fee to (2) the fee plus what the class members received,” we see an even worse number of 60% (assuming full face value of \$1.75 million) to over 72% (with a more realistic assumption of under \$1 million in redemptions) in this case.

When courts fail to insist that settling parties compensate the class for their injuries, settlements will look like the one here: class members’ collective recovery limited to coupons of questionable value; attorneys’ fees wildly disproportionate to the actual payout to the class, shielded from appellate review by self-dealing “clear-sailing” and “kicker” clauses; and injunctive relief divorced from the claims of class members. *E.g.*, *Briseño*; *Roes*; *Pearson*; *Redman*; *Pampers*; *Bluetooth*. The settlement here has all these telltale signs, a “bevy of questionable provisions.”

Briseño, 998 F.3d at 1018. This settlement flunks *Redman*, it flunks *Briseño*, it flunks *Pearson*, and it flunks Rule 23(e)(2)(C)(iii). It cannot be approved.

IV. Plaintiffs ignore critical language in *Drazen*.

Plaintiffs argue for application of 28 U.S.C. § 1712(c) and simply awarding them lodestar without regard to the value of the coupons. But *Drazen* expressly forbids this.

[E]ven when the fees are based on the lodestar method, a district court may abuse its discretion if it does not consider the redemption rate of the coupons during the fair, reasonable, and adequate assessment of the settlement as a whole. *See Linneman [v. Vita-Mix Corp.]*, 970 F. 3d 621, 628 (6th Cir. 2020)] (“[A] district court must ensure that a fees award is ‘reasonable,’ which includes as ‘the most critical factor ... the degree of success obtained.’ And as discussed below, a district court will often abuse its discretion if it fails to consider the redemption rate as part of that analysis.” (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983))).

Drazen, 106 F.4th at 1350.

Moreover, the provisions in § 1712(c) making lodestar a hypothetical means for awarding attorneys’ fees do not override Rule 23(e)(2)(C)(iii) and appellate precedent forbidding settlement approval when class counsel engages in self-dealing. By class counsel’s argument, the settlement could have issued a single \$5 coupon and class counsel would still be entitled to their lodestar, despite so drastically compromising the class’s claims. 97% of the class will not get coupons, or any relief that non-class members or opt-outs get. It is unfair to ask the class to so dramatically compromise their claims while the attorneys get their full wages, or even a multiplier. *Drazen* and *Redman* reject plaintiffs’ argument. *Accord In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1176-77 (9th Cir. 2013) (class counsel could not defend disproportionate coupon settlement even though their \$2.1M Rule 23(h) award was less than lodestar); *id.* at 1182 (“class counsel’s hard work on an action is presumably a necessary condition to obtaining attorney’s fees, it is never a sufficient condition. Plaintiffs attorneys don’t get paid simply for working; they get paid for obtaining

results.”). *See also Briseño*, 998 F.3d at 1026 (accepting far less than lodestar for years of litigation and a successful class-certification appeal does not excuse disproportion).

V. *Johnson* controls this class action because it is governed by federal procedure; Eleventh Circuit law thus precludes incentive awards.

This Court properly held that *Johnson* precludes class representative payments. Dkt. 95 at 18, 29 n.8. *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1260 (11th Cir. 2020).

Plaintiffs argue for a non-existent distinguishing principle: that *Johnson* does not apply to diversity cases. *Johnson*’s repudiation of the legality of incentive awards was categorical and the decision nowhere confines its holding to cases arising under federal law: “whether [an] incentive award constitutes a salary, a bounty, or both, we think it clear that Supreme Court precedent prohibits it.” 975 F.3d at 1258-59. Nor do plaintiffs cite any portion of *Johnson* even arguably doing so.

Class representative incentive awards are a question of federal procedure and Rule 23; state law does not dictate federal procedure. *Shady Grove Orthopedic Assoc. v. Allstate Ins.*, 559 U.S. 393 (2010). The district court cases Plaintiffs cite failed to properly consider *Shady Grove* and thus wrongly held *Johnson* does not apply in diversity jurisdiction cases.

VI. The 2023 approval opinion makes several errors.

Frank takes issue with the criticism of his attorney and objection in the February 2023 settlement approval opinion. As discussed in the Background section above, the opinion invented a “flippant” statement by Frank’s counsel, and then criticized Frank for it. From day one, Frank has consistently argued that the Rule 23(e) problem with the settlement is the intentional misallocation to benefit the attorneys at the expense of the class. If the parties fix the misallocation, they fix the problems with the settlement. Instead plaintiffs chose to exaggerate the value of the settlement to the class so that class counsel could breach their fiduciary duty to the class and receive the bulk of the settlement benefit. This is not “whining” (Dkt. 95 at 24-25) without a solution: Frank has brought similar objections for over fifteen years, and won millions of dollars for consumers and dozens of appellate decisions (including *Williams* in this circuit) with identical

arguments. Dkt. 83-1 ¶¶ 16-17, 26. For example, after Frank won *Pearson* in the Seventh Circuit, the parties negotiated a new settlement that tripled relief to the class and paid more to the attorneys. After Frank’s client won *Briseño* in the Ninth Circuit, and the district court rejected the settlement on remand, the parties negotiated a new settlement that doubled what the class actually received, with the attorneys taking a one-third share instead of an 87% share. The problems with the allocation of the settlement here cause material harm to the class that it wouldn’t if Rule 23(e)(2)(C)(iii) were followed. And this Circuit holds that class attorneys who put themselves ahead of the class’s interests have acted inequitably and may be said to forfeit their right to attorneys’ fees entirely. *Arkin v. Pressman, Inc.*, 38 F.4th 1001 (11th Cir. 2022).

There are other legal errors and category errors in the opinion.

1. The opinion found it “nearly dispositive” that Frank was the only objector. Dkt. 95 at 23-24 (quotation and citation to district-court precedent omitted). This is legal error. The “substance and amount of opposition to the settlement” is just a single *Bennett* factor. 737 F.2d at 986. And no matter how all the *Bennett* factors shake out, a settlement must still satisfy the Rule 23(e)(2) requirements. *Equifax*, 999 F.3d at 1273; *see also Bluetooth*, 654 F.3d at 946 (“consideration of [Ninth Circuit’s similar multifactor test] alone is not enough to survive appellate review”; reversing settlement approval because of three red flags all present in this settlement).

Moreover, it’s a misapplication of the *Bennett* factor to look only to the “amount of opposition” while disregarding the “*substance*” of the objections. Frank’s objection was substantive and raised important statutes, Rules, and precedents that class counsel failed to identify to the court. (Even now, class counsel continues to fail to identify binding precedents and federal rules.) This *Bennett* factor merely tells courts there’s no need to give weight to paper-thin objections. A meritorious objection doesn’t become less meritorious because it’s made by a single objector. *E.g.*, *Briseño* (one objector at fairness hearing); *Pampers* (same).

While an outpouring of objections is a factor suggesting widespread dissatisfaction with a settlement, the inverse is not true. It is neither surprising nor probative that only a public-interest law firm filed an objection, given the burdens of objection compared to the benefits in a small-

dollar consumer settlement. (To the extent it is probative, it should weigh against approval that a public-interest firm devoted scarce resources to objecting to a particular settlement. Dkt. 83-1 ¶ 36.) No class member would have had the financial incentive to pay for postage to file a *pro se* objection much less hire an attorney to investigate whether to produce a substantive objection. Indifference or silence cannot be considered support for the settlement. *Redman*, 768 F.3d at 628 (one objector); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 217-18 (5th Cir. 1981).

2. The opinion found it probative that there “was no opposition to Settlement Plaintiffs’ motion for preliminary approval.” Dkt. 95 at 29-30. How could there be opposition? The only ones given notice of the motion were the settling parties supporting the settlement. Dkt. 55 at 2, 37. The class (including Frank) had no notice. And if Frank had somehow magically learned of the settlement and objected at the time, class counsel surely would have complained that Frank had no standing to oppose preliminary approval as a non-party; that the objection was premature; and that the Court should wait until the fairness hearing to address Frank’s concerns. (Too, ever since the 2018 amendments, it’s a misnomer to call it a “motion for preliminary approval.” The motion was necessarily one to give notice of a proposed settlement to the class. Fed. R. Civ. Proc. 23(e)(1).) More importantly, it is reversible error for a district court to rely on its conclusory opinions at the unopposed (and thus effectively *ex parte*) preliminary approval stage to decide class certification at the fairness hearing. *In re Target Corp. Customer Data Sec. Breach Litig.*, 847 F.3d 608, 613 (8th Cir. 2017); *cf.* Dkt. 68 at 3-4.

3. It is irrelevant that class counsel sought smaller fees than what it would cost for class members to individually litigate—much less what Elizabeth Holmes’s lawyers charged in a privately negotiated contract. Dkt. 95 at 25. Yes, it’s cheaper for attorneys to bring aggregated class litigation instead of individual cases—that’s the entire point of class actions, which can’t be brought under Rule 23(b)(3) if they’re not “superior” to other forms of litigation. By this standard, every (b)(3)-certified settlement satisfies Rule 23(e) no matter the ratio of the fee to the recovery, which is obviously not true. *E.g.*, *Briseño*. Rule 23(e) provides “an additional requirement” beyond

Rule 23(b), to “protect[] unnamed class members from unjust or unfair settlements affecting their rights when the representatives become fainthearted.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621, 623 (1997).

No one objected to Holmes’s lawyers’ fees because *she privately negotiated her retainer in advance* without any effect on third parties; no one except Holmes would have had legal standing to complain. In comparison, absent class members don’t get to choose their class counsel in advance and aren’t present at the settlement table or when fee requests are drafted, and objections are necessary to protect the due process rights of affected absent third parties when attorneys favor themselves over their clients. Simply put, class actions are different.

4. It is not a relevant factor that “Claimants availed themselves of top lawyers without leaving their homes or even spending one dime.” Dkt. 95 at 25. Once again, the first part of that clause is true in nearly every class settlement, and not a grounds for distinguishing class settlements that satisfy Rule 23(e)(2) from those that fail. It’s akin to telling a scout to look for potential NBA players who are at least five feet tall. The second part of that clause is clearly erroneous as an economic matter. Every dime paid to class counsel is a dime that the defendant won’t pay to class members to settle a case, and thus an economic *cost* to the class, even if the class is not directly “spending” it—exactly the allocation problem *Williams, Briseño, Pearson, Redman, Kurtz*, Rule 23(e)(2)(C), and Frank’s objection identify.

Many of the reasons the opinion gave for approving the settlement are *non sequiturs*; none overshadow the requirement to satisfy Rule 23(e)(2)(C).

Conclusion

The class representatives do not have standing to seek injunctive relief, precluding approval of this settlement under *Williams*. In the alternative, Eleventh Circuit law precludes class certification.

The proposed coupon settlement disproportionately benefits class counsel at the expense of class members. The proposed settlement also contains other problematic provisions—clear

sailing and a kicker. Given the Court's fiduciary duty to the class, one heightened under CAFA, the proposed settlement should not be approved.

In the alternative, if the Court approves the settlement, it should not award fees until after the coupon redemption period, and then award fees proportional to the redemption value of the coupons. But because of the unfair kicker provision, that would just be a windfall to J&J without resolving the settlement's unfairness. J&J was willing to pay about \$3 to 4 million of new money to settle this case, and fairness requires that the class receive the lion's share of that, which is why a simple fee reduction is not enough to make the settlement fair.

Date: July 3, 2025

Respectfully submitted,

/s/ Theodore H. Frank

John M. Andren

Florida Bar No. 1011609

Theodore H. Frank (*pro hac vice*)

HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1629 K Street NW, Suite 300
Washington, DC 20006
Phone: (703) 203-3848

Attorneys for Objector Theodore H. Frank

CERTIFICATE OF SERVICE

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

/s/ Theodore H. Frank