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 THEODORE H. FRANK'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court makes the following findings of fact, and conclusions of law:

INTRODUCTION

1. On May 24, 2021, Valisure, an independent chemical testing laboratory, filed a citizen petition with the U.S. Food & Drug Administration disclosing its findings that certain Johnson & Johnson Consumer Inc. ("JJCI") products sold under the company's Neutrogena and Aveeno brands contained high levels of benzene and requested, *inter alia*, that the Commissioner issue a regulation, request recalls of the products, and revise relevant industry guidance.

2. The following day, Plaintiffs filed the first complaint in this action alleging violations of Florida's Deceptive and Unfair Trade Practices Act and unjust enrichment based on the alleged adulteration and mislabeling of JJCI's sunscreen products. *Serota v. Johnson & Johnson Consumer Inc.*, No. 21-cv-61103 (S.D. Fla.), Dkt. 1. Additional class action complaints were filed by in multiple jurisdictions.

3. On July 14, 2021, Defendant JJCI 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. On the same day JJCI instituted its recall, it announced it would offer full cash refunds for the full average retail selling price of the affected products, and established a process for claimants to obtain such refunds.

4. On July 30, 2021, the *Serota* plaintiffs filed an amended complaint adding additional claims for consumer fraud and contract relating to the failure to disclose the grounds for the recall and arguing that the recall should have encompassed additional products. On October 8, 2021, the United States Judicial Panel on Multidistrict Litigation centralized the actions in this Court. Dkt. 1.

5. The Plaintiffs and JJCI reached a nationwide settlement of the class actions, and, after a hearing, the Court granted the motion under Rule 23(e)(1) and ordered notice to the class. Dkt. 55; Dkt. 68; Dkt. 73.

6. Before this Court is Plaintiffs' motion for final approval of the settlement and representative plaintiff awards under Rule 23(e)(2) and amended motion for attorneys' fees and representative awards under Rule 23(h). Dkt. 82; Dkt. 78-1.

7. The motions were opposed by class member Theodore H. Frank, who objected on July 7, 2022, on behalf of the entire class, as well as on behalf of a subset of class members, under Rule 23(e)(5). Dkt. 83. Plaintiffs filed an opposition to the objection on August 8, 2022. Dkt. 87. Frank filed a reply on August 11, 2022. Dkt. 90. The Court has considered these filings, and the supporting declarations.

8. The Court held a fairness hearing on August 12, 2022. Counsel for Plaintiffs, JJCI, and Frank presented argument. Dkt. 92.

9. For the reasons stated below, the Court denies Plaintiffs' motion for class certification, denies approval of the settlement, and denies the motion for attorneys' fees and representative plaintiffs' awards as moot. Even if the Court considered the Plaintiffs' untimely and unauthorized opposition to the objection, it would come to the same conclusions.

I. Jurisdiction and Parties

10. Plaintiffs Katherine Brennan, Michelle Mang, Meredith Serota, Jacob Somers, Lauren Harper, Heather Rudy, Fredric Salter, Judith Barich, Dina Casaliggi, Kelly Granda, Kyra Harrell, and Carmen Grisham allege that they are purchasers of JJCI sunscreen products who suffered economic injury from purchasing products that they claim they would not have purchased had they known of the alleged adulteration with benzene. They brought putative class actions on behalf of purchasers of JJCI sunscreen products. *Serota v. Johnson & Johnson Consumer Inc.*, No. 21-cv-61103 (S.D. Fla.); *Brennan v. Johnson & Johnson Consumer Inc.*, No. 2 l-cv-04869 (N.D. Cal.).

11. Though no one challenges Article III jurisdiction, the Court has an independent obligation to assure itself of jurisdiction. *Drazen v. Piuto*, 41 F.4th 1354 (11th Cir. 2022). Plaintiffs' complaints have alleged redressable injury-in-fact to a class of JJCI sunscreen product purchasers that satisfies the requirements of Article III. But the class in this proposed settlement is broader than the

classes defined in the *Serota* and *Brennan* complaints. Dkt. 68 ¶ 6. Despite this mismatch, Plaintiffs did not file a superseding consolidated complaint after the settlement. This can be a source of jurisdictional problems, because *Drazen* held that every member of a certified class must have Article III standing, and the Plaintiffs have never formally made that allegation with the new class definition. 28 U.S.C. § 1653 permits parties to correct jurisdictional defects, and the Court will assume *arguendo* that Plaintiffs will be able to make the required corrective filing, which they should do within fourteen days of this ruling, or there will be additional grounds to refuse to certify the class.

12. Defendant JJCI is a New Jersey corporation with its principal place of business in New Jersey.

13. This Court has original jurisdiction pursuant to 28 U.S.C. §1332(d)(2). The matter in controversy, exclusive of interest and costs, exceeds the sum or value of $5,000,000 and is a class action in which there are in excess of 100 class members and at least one Plaintiff is a citizen of a state different from the Defendant.

II. Settlement

14. On December 17, 2021, two months after the consolidation, and before any substantive litigation, Plaintiffs, with JJCI's acquiescence, moved for "preliminary approval" of a settlement. Dkt. 55. This is a misnomer; since the 2018 amendments to Rule 23, courts do not grant "preliminary approval," but simply issue a decision directing notice of the settlement. Rule 23(e)(1). The Court, after a February 17, 2022 hearing without the benefit of adversarial presentation, and relying on the Plaintiffs' representations in the unopposed motion, granted the motion on March 28, 2022. Dkt. 68.

15. The settlement would settle the claims of a proposed opt-out Rule 23(b)(3) class broader than that alleged in the *Brennan* and *Serota* complaints:

> [A]ll persons and entities in the United States who purchased one or more of the following products for personal, family, or household use and not for resale at any time between May 26, 2015 and the Notice Date: Neutrogena® Beach Defense® aerosol sunscreen, Neutrogena® Cool Dry Sport aerosol sunscreen, Neutrogena® Invisible Daily™ defense aerosol sunscreen,

> Neutrogena® Ultra Sheer® aerosol sunscreen, Aveeno® Protect + Refresh aerosol sunscreen, Neutrogena® Ultra Sheer® Dry-Touch Water Resistant Sunscreen, Neutrogena® Sheer Zinc™ Dry-Touch Face Sunscreen, and Aveeno® Baby Continuous Protection® Sensitive Skin Sunscreen Lotion.
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> For the purposes of this definition, individuals living in the same household shall be deemed to be a single Class Member.
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> Excluded from the Class are (a) all persons who are employees, directors, officers, and agents of JJCI, or its subsidiaries and affiliated companies; (b) persons or entities who purchased the Products primarily for the purposes of resale to consumers or other resellers; (c) governmental entities; (d) persons or entities who timely and properly exclude themselves from the Class as provided in this Settlement; and (e) the Court, the Court's immediate family, and Court staff.

Dkt. 68 ¶ 6.

16. The settlement offers relief in the form of refunds to consumers for the full average retail selling price of the recalled aerosol Sunscreen Products—but only through January 14, 2022, months before settlement notice issued in this case. Any class member learning of this settlement relief through the notice program would have been unable to obtain the relief. JJCI had already refunded at least $9,284,264.58 before settlement was reached. Richards Class Counsel Decl. (Dkt. 55-2) ¶ 9. The parties presented no evidence how much the total refund had been when the parties executed the settlement. The total refund at the conclusion of the program was $9,528,207.62. Grombacher Decl. (Dkt. 82-1) ¶ 45. Thus, the post-settlement refunds—all of which will remain in class members' pockets whether or not this Court approves the settlement and releases *every* class member's claim—amount to at *most* just under $244,000, and perhaps substantially less than that depending on the timeliness of the Richards Declaration's calculations. Furthermore, it is unclear whether any of this can be attributed to the settlement, because the parties presented no evidence of when JJCI intended to end its refund program.

17. In addition, the Settlement creates a voucher program to provide relief to consumers with respect to JJCI's non-aerosol Sunscreen Products (*i.e.*, those Sunscreen Products not subject to JJCI's recall). Through this voucher program, JJCI will offer the purchaser a voucher equal to the average retail selling price of the non-aerosol Sunscreen Products, up to a maximum of two (2) such

products per household, toward the purchase of any Neutrogena or Aveeno products. Vouchers shall be transferrable and shall expire twelve months from their issue date. The maximum face value of vouchers to be distributed by JJCI under the non-aerosol voucher program will be $1.75 million, and each claim will be reduced on a *pro rata* basis in the event that claims exceed this amount. *See* Settlement (Dkt. 55-9) ¶ 53. The parties presented no evidence about the likely redemption rate of the voucher program. Plaintiffs represent that the vouchers will be worth about $4.98 each. Dkt. 87 at 7. This is substantially less than stated on Court-approved settlement website: "Vouchers will be worth $10.58 each and may be used toward the purchase of any Neutrogena® and Aveeno® product."[1]

18. The settlement also provides injunctive relief requiring JJCI to maintain and test for benzene levels below 1 part per million in the raw materials for its Sunscreen Products for two years from the date of the execution of the settlement, *i.e.*, until December 2023. However, the parties presented no evidence that JJCI was not already adhering to that level in raw materials or products that it had not recalled, or that the injunction would materially change any products consumers received.

19. The settlement releases the class's claims for economic damages and injunctive relief relating to the facts, activities, or circumstances alleged in the Action, and does not release any claims for personal injuries. Settlement ¶¶ 68-71.

20. The settlement proposes $250 incentive payments to the twelve named plaintiffs. Settlement ¶ 59.

21. Under the Settlement, Class Counsel have also reserved the right to petition the Court for an award of reasonable attorneys' fees of up to $2,500,000 and reimbursement of costs and expenses incurred in the prosecution of this case up to $100,000. Settlement ¶ 61. JJCI agrees not to challenge this request. *Id.* This amount is segregated from the fund for the class, which means any reduction in attorneys' fees will revert to JJCI, rather than the class. *See id.* ¶ 63.

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[1] *Avaliable at* https://sunproductsettlement.com/Summary/portalid/0?portalid=0.

III. Class Certification

22. The Court has an independent obligation to "conduct its own inquiry" that the Rule 23 class-certification standards are satisfied, regardless of whether any party has contested an element. *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1188 (11th Cir. 2003). The Plaintiffs have the burden of establishing class certification is appropriate. *Carriuolo v. General Motors Co.*, 823 F.3d 977, 981 (11th Cir. 2016) (citing *Heaven v. Trust Co. Bank*, 118 F.3d 735, 737 (11th Cir. 1997)). Their own papers, however, demonstrate that it is not.

23. The class here is hundreds of thousands, perhaps millions, of consumers. There is no question that Rule 23(a)(1)'s numerosity standard is met. *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986).

24. But Rule 23(a)(2) commonality requires that the claims are "of such a nature that it is capable of classwide resolution," meaning that "determination of its truth or falsity will resolve an issue that is central to the validity of *each* one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (emphasis added). This standard is not satisfied, because, as the settlement itself seems to recognize, there are material differences between the claims relating to the recalled aerosol products and the non-aerosol products. *First*, the aerosol products were affirmatively voluntarily recalled, and JJCI voluntarily established a refund program, refunding at least $9,284,264.58 before there was a settlement. Richards Class Counsel Decl. (Dkt. 55-2) ¶ 9. At least one court has held in deciding a class certification question that such a program moots any cause of action. *In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011). Leaving open the question of whether *Aqua Dots* would apply to this case in a settlement posture, it is beyond cavil that JJCI would have an affirmative defense with respect to aerosol products that it would not have with respect to non-aerosol products, and the litigation over aerosol products would include the question of whether the voluntary refund program absolved JJCI of liability. *Second*, as Plaintiffs' own papers concede, JJCI has different affirmative defenses that apply to non-aerosol products that do not apply to aerosol products because "benzene was largely undetectable in the non-aerosol products," and, thus in the event of litigation, "class members could be left with no compensation for non-recalled products." Dkt. 55 at 30-31.

Plaintiffs affirmatively state that "both JJCI's testing and testing conducted by Plaintiffs' independent third-party laboratory[] revealed no signs of benzene contamination" in the non-aerosol products. By Plaintiffs' own concession, the claims in this case are not open to classwide resolution.

25. Plaintiffs cite *Dukes* for the principle that a "single common question will do," 564 U.S. at 359, but that passage demonstrates that this Court must consider the "dissimilarities" it has discussed to determine whether a single common question even exists with respect to the entire class. It does not.

26. 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). The Plaintiffs allege that they and the members of the proposed Class purchased JJCI's Sunscreen Products without knowledge that they were contaminated with benzene, that this was due to JJCI misconduct, and they all suffered financial harm as a result. Because the claims of the Plaintiffs and the absent class members concern the same alleged conduct by JJCI, allege the same harm, and arise from the same legal theories, Rule 23(a)(3)'s typicality requirement is satisfied.

27. Similar to, but not co-extensive with, the Rule 23(a)(2) analysis, Rule 23(a)(4) is not met because of two intraclass conflicts. *First*, as discussed above, the interests of the class members who purchased recalled products conflict with the interests of class members who purchased non-recalled products. As effectively conceded by Plaintiffs' papers, and by the differing relief offered by the settlement, these claims have different litigation values. But JJCI's interest is in minimizing the total cost of the settlement. *E.g.*, *Piambino v. Bailey*, 757 F.2d 1112, 1143 (11th Cir. 1985); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 717 (6th Cir. 2013). While Plaintiffs have every incentive to maximize the *total* recovery, every settlement dollar going to recalled-product consumers is a dollar not going to non-recalled-product consumers. Plaintiffs cannot simultaneously represent the two sets of class members because they cannot have had "an interest in maximizing compensation for *every* category." *In re Literary Works in Elec. Databases*, 654 F.3d 242, 252 (2d Cir. 2011) (emphasis in original). In comparison, the Eleventh Circuit recently refused to apply *Literary Works* because "all class members are entitled to the same class benefits." *In re Equifax Inc. Cust. Data Sec. Breach*, 999 F.3d 1247, 1277

(11th Cir. 2021). That is not so here, where one set of class members gets an already-expired right to a cash refund, and another set gets a new claims process with vouchers of questionable value. Here, as discussed above, Plaintiffs concede that their allegations over JJCI non-aerosol products were meritless. But they chose to use the settlement to direct relief to non-aerosol purchasers instead of maximizing the refund period for aerosol purchasers, a breach of their fiduciary duty to the aerosol purchasers. As that choice shows, Plaintiffs have structured the settlement class so that class counsel must serve two masters, and disadvantage one to benefit the other. Rule 23(a)(4) thus requires either subclassing, or, at the minimum, separate representation in the settlement negotiations. *E.g.*, *In re Blue Cross Blue Shield Antitrust Litig.*, No. 2:13-CV-20000, slip op. (N.D. Ala. Aug. 9, 2022), Dkt. 2931.

28. *Second*, class members seeking retrospective relief—damages for past purchases—have interests that conflict with class members seeking prospective injunctive relief. At least some class members will not purchase JJCI sunscreen products between December 2021 and December 2023 and will not benefit from the injunctive relief. But to the extent the prospective injunctive relief has value, every dollar JJCI commits to the settlement of the injunctive-relief claims is a dollar that is not going to retrospective relief. Again, Plaintiffs cannot have had "an interest in maximizing [relief] for *every* category" and Rule 23(a)(4) requires separate representation in that scenario. Although unpublished, the Eleventh Circuit has persuasively held that it is impermissible to join similarly conflicting parties into a single class with unitary representation. *W. Morgan-E. Lawrence Water & Sewer Auth. v. 3M Co.*, 737 F. App'x 457, 464 (11th Cir. 2018) ("the Class's interests could not adequately be represented by counsel purporting to negotiate on behalf of both the Water Authority and the Class, because their interests were inherently conflicted"). In *3M Co.*, class members "asserted claims for monetary damages addressing individualized harms … claims not shared by the Water Authority" while the Water Authority was seeking to "maximiz[e] the amount of injunctive relief obtained from Defendants while minimizing the value of … class members' individualized claims for compensatory damages." *Id.* at 464. So too here.

29. Because the single class as currently constituted without separate representation does not satisfy Rules 23(a)(2) and (a)(4), it cannot be certified, and the Court need not resolve whether the

other requirements of Rule 23(b)(3) are satisfied. But given the differences in how the litigation would proceed over recalled products and non-recalled products and the impossibility of classwide resolution of such dissimilarly situated products in a single class, it is doubtful that common issues predominate.

IV. Rule 23(e)(2) Settlement Fairness Inquiry

30. Because the class cannot be certified, the Court need not decide whether it would have approved the settlement, but, because of the possibility of a Rule 23(f) appeal on class certification, it does so for economy of judicial resources.

31. 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." *Dry Max Pampers*, 724 F.3d at 715.

32. 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).

33. The Court cannot approve a settlement unless it determines that it is fair, reasonable, and adequate. This requires an analysis of the factors listed in Rule 23(e)(2), as well as the six-factor test in *Bennett v. Behring Corp.*, 737 F.2d 982 (11th Cir. 1984). *Equifax*, 999 F.3d at 1273. There is no

presumption in favor of settlement approval; in addition, the Court must give a reasoned response to all thoughtful objections. *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1261-63 (11th Cir. 2020).

34. 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) ("*Bluetooth*"). 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.

A. Frank Objection

35. Here, class member Theodore H. Frank filed a timely objection on behalf of the entire class. Dkt. 83. He also claims, and the settling parties do not dispute, that he will not benefit from the injunctive relief, and objects on behalf of class members like himself who will not benefit from the injunctive relief. *Id.* Frank purchased both recalled and non-recalled products, but did not obtain a refund for the recalled product.

36. Frank is Director of Litigation at the non-profit public-interest law firm, Hamilton Lincoln Law Institute, which is the home of the Center for Class Action Fairness, which he founded. Frank has won several cases relating to objections to settlements he deems unfair; as the Seventh Circuit recently wrote, "Frank's track record—which now includes his success in this case—speaks for itself." *In re Stericycle Sec. Litig.*, 35 F.4th 555, 572 & n.11 (7th Cir. 2022) (citing cases). That said, the merits of an objection do not rise or fall on the identity of an objector. *Id.* While Frank is the only objector, the whole point of any class action is to aggregate claims that would be too burdensome to

litigate individually. It is thus unsurprising that few class members speak up to object to settlements over small-dollar claims, and no adverse inference should be drawn from this fact that only a public-interest attorney has done so. *Redman v. RadioShack Corp.*, 768 F.3d 622, 628 (7th Cir. 2014) (reversing settlement approval of a coupon settlement where Frank's client was the only objector).

37. Frank objects to the settlement's supposed failure to comply with the Class Action Fairness Act; to the Plaintiffs' valuation of the settlement relief; and alleges that the settlement impermissibly benefits class counsel at the expense of the class. He also raises a potential Rule 23(a)(4) issue.

38. On August 8, four days before the final approval hearing and over a full month after Frank filed his July 7 objection, Plaintiffs filed their opposition. Dkt. 87. The Court's Preliminary Approval Order did not provide a deadline for a response from Plaintiffs to any objections. *See* Dkt.68 at 9. The proposed settlement does state that "the Parties shall request that the Court allow any interested party to file a response to any objection ... no later than seven (7) days before the Fairness Hearing, or as the Court may otherwise direct." Dkt. 55-9 at ¶ 106. But no party requested to respond to Frank's objection, the Court did not otherwise direct a party may respond, and Plaintiffs filed four days prior to the hearing. Even under the more general Local Rules governing motion practice, any opposition must be filed no later than fourteen days after the motion. L.R. 7.1(c)(1). And Plaintiffs' filing is really a reply in support of their motions, which would make the deadline seven days. *Id.* It is untimely under any feasible calculation, and the Court is within its rights to disregard it entirely. But nothing in the filing refutes the Frank objection, which this Court finds meritorious.

1. Class Action Fairness Act

39. Congress has condemned "abuses of the class action device," such as when "counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value" and where "unjustified awards are made to certain plaintiffs at the expense of other class members." 28 U.S.C. § 1711 note §§ 2(a)(3), (a)(3)(A). To address these abuses, Congress passed the Class Action Fairness Act ("CAFA"), which implements a strict and specific regime for evaluating all settlements

and accompanying fee awards that involve coupons. 28 U.S.C. § 1712. Yet the Plaintiffs don't mention CAFA a single time in the memoranda in support of either settlement approval or their fee request.

40. This forfeiture is reason alone to deny settlement approval. Many settlements have no objections, and the papers in support of settlement approval may be, in effect, *ex parte*. Because of this, counsel for settling parties have a heightened duty of candor in their filings relating to class-action settlements. *E.g.*, ABA Model R. Prof. Conduct 3.3(d); *Ark. Teacher Retirement Sys. v. State St. Corp.*, 25 F.4th 55, 65 (1st Cir. 2022). Class counsel's filings fall far short of this. The plain language of 28 U.S.C. § 1712 applies; even if class counsel disagrees, it had an affirmative obligation to make the argument that "vouchers" are not "coupons" well before Frank raised it in his objection. The Court draws the adverse inference that class counsel did not volunteer the possible applicability of 28 U.S.C. § 1712 because it did not believe its settlement would withstand the scrutiny that § 1712 requires.

41. "Coupon" is not defined in CAFA, and the Eleventh Circuit has not endorsed or prescribed any criteria for defining the term. Thus "coupon" as used in the CAFA context must be given its "ordinary meaning." *See Kouichi Tanicgushi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). "A coupon may be defined as a certificate or form 'to obtain a discount on merchandise or services,'" and "Webster's also defines coupons as 'a form surrendered in order to obtain an article, service or accommodation.' Coupons are commonly given for merchandise for which no cash payment is expected in exchange." *Dardarian v. Officemax N. Am., Inc.*, No. 11-cv-00947, 2013 U.S. Dist. LEXIS 98653, at *6-7 (N.D. Cal. July 12, 2013) (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1988)). Not only does this ordinary meaning of "coupon" comport with the ordinary meaning of "voucher," *id.*, but Congress intended the terms to be used interchangeably. *Redman*, 768 F.3d at 636.

42. The $5 vouchers here are no more than certificates "to obtain a discount on merchandise or services." *Dardarian*, 2013 U.S. Dist. LEXIS 98653, at *6-7. That the parties used the euphemism "voucher" in place of "coupon" does not change the underlying substance of the relief. *See, e.g.*, *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1176 (9th Cir. 2013) ("e-credits" are a "euphemism" for coupons); *In re EasySaver Rewards Litig.*, 906 F.3d 747 (9th Cir. 2018) ("credits"); *Figueroa*, 517 F. Supp. 2d at 1320 ("merchandise credits" are coupons); *see also In re Online DVD-Rental Antitrust Litig.*,

779 F.3d 934, 952 (9th Cir. 2015) ("*Online DVD*") (courts should "ferret[] out the deceitful coupon settlement that merely co-opts the term 'gift card' to avoid CAFA's requirements"); *McKinney-Drobnis v. Oreshack*, 16 F.4th 594, 604 (9th Cir. 2021) ("vouchers" "valid only for select products or services" count as coupons under CAFA).

43. Plaintiffs argue that the vouchers are not coupons because they can be used to purchase a whole product. The Court is skeptical of the factual premise as discussed below, but the argument is irrelevant under the statute. A coupon for a free product is still a coupon. A Google query for the phrase "Coupon for a free" returns 1,410,000 hits (searched Aug. 25, 2022). Publications such as the *New York Times* use the word "coupon" to describe vouchers for free products. *E.g.*, Scott Cacciola, *West Looms as Knicks Keep Going South*, N.Y. TIMES (Nov. 23, 2013) ("everyone in attendance received a coupon for a free chicken sandwich as part of a fan promotion"). In modern parlance, "[c]oupons are commonly given for merchandise for which no cash payment is expected in exchange." *Dardarian*, 2013 U.S. Dist. LEXIS 98653, at *7. Where two non-exclusive definitions "fall within the plain language" of a non-defined statutory term, and "both create the very dangers and risks that Congress meant ... to address," the term should be interpreted to encompass both readings. *See Smith v. United States*, 508 U.S. 223, 240-241 (1993).

44. Even if the Court is inclined to disregard the plain language of § 1712 or the ordinary meaning of "coupon" and follow the multifactor balancing used by the Ninth Circuit in *McKinney-Drobnis*, the $5 "vouchers" are still coupons. *McKinney-Drobnis* considered three guiding factors in determining that the vouchers resulting from the settlement were coupons under CAFA: "(1) whether class members have 'to hand over more of their own money before they can take advantage of' a credit, (2) whether the credit is valid only 'for select products or services,' and (3) how much flexibility the credit provides, including whether it expires or is freely transferrable." 16 F.4th at 602 (quoting *EasySaver* at 755). Applying those factors, the $5 vouchers here are coupons. As in *McKinney-Drobnis*, the vouchers here might "require class members 'to hand over more of their own money before they can take advantage of' those benefits[.]" 16 F.4th at 604. Because of the number of claims submitted for vouchers and the thereby high likelihood of the coupons being prorated to a value of $5 to avoid

exceeding $1.75 million in the aggregate. According to its own product website, the only Neutrogena sun product that costs close than $5 is Sun Rescue™ After Sun Medicated Relief Gel for Sunburned Skin, listed for a 25% discounted sale price of $5.99. *See* Declaration of John M. Andren (Dkt. 83-4) ¶ 5. But that is not a *sunscreen* product, so a $5 voucher "is not enough to purchase" Neutrogena's or Aveeno's sunscreen offerings and class members cannot replace "the [product] that class members were allegedly injured by—without spending their own money." *McKinney-Drobnis,* 16 F.4th at 604.

45. Similarly, the number of "products that [Aveeno and Neutrogena] sells pale in comparison to the millions of low-cost products that Walmart sells, as in *Online DVD*" and all of Aveeno and Neutrogena's products "fall under the same umbrella category of" skincare, hair care, and cosmetics. *Id.* at 605. Indeed, the type of products that can be obtained with a settlement coupon here is even more limited than the "251 different products" available in *McKinney-Drobnis*. *Id.* As in *McKinney-Drobnis*, class members cannot elect cash instead of a coupon. *Compare* 16 F.4th at 599-600 *with* Dkt. 55-9 at 14-15. The coupons contain an expiration date of one year and are thereby no more flexible than the coupons found to be coupons in *McKinney-Drobnis*. *Compare* 16 F.4th at 605, *with* Dkt. 55-9 at 15. The vouchers are transferable and can be aggregated, but that was also true in *McKinney-Drobnis*. *Compare* 16 F.4th at 605 *with* Dkt. 55-9 at 14.

46. In short, the vouchers expire, can be used only for a narrow range of Aveeno- and Neutrogena-branded items, and fall within any meaning of "coupon" under CAFA. Plaintiffs' assertion that the vouchers are not a "discount" (Dkt. 87) is frivolous. Thus, the settlement value and any attorneys' fees should be based on the actual value of coupons redeemed, not the $1.75 million face value of coupons available to the class.

47. The Plaintiffs forfeited any discussion of the likely redemption value of the vouchers, placing all their eggs in the "vouchers are not coupons" basket. Dkt. 87. Because the Plaintiffs have failed to meet their burden to prove the value of the vouchers, the Court is within its rights to treat them as valueless.

48. The Plaintiffs suggest in the alternative that the Court could apply 28 U.S.C. § 1712(c). Dkt. 87 at 9 n.4. Section 1712(c) permits the Court to calculate attorneys' fees by attributing a portion

of the fees to the coupons and a portion of the fees to an injunction. But neither their original motion for fees, nor their belated reply brief provide any analysis or facts for calculating the complex § 1712(c) formula, and have thus forfeited the argument.

49. While 28 U.S.C. § 1712 does not ban coupon settlements, it does require a heightened standard of fairness. Congress expressed concern in CAFA that "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed, such as where … class counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value." 28 U.S.C. § 1711 note §§ 2(a)(3), (a)(3)(A); *see also EasySaver*, 906 F.3d at 754-55. Such unfairness was prevalent because the use of coupons unlikely to be redeemed "masks the relative payment of class counsel as compared to the amount of money actually received by the class members." *HP Inkjet*, 716 F.3d at 1179 (quoting Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 1049 (2002)). Coupon settlements suffer from other flaws, including that "they often do not provide meaningful compensation to class members; they often fail to disgorge ill-gotten gains from the defendant; and they often require class members to do future business with the defendant in order to receive compensation." *Figueroa*, 517 F. Supp. 2d at 1302. Coupons also benefit the defendant as they can "serve as a form of advertising for the defendants …." *In re Mexico Money Transfer Litig.*, 267 F.3d 743, 748 (7th Cir. 2001). And when a settlement contemplates unused coupon value functionally reverting to the defendant, in this case by never leaving the defendant in the first place, the dangers are "even more grave." *Roes 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1053 (9th Cir. 2019). "Unchecked, such reversions would allow defendants to create a larger coupon pool than they know will be claimed or used, just to inflate the value of the settlement and the resulting attorneys' fees." *Id.* at 1054.

50. It is because of "the[se] well-documented problems associated with such settlements [that] Congress voiced its concern over coupon settlements when it amended [CAFA] to call for judicial scrutiny of attorneys' fee awards in coupon cases." *Reed v. Continental Guest Servs. Corp.*, No. 10 Civ. 5642, 2011 WL 1311886, at *3 (S.D.N.Y. Apr. 4, 2011). Because of the inherent dangers of coupon settlements, CAFA requires a district court to apply "heightened judicial scrutiny" and to value

the settlement, at least for fee purposes, based "on the value to class members of the coupons that are redeemed," 28 U.S.C. § 1712(a). *See also McKinney-Drobnis*, 16 F.4th at 602.

51. The Senate Committee's Report on CAFA confirms these legislative aims:

> [W]here [coupon] settlements are used, 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 [Section 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.

52. The Plaintiffs provide no argument that the settlement satisfies the heightened standard of fairness 28 U.S.C. § 1712 requires. The Court must consider the argument forfeited and hold the settlement unfair for this reason alone.

53. Even if the Court were to decide that this were not a settlement providing for a recovery of coupons, the new Rule 23(e)(2)(C)(ii) requires it to consider the "effectiveness" of the distribution of relief to the class. This is an objective standard requiring the Court to look at what the class *actually* receives, not just what is made available. *E.g.*, *Briseño v. Henderson*, 998 F.3d 1014, 1026 (9th Cir. 2021); *Roes 1-2*, 944 F.3d at 1052. A voucher that expires unused is not an "effective" form of relief. Thus, after the 2018 amendments, whether or not an instrument of settlement relief qualifies as a "coupon": the Court must value it at the redemption rate, and not the face value.

2. Settlement Valuation

54. Frank argues that the Plaintiffs' settlement valuation is overstated in several ways. The Court agrees.

a. Vouchers

55. As discussed above, the vouchers are not worth their $1.75 million face value, and Plaintiffs have failed to present any evidence, or even empirical precedent, for what the redemption

rate would be. 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). Because Plaintiffs have failed to even meet the burden of production, the Court is within its rights to value the vouchers at zero. JJCI surely has internal data for how it accounted for the voucher value under GAAP, but the parties did not disclose that, either, and the Court must draw the adverse inference. Frank concedes that *some* of the vouchers will be redeemed, perhaps as much as 5%. The Court will give the settling parties some benefit of the doubt, and estimate that 10% of the vouchers will be redeemed. But that is a value of $175,000, not $1.75 million.

b. "Extension" of the Refund Program

56. Plaintiffs take credit for the value of the refund program. Frank disputes this, noting that JJCI began the refund program voluntarily. The Court agrees. Preliminary Approval Hearing Tr., Dkt. 73 at 13:11-14:15 (representation of JJCI counsel).

57. As an initial matter, Plaintiffs' original motion for attorneys' fees seeks to take credit only for the "extension" of the refund program from the execution of the December settlement agreement to the January expiration. Dkt. 78-1 at 2. But in Plaintiffs motion for settlement approval, Dkt. 82, Plaintiffs misleadingly assert that the refund program paid a total of $9,528,207.62 and seem to suggest that entire amount be attributed to the settlement without ever establishing the value of the extension, as their fee motion promised. Time moves forward, and a settlement agreement cannot be said to have "caused" payments that happened before the settlement. "*Post hoc, ergo propter hoc*" is by itself fallacious reasoning, but this is "*pre hoc*." Again, Plaintiffs' filings fall far short of their duty of candor to the Court.

58. JJCI had already refunded at least $9,284,264.58 before there was a settlement. Richards Class Counsel Decl. (Dkt. 55-2) ¶ 9. The parties presented no evidence how much the total refund had been when the parties executed the settlement. The total refund at the conclusion of the program was $9,528,207.62. Grombacher Decl. (Dkt. 82-1) ¶ 45. Thus, the putative refund extension

is worth at *most* just under $244,000, and perhaps less than that depending on the timeliness of the Richards Declaration's calculations.

59. But Plaintiffs fail to even establish that the "extension" is worth $243,943.04 or is even an "extension." The settlement does not call the January deadline an "extension," but a "continuation." Dkt. 55-9 ¶ 51. There is no evidence when JJCI planned to end its refund program, and thus no evidence that the settlement created any marginal benefit over what the class would receive anyway. For example, if JJCI planned to have a six-month-long refund program when it began the recall, then Plaintiffs added no value when they negotiated an agreement that the refund program would last six months. The extension may not even be an extension: perhaps JJCI originally intended to continue the refund program for a full year, and the settlement agreement permitted JJCI to cut its planned refund program short. The Plaintiffs have the burden of proof, and do not even meet the burden of production. It is implausible that JJCI planned to end the refund program the day the settlement was signed but for the signing of the settlement.

60. Moreover, the refund program ended over seven months ago in January. Class members who relied on class notice to learn about settlement relief would not be able to access the refund program. The class will receive no additional benefit from the refund program whether this Court approves the settlement or does not. JJCI will not attempt to claw back the refunds if the Court denies settlement approval. Thus, the refund program cannot be said to be consideration for the waiver of the class's damages claims for aerosol products.

c. Injunctive Relief

61. Plaintiffs assert that the injunctive relief is worth $80 million. This prospective relief consists of: (1) the non-sale of any aerosol products subject to the aerosol product recall; (2) corrections to the sourcing and use of isobutane raw material supply, which contained the carcinogen benzene leading to the recall in the first place; and (3) testing of finished goods aerosol products. Frank objects to the valuation.

62. The proponents of a settlement must "bear the burden of demonstrating that class members would benefit from the settlement's injunctive relief." *Koby v. ARS Nat'l Servs.*, 846 F.3d 1071, 1079 (9th Cir. 2017); *Pampers*, 724 F.3d at 719 (compiling authorities). Class counsel do not meet their burden to quantify any degree of class benefit from the so-called injunctive relief for it to be considered in the Court's fairness analysis.

63. The prospective injunctive relief seems to consist of actions JJCI would have undertaken under the supervision of the FDA or for its own brand-management purposes, regardless of the settlement. Further, Plaintiffs identify no material differences between FDA requirements and the injunctive relief, let alone how it has created a better sunscreen product for consumers. And class members cannot benefit from the prospective relief unless they continue to purchase Neutrogena and Aveeno products. To the extent the injunctive relief has any value at all, it imposes settlement costs that could have instead been benefits targeted to the class of past purchasers waiving their damages claims.

64. "The fairness of the settlement must be evaluated primarily based on how it *compensates class members*—not on whether it provides relief to other people, much less on whether it interferes with the defendant's marketing plans." *Pampers*, 724 F.3d at 720 (internal quotation marks omitted; emphasis in original). "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. These are proper recognitions of the principle that the class consists of people who interacted with defendant in the past, while the prospective injunctive relief can only benefit those who interact with defendant in the future. Commentators have recognized the problem of such fictive injunctive relief in settlements that remit no benefit to class members. *See, e.g.*, Erin L. Sheley & Theodore H. Frank, *Prospective Injunctive Relief and Class Settlements*, 39 HARV. J. L. PUB. POL'Y 769, 832 (2016). The injunctive relief applies to class members and non-class members and opt-outs alike. There is no marginal benefit to being in the class, and thus the injunctive relief cannot be consideration for the release of *damages* claims.

65. The $80 million valuation is illusory as a matter of law in other respects. *First*, "[t]he 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 (quoting *In re TD Ameritrade Accountholder Litig.*, 266 F.R.D. 418, 423 (N.D. Cal. 2009) (Walker, J.)). It is "egocentrism" to assume that the class members are concerned about the costs incurred by JJCI. *Pampers,* 724 F.3d at 720; *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (putting defendant out of business not valuable to class members). *Second*, JJCI would have incurred these costs independently of the settlement because of the pre-existing recall. To artificially inflate the valuation of the settlement to support an exorbitant attorney's fees payout, class counsel is including necessary expenditures by JJCI that are a byproduct of JJCI's day-to-day business operations. These costs are epiphenomenal and predetermined, resulting from the recall, not the settlement, and certainly not the product of litigation.

66. Plaintiffs complain that "Frank offers no evidence of what nonmonetary/injunctive relief would have been provided consumers in the absence of this litigation." Dkt. 87 at 10. But it is *Plaintiffs* who have the burden of evidence, and present none. It is implausible that JJCI, having engaged in a voluntary recall, was going to sell recalled products without an injunction. Even if the settlement's 1 ppm raw materials testing standard differs from the 2 ppm finished product testing standard JJCI claims to have been complying with, there is (1) no evidence that JJCI was not already complying with a 1 ppm standard (again, Plaintiffs' briefs concede that JJCI non-aerosol products have no measurable level of benzene), and (2) no evidence that consumers benefit from the difference supposedly heightened 1 ppm standard. Plaintiffs do not identify which parts of the injunctive relief differ from existing FDA requirements or JJCI business plans. An injunction to obligate a defendant to continue doing what it was doing has "no real value." *Koby*, 846 F.3d at 1080.

67. Plaintiffs' citation (Dkt. 87 at 10-11) to *Poertner v. Gillette Co.,* 618 F. Appx. 624 (11th Cir. 2015), is inapposite. *Poertner* held that the district court did not clearly err in ascribing value to the injunctive relief based on the evidentiary record before it. *Poertner* did not hold that plaintiffs always prevail if they assert that injunctive relief has value, and did not hold that plaintiffs have no obligation to meet the burden of proof.

68. Plaintiffs argue (Dkt. 87 at 11) that JJCI's voluntary actions took place after the *Serota* complaint was filed, and that they should therefore be credited for it.

69. *First*, other than the "*post hoc, ergo propter hoc*" reasoning, Plaintiffs provide no evidence that the *Serota* complaint, rather than press coverage or the threat of FDA action or JJCI's own interests in providing a satisfactory customer experience, was the cause of JJCI's voluntary actions.

70. *Second*, even if the Court were to credit the *post hoc* reasoning, Plaintiffs are effectively making an argument that they are entitled to fees because Plaintiffs were a catalyst to the voluntary actions they now call "injunctive relief." (The word "catalyst" does not appear in any of Plaintiffs' briefs.) Plaintiffs cite no legal authority for the catalyst theory, which is made for the first time in their reply brief, and can be considered forfeited for this reason alone. *Compare* Dkt. 78-1 at 2 (acknowledging Plaintiffs can take credit only for post-settlement relief). The proposition is questionable even outside of the Rule 23(e) settlement context. *E.g.*, *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001) (plaintiffs who catalyze actions by defendants are not a "prevailing party" for purposes of 42 U.S.C. § 1988). The argument is even weaker when it comes to adjudicating settlement fairness when the "process is 'more susceptible than adversarial adjudications to certain types of abuse.'" *Holmes*, 706 F.2d at 1147 (quoting *Pettway v. Am. Cast Iron Pipe Co.*, 576 F.2d 1157, 1169 (5th Cir. 1978). A settlement is a trade of the release of the class's claims for a set of benefits. If the class would receive the benefits even if there was no settlement, even if they opt out from the settlement those benefits cannot possibly be consideration for the class's release. *E.g.*, *Koby*, 846 F.3d at 1080.

71. For these reasons, the Court ascribes no value to the injunctive relief component of the settlement.

3. Rule 23(e)(2)(C) Objections

72. Granting generous assumptions to Plaintiffs, the value of the settlement relief is between $175,000 and $419,000 plus attorneys' fees. Even if the Court were to implausibly assume that every voucher would be redeemed for full face value, the settlement relief would be less than $2 million. Frank argues that this is disproportionate to the negotiated attorney fee of $2.5 million, and also objects to questionable settlement terms—"clear sailing" and a "kicker"—that shield the

attorneys' fees from scrutiny. *E.g.*, *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011); *Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014) (Posner, J.). Frank contends that this causes the settlement to fail the standard of Rule 23(e)(2)(C)(ii) and (iii). The Court will address this argument and objection in its discussion of the Rule 23(e)(2) factors.

B. Notice

73. The Court finds the notice program superficially meets the requirements of Rule 23(c). The Court is troubled by the fact that notice did not issue until *after* the refund program had concluded, and thus failed to alert class members to this form of relief. Plaintiffs point to pre-settlement publicity in the summer of 2021 when JJCI engaged in its voluntary recall, but that is not notice of a settlement class's rights. But the Court believes it sufficient to address that mismatch in its adjudication of settlement fairness under Rule 23(e), and leaves open the question of whether it violates Rule 23(c) to issue settlement notice only after it becomes impossible for some class members to take advantage of putative settlement benefits.

C. Rule 23(e)(2) Analysis

1. Rule 23(e)(2)

74. The 2018 amendments to Rule 23 created a new Rule 23(e)(2), listing factors a Court must consider before approving a settlement as "fair, reasonable, and adequate." "Rule 23(e)(2) assumes that a class settlement is invalid." *Briseño*, 998 F.3d at 1030 (citation omitted). It is class counsel, not Frank, who "voluntarily accepted a fiduciary obligation towards members of the putative class," and bears the "heavy burden" imposed upon them by Rule 23. *Piambino*, 757 F.2d at 1144 (cleaned up). While the Court should consider the *Bennett* factors, it does so only in *addition* to the Rule 23(e)(2) factors. *Equifax*, 999 F.3d at 1273.

75. Remarkably, Plaintiffs' papers never mention the Rule 23(e)(2) factors. Dkt. 82. Instead, they cite to cases such as *Poertner* that rely on the pre-amendment version of Rule 23(e). *E.g.*, Dkt. 82 at 26-27 (purporting to cite Rule 23(e)(1), which is no longer the relevant rule after the Amendments). Even Plaintiffs' belated reply brief fails to mention Rule 23(e)(2). Once again, the

Plaintiffs' filings fall far short of their duty of candor. This is reason alone to find an argument that Rule 23(e)(2) is met is forfeited and to reject approval of the settlement. But even if the Court were to independently consider the Rule 23(e)(2) factors in the interests of providing guidance to future settlements, it would find that this settlement fails them in several separate regards.

76. Rule 23(e)(2)(A) requires the Court to consider whether "the class representatives and class counsel have adequately represented the class." The Court's Rule 23(a)(4) class-certification analysis above, identifying intraclass conflicts, requires it to answer this question in the negative. In addition, the Court looks disfavorably upon the settlement terms that favor class counsel at the expense of the class. Class counsel owes a fiduciary duty to the class not to structure a settlement so that they are the primary beneficiaries. *Briseño*, 998 F.3d at 1024-25; *Pearson v. NBTY, Inc.*, 772 F.3d 778, 780 (7th Cir. 2014); *Redman*, 768 F.3d at 638-39. And the Court is troubled by Plaintiffs' lack of candor in their filings, including their failure to voluntarily draw the Court's attention to 28 U.S.C. § 1712 or the new Rule 23(e)(2), and their failure to voluntarily disclose how few refunds were paid after the settlement was signed.

77. Rule 23(e)(2)(B) requires the Court to consider whether "the proposal was negotiated at arm's length." The Court accepts Plaintiffs' representation that this occurred, and no one accuses the parties of a reverse auction or other express collusion. Dkt. 82 at 27-29. However, satisfying the Rule 23(e)(2)(B) requirement is necessary, but not sufficient by itself. *Briseño*, 998 F.3d at 1031. 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 Court disagrees with Plaintiffs' assertion (Dkt. 82 at 29) that there was no "self-dealing," but self-dealing can occur even in an arm's-length negotiation. The Court addresses self-dealing in its Rule 23(e)(2)(C) analysis.

78. The allocation issue is addressed in Rule 23(e)(2)(C), which requires the Court to consider whether

> (C) the relief provided for the class is adequate, taking into account:

> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3)[.]

79. Though Frank's objection relies heavily on Rule 23(e)(2)(C), the Plaintiffs never address this rule, contest Frank's interpretation of the rule, or contest the precedents Frank cites as relevant to his interpretation of the Rule.

80. With respect to Rule 23(e)(2)(C)(i), the Plaintiffs concede that JJCI's non-aerosol products were "unaffected" by benzene and that the claims are meritless. *E.g.*, Dkt. 87 at 3. Thus, even a peppercorn of relief would be "adequate" with respect to these class members under Rule 23(e)(2)(C)(i)—though that raises issues under Rule 23(a)(4) above and Rule 23(e)(2)(D) below. Plaintiffs identify several potential hurdles they would need to overcome to prevail on claims relating to aerosol products. Dkt. 82 at 29-31. The Court has already identified an additional one in the *Aqua Dots* precedent. For these reasons, the total relief of about $3 million satisfies the Rule 23(e)(2)(i) standard.

81. However, the disproportion of the *allocation* of that $3 million settlement benefit—at most $0.4 million for the class of past purchasers, and $2.5 million for the attorneys, which is admittedly in excess of the putative lodestar—is troubling under Rules 23(e)(2)(C)(ii) and (iii). Even if the case were entirely meritless and JJCI overpaid to settle this case because a single peppercorn of relief was adequate to compensate the class for its claims, class counsel's fiduciary duty requires it to proportionally share that windfall with the class. It would be absurd and create perverse incentives if class counsel could receive a higher fee when they bring a bad case than when they bring a meritorious one.

82. The Court has already used Rule 23(e)(2)(C)(ii)'s "effectiveness" standard to adjudicate the settlement valuation. There is no evidence of the redemption rate of the vouchers; incomplete evidence on whether the settlement actually marginally increased refund claims, and certainly did not

do so by more than $244,000; and the injunctive relief is ineffective between the lack of evidence of marginal benefit to class members, the failure to target the injunctive relief to class members versus non-class members, and the lack of evidence that the injunction did not simply memorialize what JJCI was already doing.

83. Plaintiffs argue (Dkt. 82 at 33-34) that a settlement can be accepted with a low claims rate. The Court does not disagree. But Rule 23(e)(2)(C)(ii) requires the Court to consider that low claims rate in evaluating the effectiveness of the claims process.

84. That leaves the adequacy of the settlement with respect to "the terms of any proposed award of attorney's fees." This language in Rule 23(e)(2)(C)(iii) makes no sense *unless* it creates a proportionality standard matching that in *Redman*. A settlement benefit that is adequate if the attorneys negotiated a $200,000 fee for themselves may not be adequate if the attorneys negotiated a $2,500,000 million fee for themselves. For example, if this were a pure common fund of $3 million, it would be absurd for the Court to award over 80% of the fund to the attorneys.

85. But this is not a pure common fund, because the "the terms of any proposed award of attorney's fees" in the settlement segregates the attorney fee from the class benefit. If the Court were to correct the disproportion by reducing the attorney fee to a 28 U.S.C. § 1712(a) inquiry after the coupon redemption rate was known, the reduction would redound to JJCI, rather than to the class. *Pearson*, 772 F.3d at 786. This is unfair to the class. JJCI was, for better or worse, willing to pay $3 million to settle the case. There is "no apparent reason the class should not benefit from the excess allotted" to attorneys' fees. *Roes*, 944 F.3d at 1059-60. This is nothing if not self-dealing.

86. Additional evidence that the segregation is self-dealing is the fact that, in combination with the clear-sailing clause (another one of "the terms of any proposed award of attorney's fees"), it shields class counsel's fee request from appellate scrutiny. A court and potential objectors have less incentive to scrutinize a request because the kicker combined with the clear-sailing agreement means that any reversion benefits only the defendant that had already agreed to pay that initial amount. Charles Silver, *Due Process and the Lodestar Method*, 74 TUL. L. REV. 1809, 1839 (2000) (such a fee arrangement is "a strategic effort to insulate a fee award from attack"); Lester Brickman, LAWYER

BARONS 522-25 (2011) (arguing that reversionary kicker is *per se* unethical). If Frank disagreed with the Court's fee award, he may not have appellate standing to challenge the fee award; but the clear-sailing clause means that there is no chance of appellate review, because JJCI may not challenge a fee award either. For these reasons, a "kicker" clause should be subject to a "strong presumption of … invalidity." *Pearson*, 772 F.3d at 787.

87. Plaintiffs argue (Dkt. 82 at 28) that "The participation of a respected neutral like Judge Lifland in the negotiation process should give the Court confidence that the negotiations were conducted in an arm's-length, non-collusive manner." Which is why the Court accepted that the settlement met the standard of Rule 23(e)(2)(B). But a settlement must satisfy *both* Rule 23(e)(2)(B) and Rule 23(e)(2)(C). As discussed above, the parties need not expressly "collude" for class counsel to self-deal and structure a settlement so that it is disproportionately benefits class counsel; arm's length negotiations do not protect against unfair allocation issues.

88. There is no evidence that Judge Lifland considered Rule 23(e)(2)(C), 28 U.S.C. § 1712, the adverse effects on the class of the segregated fee structure, the judicial precedents this Court relies upon, or the interests of absent class members. There is no reason he would: the parties did not hire Judge Lifland to adjudicate whether a settlement met the muster of Rule 23(e), but to help the parties "get to yes" in settlement negotiations. Unfortunately, the best way to "get to yes" is for class counsel and the defendant to structure a settlement to shortchange absent class members not at the table. No collusion is needed to do this: just a defendant and class counsel acting in their own self-interest without regard to class counsel's fiduciary duty to the class. In any event, even if Judge Lifland *did* consider Rule 23(e) settlement fairness, it cannot bind this Court or the class, which has a due process right to notice and a hearing that did not occur before the mediator. It would violate due process to defer to the mediator, especially when a private mediator financially relies upon the repeat business of negotiating parties. *See generally* Brian Wolfman, *Judges! Stop Deferring to Class Action Lawyers,* 2 U. MICH. J. L. REFORM 80 (2013).

89. *Poertner*, a 2015 unpublished opinion, suggests that the arm's length negotiations protect against the self-dealing problems created by clear sailing and kicker clauses. But that decision

predated the 2018 amendments, which side with *Pampers* and *Pearson*, and make clear that a court's inquiry about arm's length negotiations (Rule 23(e)(2)(B)) is independent and separate from the inquiry about the terms of the proposed attorney's fee award (Rule 23(e)(2)(C)). *Poertner* is unpublished and not binding on this Court; it is not persuasive on this question compared to *Pampers*, *Pearson*, *Redman*, *Roes*, and *Briseño*. *See McNamara v. Gov't Empls. Ins. Co.*, 30 F.4th 1055, 1061 (11th Cir. 2022). But, more importantly, the Court cannot follow *Poertner*'s suggestion without making a nullity of Rule 23(e)(2)(C)(iii), which *Poertner* could not have considered. Plaintiffs propose no alternative interpretation of the Rule to reconcile *Poertner* with Rule 23(e)(2)(C)(iii), and make no argument that *Redman* is wrongly decided.

90. The settlement is ambiguous with respect to another term for the payment of attorney's fees. On the one hand, the settlement provides that a reduction in the fee award does not terminate the settlement. Dkt. 55-9 ¶ 62. On the other hand,

> [i]n the event the terms or conditions of this Settlement are materially modified by any court, either Party in its sole discretion may, within fourteen (14) days after such a material modification, declare this Settlement null and void. For purposes of this Paragraph, material modifications include but are not limited to … the terms of the Attorneys' Fees and Expenses and Incentive Awards.

Id. ¶ 117. The latter provision is troubling, and, if read literally, appears to permit class counsel to back out of the settlement if the Court reduces the fee or expense request, applies 28 U.S.C. § 1712, or denies the Incentive Awards request. This by itself is self-dealing that would violate Rules 23(e)(2)(A) and (C)(iii).

91. Rule 23(e)(2)(C)(iii) also requires the Court to consider the timing of the fee payment.

92. The parties and objector do not discuss this, but the Settlement provides that fees shall be paid within 30 days of the Effective Date, defined as the date after final judgment when all appeals have been resolved. Dkt. 55-9 ¶¶ 18, 61.

93. There is no issue with the timing of the fee payment, but the other terms of the proposed attorney's fee award, including the disproportionality of the proposed fee, the clear-sailing clause in conjunction with the kicker preventing the Court from benefiting the class by fixing the

disproportionality, and the failure to comply with 28 U.S.C. § 1712, make settlement relief inadequate and unfair.

94. The Court therefore sustains Frank's objection: the settlement fails to satisfy Rule 23(e)(2)(C)(iii), and must be rejected.

95. There appear to be no side agreements under Rule 23(e)(3), and thus nothing to consider under Rule 23(e)(2)(C)(iv).

96. Rule 23(e)(2)(D) requires the Court to evaluate whether "the proposal treats class members equitably relative to each other." Neither the Plaintiffs nor Frank discuss this provision. But, as discussed above, Plaintiffs concede that the claims of non-aerosol class members are worthless. It thus seems inequitable that the non-aerosol class members receive payments that could have been provided to aerosol purchasers. Plaintiffs assert the injunctive relief is worth $80 million: the Court disagrees, but if it were so, how could that be equitable relative to the scant payment to past purchasers? Perhaps there is an explanation for why these disparities are equitable, but the Plaintiffs provide none, though they have the burden of proof on all Rule 23(e)(2) issues. Given the forfeiture, the Court cannot conclude that Rule 23(e)(2)(D) is satisfied. The Court would have been much more confident about this issue had separate representation been provided as Rule 23(a)(4) requires.

2. *Bennett* Factors

97. The six *Bennett* factors are:

> (1) the existence of fraud or collusion behind the settlement;
>
> (2) the complexity, expense, and likely duration of the litigation;
>
> (3) the stage of the proceedings and the amount of discovery completed;
>
> (4) the probability of the plaintiffs' success on the merits;
>
> (5) the range of possible recovery; and
>
> (6) the opinions of the class counsel, class representatives, and the substance and amount of opposition to the settlement.

737 F.2d at 986. The first factor overlaps with the Court's Rule 23(e)(2)(B) analysis; the second through fifth factors overlap with the Court's Rule 23(e)(2)(C)(i) analysis, and the Court will not repeat that

analysis here.

98. The sixth factor is mysterious. If class counsel or the class representative opposes the settlement, why ask the Court for its approval? This aspect of the sixth factor is trivially satisfied.

99. The "substance and amount of opposition to the settlement" weighs against settlement approval. Frank's objection was substantive and meritorious and raised important statutes, Rules, and precedents class counsel failed to identify to the Court. While Frank was the only objector, as the Court discussed, it is hardly surprising that only a public-interest law firm filed an objection, given the burdens of objection compared to the benefits in a settlement where only coupons with a small-dollar value were available. No class member would have had the financial incentive to hire an attorney to produce a substantive objection as detailed as Frank's non-profit firm's objection. Indifference cannot be considered support for the settlement. *Redman*, 768 F.3d at 628; *In re Corrugated Container Antitrust Litig.*643 F.2d 195, 217-18 (5th Cir. 1981).

100. For these reasons, the settlement fails to satisfy Rule 23(e)(2). In general, the Court is impressed by the similarity between this settlement and the settlement approval reversed by the Seventh Circuit in *Redman*. As here, *Redman* involved a coupon settlement that the Plaintiffs implausibly denied was a coupon settlement; a "clear sailing" agreement; a "kicker"; and attempt to value class notice as a pecuniary benefit to the class; and a disproportion between the settlement benefit and the attorney fee. *See also Briseño*, 998 F.3d at 1018 (calling a similar combination "a bevy of questionable provisions"). Plaintiffs' briefs never mention *Redman*, which in many ways evaluated a better settlement: the disproportion was lower than the disproportion here; and the class notice here only informed class members of a refund program that had already expired by the time the parties issued notice. The Court would deny settlement approval.

V. Attorney's Fees

101. Because the Court denies class certification and denies settlement approval, the request for attorney's fees and costs is denied as moot.

102. Class counsel's fee request failed to comply with 28 U.S.C. § 1712, even in the alternative. Perhaps class counsel hoped for multiple bites at the apple: heads, class counsel wins; tails, it gets a do-over to comply with 28 U.S.C. § 1712. The Court's order required class counsel to submit its Fee Application 35 days before the objection deadline. Dkt. 68 ¶ 21. Permitting a new fee request would have unfairly multiplied proceedings, and consistent with Rule 23(h), required renoticing the class. *See Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1252-53 (11th Cir. 2020). The Court would have denied attorney's fees and awarded only the undisputed costs figure because of the forfeiture, and because of the lack of candor in filings that class counsel could not have known would be adversarial. To do otherwise incentivizes attorneys to withhold information from the Court in what are frequently *ex parte* proceedings. If there is a more than colorable argument that 28 U.S.C. § 1712 applies, class counsel has the affirmative obligation to call the Court's attention to it, and justify its Rule 23(h) fee request under that statute, even if only in the alternative.

VI. Representative Awards

103. Because the Court denies class certification and denies settlement approval, the Court denies the request for representative awards as moot. But *Johnson* would require the Court to deny the request had it not been moot. 975 F.3d at 1260.

CONCLUSION

104. For these reasons, the Court denies class certification, denies settlement approval, and sustains Frank's objections in part as discussed above. The requests for attorney's fees and incentive awards are denied as moot.

Dated: ____________________, 2022

____
Raag Singhal
United States District Judge

Date: August 26, 2022

Respectfully submitted,

/s/ John M. Andren

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