No. 16-1652

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN RE: SUBWAY FOOTLONG SANDWICH MARKETING
AND SALES PRACTICES LITIGATION

APPEAL OF: THEODORE H. FRANK,
Objector-Appellant.

On Appeal from the United States District Court
for the Eastern District of Wisconsin, No. 2:13-md-2439,
Judge Lynn Adelman

Reply Brief of Appellant Theodore H. Frank

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Table of Contents

Table of Authorities

Cases

Rules and Statutes

Other Authorities

Introduction

Frank noted that there was no record evidence identifying a single practice imposed by the settlement's injunction that Subway had not already adopted, and no record evidence that the injunction would have an effect on a single sandwich compared to the pre-settlement status quo. OB7-8; OB15-19.[1] The parties contest this without identifying a single record citation to the contrary (*e.g.*, DB28-29); such an unsupported argument cannot fly. Fed. R. App. Proc. 28(a)(8), (b). The district court assumed that it could certify a class even if "the injunctive relief does no more than formalize the practice changes that Doctor's Associates already agreed to make." A18.

Frank noted that there was no record evidence that Subway had any plans in the next four years to break their public promise to customers to do a better job of ensuring that the shape of its bread was sufficiently long and not unduly thick. OB8; OB17-18. Subway admits that the injunction has no effect on their "immediate" practices, and that they would do the same thing even if the district court or this Court rejects the settlement. DB29. The appellees fulminate (*e.g.*, DB29), but never identify any record evidence that "there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *Milwaukee Police Ass'n v. Jones*, 192 F.3d 742, 748 (7th Cir. 1999) (internal quotation and citation omitted); *accord Kansas v. Nebraska*, 135 S. Ct. 1042, 1059 (2015).

[1] OB, PB, DB, and A refer to Frank's Opening Brief, Plaintiffs' Corrected Brief, Defendant's Brief, and the Appendix respectively. As in his opening brief, Frank uses "DAI" and "Subway" interchangeably.

The combination of these two effectively uncontested facts should end the inquiry under *Aqua Dots*: bringing a class action that provides benefit only to the attorneys without hope of benefit to class members violates Rule 23(a)(4). Frank noted that "every feature of this settlement that the district court highlighted as a reason to distinguish this case from *Aqua Dots* was present in *Aqua Dots*." OB15-18. The appellees provide no reason to think otherwise.

The parties argue that *Aqua Dots* applies only to Rule 23(b)(3) damages claims and not to Rule 23(b)(2) settlements. PB18-19; DB21-27. But this ignores that *Aqua Dots* expressly disclaimed a Rule 23(b)(3) analysis. 654 F.3d 748, 752 (7th Cir. 2011). Instead, *Aqua Dots* was decided under 23(a), *see id.*, which applies just as much to Rule 23(b)(2) class actions and settlements. *E.g., In re Dry Max Pampers Litig.*, 724 F.3d 713, 721-22 (6th Cir. 2013). (Subway's brief is especially incoherent on the class certification issue. They argue that the underlying suit is meritless and that a litigation class could not be certified (DB23-24; DB25 n.12), but never identify why a settlement class certification would be appropriate when a litigation class would not. It is further dumbfounding that defense counsel would argue that it is appropriate and beneficial for plaintiffs to seek injunctions and attorneys' fees against businesses that *might* engage in wrongdoing. DB25. But that standard—one that would expose Subway to an infinite number of otherwise meritless class actions—is not the law, as *Aqua Dots* itself recognized in a case where plaintiffs sought an injunction requiring the continuation of a refund program. OB15.) And though Frank's opening brief emphasized that because the putative *Aqua Dots* class counsel sought an injunction, OB15-16, one could not distinguish *Aqua Dots* from this case by arguing that plaintiffs here were seeking an

injunction, the parties attempt to do exactly that without ever addressing Frank's argument. Finally, appellees argue that *Aqua Dots* should apply only to cases where the class would be affirmatively harmed by settlement, and not to cases where 100% of the benefit would accrue to class counsel and the class representatives. That's not what *Aqua Dots* says, and appellees give no public-policy rationale for such an exception to *Aqua Dots*, nor can they. Plaintiffs' argument that Subway's actions can't moot their claims for injunctive relief (PB16) is wrong (as their own cited cases demonstrate), but it is also irrelevant: the *Aqua Dots* class certification standard doesn't mention, much less turn on, Article III mootness.

Frank's jurisdictional statement noted that he had appellate standing to challenge the settlement approval and class certification under *Devlin v. Scardelletti.* OB1. Though appellees each stated that Frank's jurisdictional statement was "complete and correct" (PB1; DB1), they contradict this several pages later by asserting he has no standing to challenge a settlement class certification on appeal. PB28; DB24. The contradiction violates 7th Cir. R. 28(b). More importantly, *Silverman v. Motorola* has nothing to do with challenges to class certification and settlement approval. In *Silverman,* a class member unaffected by the fee award (because of his failure to make a claim on the common fund) challenged only the fee award without challenging settlement approval or class certification. This Court has previously called an analogous argument for application of *Silverman* to an objector's challenge of settlement approval "frivolous." *Eubank v. Pella Corp.*, 753 F.3d 718, 729 (7th Cir. 2014). Neither appellee mentions *Devlin* or *Eubank*'s holding on standing.

A lawsuit designed to provide 100% of the benefits to class counsel and the class representatives without any benefit to the class cannot be certified under Rule 23(a)(4) under *Aqua Dots*. The parties never explicitly ask this Court to overrule *Aqua Dots* and give no reason to, much less a reason to permit such an abuse of the class-action system. The settlement approval and class certification must be reversed.

Argument

I. Frank has standing to appeal the denial of an objection to an improper class certification in an order imposing an injunction upon him, and this Court has previously recognized that an argument to the contrary is "frivolous."

The judgment in this case imposes an injunction upon "[e]ach member of the Class," including Frank, A31, and pays class counsel 100% of the settlement proceeds with no incremental benefit to the class. A successful challenge to the improper class certification will lift the injunction on Frank. Perhaps after reversal new class representatives and new class counsel might turn to litigating for the benefit of the class; perhaps that's impossible and the case will just melt away as the (b)(3) class action already did. But of course an objecting class member has appellate standing to challenge that order and class certification. *Devlin v. Scardelletti*, 536 U.S. 1 (2002); *Eubank*, 753 F.3d at 729.

Frank cited *Devlin* in his jurisdictional statement and noted his appellate standing. OB1. Both sets of appellees agreed that Frank's jurisdictional statement was "complete and correct." PB1; DB1. But then both go on to blithely argue that Frank doesn't have standing. PB28; DB24. This contradiction means that 7th Cir. R. 28(b) was

violated, but even if the rules violation doesn't act as a forfeiture, this Court has called the argument the parties are making "frivolous." *Eubank*, 753 F.3d at 729.

Plaintiffs argue that "an objecting class member must show that he has some interest in the amount of attorneys' fees awarded." PB28. Not remotely true in the context of challenging settlement approvals. This Court has upheld multiple successful appeals of settlement approvals not just by objecting class members without an "interest in the amount of attorneys' fees awarded," but multiple successful appeals by ***this*** objecting class member in such a scenario. *E.g., Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014) (reversing settlement approval upon appeal by objector Frank, even though any reduction in attorneys' fees would redound to defendant). *Robert F. Booth Trust v. Crowley*, 687 F.3d 314 (7th Cir. 2012) assumed without discussion that Frank had standing to challenge approval of a $0 settlement where any reduction of attorneys' fees would redound to the defendant, but also went further and affirmatively held that it was reversible error to refuse the objecting shareholder intervention rights in a shareholder derivative action. That the parties here structured their settlement with the unfair "gimmick" of a "kicker" to revert any reduction in attorneys' fees to the defendant rather than the class is a red flag against settlement approval rather than a reason to deny standing to a class member challenging the abusive settlement. *Pearson*, 772 F.3d at 786; *cf. also In re Southwest Airlines Voucher Litig.,* 799 F.3d 701, 714 (7th Cir. 2015) (entertaining absent class-member challenge to Rule 23(a)(4) adequacy of representation despite resulting reversion of fee award to defendant). And class counsel knows this, because he argued and lost *Redman v. RadioShack Corp.* in this Court, which reversed a settlement approval even though the objecting class member had no interest

in the attorney fee in that settlement because of a similarly abusive kicker. 768 F.3d 622, 637 (7th Cir. 2014).

Subway argues that Frank doesn't have standing because he gets settlement benefits without injury. DB24. The argument assumes the conclusion (Frank disputes that he benefits from the settlement and Subway provides no record evidence otherwise) but also proves too much. Whether the settlement's released claims have value such that Frank is injured by the release goes to the merit of those underlying released claims, not to Frank's standing to have the right to assert them. If the reinstatement of the released claim does not give standing to Frank, how do the class representatives have standing to sue in the first place, given that, by definition of the class certification, the representatives' claim is "typical of the claims… of the class"? Fed. R. Civ. Proc. 23(a)(3). Having successfully argued that Rule 23(a)(3) is met, Subway is judicially estopped from asserting that Frank's standing is different than the standing of the class representatives. If the class representatives have standing to waive Frank's rights, then Frank has standing to challenge the settlement approval; if Subway's argument were correct, then there would be no Article III jurisdiction to impose the settlement in the first place.

Both plaintiffs and Subway incorrectly rely upon *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956 (7th Cir. 2013). PB28; DB24. In *Silverman*, an objecting class member who never made a claim on a common fund objected to the attorneys' fee percentage of the common fund (awarded under Rule 23(h)) without objecting to the settlement (Rule 23(e)) or class certification (Rule 23(a) and (b)). Because no reduction in the fee would benefit the class member, he had no standing to object to the fee. 739 F.3d at 957.

But nothing in *Silverman* has any bearing on whether an objector has standing to object to a *settlement approval* or *class certification*.

In *Eubank*, the settlement precluded an objecting class member from filing a claim. When class counsel in *Eubank* moved to dismiss the appeal by arguing *Silverman* applied to the standing of that objector objecting to a settlement approval, this Court correctly called the argument "frivolous"—so obviously frivolous that the Court felt that it did not merit additional sanctions because "little time was spent on it either by us judges or by the objectors' lawyers." 753 F.3d at 729. This Court, too, need not waste time on this frivolous argument.

Frank has standing to challenge a settlement and class certification that releases his claims against Subway. His claims are no more meritless than those of the class representatives, and their standing is coextensive.

II. Once the court found that distribution to the class was impossible, *Aqua Dots* precluded certification where the defendant had already voluntarily acted to cease any wrongdoing.

Once Subway acted to correct any perceived problems with sandwich length, there was no cause of action for prospective injunctive relief in the absence of "cognizable danger of recurrent violation." *Milwaukee Police Ass'n v. Jones*, 192 F.3d 742, 748 (7th Cir. 1999) (internal quotation and citation omitted); *accord Kansas v. Nebraska*, 135 S. Ct. 1042, 1059 (2015); *see also In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748 (7th Cir. 2011). All that was left were claims for retrospective damages, but even this class counsel felt that pointless. A3-4; OB4-5; DB3-6; PB12. Under *Aqua Dots*, once it becomes impossible to benefit a putative class, Rule 23(a)(4) precludes class certification. Instead,

class counsel structured a settlement that provided no marginal benefit to the class and only payment to themselves, and the district court approved the class certification and settlement. This was reversible error. The appellees provide no reason to think otherwise.

A. Appellees identify nothing in the record contradicting Frank's characterization of the facts.

Frank noted that there was no record evidence identifying a single practice imposed by the settlement's injunction that Subway had not already adopted, and no record evidence that the injunction would have an effect on a single sandwich compared to the pre-settlement status quo. OB7-8; OB15-19. Subway asserts that "Frank is wrong," DB28-29, but doesn't deign to either identify a single new practice affecting a single sandwich or a single record citation supporting their *ipse dixit*. DB7-8. Indeed, Subway expressly admits that if settlement approval had been denied, they would be engaged in the same practices voluntarily—the very definition of a settlement making no difference. DB29. Plaintiffs simply repeat the conclusory statements of the Cousins declaration without addressing Frank's argument why the Cousins declaration proves nothing relevant (*compare* PB6-7 and PB15 *with* OB17-18): the question is not whether Subway's practices changed as a result of litigation, but whether Subway must materially change its practices as a result of the settlement (in exchange for the class waiver of claims and payment of attorneys' fees). *See* Section II.C. below. Plaintiffs also assert that Subway ended a relationship with a vendor at their behest (PB15), but that claim has nothing to do with the settlement, and isn't supported by anything in the

record in any event. At the end of the day, all plaintiffs can do is assert *ipse dixit* that they provided "meaningful relief" (PB20) without providing a single record citation to a shred of evidence that the relief was meaningful.

Frank noted that there was no record evidence that Subway had any plans in the next four years to break their public promise to customers to do a better job of ensuring that the shape of bread was sufficiently long and not unduly thick. OB8; OB17-18. The parties identify no record evidence to the contrary. Subway concedes that they have "no immediate intention" of ending the quality-control measures, but implausibly suggests (without any record evidence support) that there might be some time in the next four years where they'd try to sneak one over on the public again if they think the public forgets, despite Subway's earlier public pronouncements that their "commitment remains steadfast to ensure that every SUBWAY Footlong sandwich is 12 inches at each location worldwide." OB3. Nothing in the record supports this contention.

One finds it curious that Subway denigrates the truthfulness of its public commitment to its customers, but in any event, "something more than the mere possibility" of a recurrent violation is needed to prove entitlement to injunctive relief. *Milwaukee Police Ass'n*, 192 F.3d at 748 (internal quotation and citation omitted). Indeed, it's surprising that Subway is so determined to seek affirmance that it proposes a rule that plaintiffs may seek injunctive relief to "codif[y] as a court order practice changes already instituted by a defendant" based on unsupported speculation that the defendant *might* engage in future wrongdoing. Such a rule invites and permits otherwise meritless class actions against Subway enjoining its franchisees from using horsemeat, deliberately contaminating customers' food with *E. coli*, and serving

undercooked eggs at breakfast, even though there is no reason to believe Subway engages in or doesn't already have policies against such practices—after all, they *might* engage in wrongdoing in the distant future if Subway "decided at some point in the next few years that one or more of these [policies] was no longer appropriate for its business model." By Subway's lights, the class plaintiffs in *this* case can sue again over bread length four years after the settlement takes effect and seek another four-year injunction; if this Court affirms on these briefs, Subway would be judicially estopped from arguing that that future suit was meritless. Fortunately for Subway, which cites only the district court decision and no other precedent for the proposition, it is wrong on the law, and it does not have the need to repeatedly pay plaintiffs' lawyers attorneys' fees for obtaining injunctions that codify as a court order each of Subway's business practices that protect consumers—though one can imagine plaintiffs' lawyers kicking themselves for not hoodwinking Subway into paying up for such pointless rent-seeking class actions earlier if Subway really believes what it said in its brief here. Contrary to the district court and both appellees, plaintiffs' lawyers do not have the right to seek an "enforcement mechanism" for potential wrongdoing willy-nilly.

Fed. R. App. Proc. 28(a)(8) and (b) requires appellees to provide record citations for their factual contentions, but appellees' failure to do so is not just a technicality, but a reflection of the reality that there is *nothing* in the record supporting their contentions. The factual premises of *Aqua Dots* are met here: there is no evidence that this settlement provides any incremental benefit to consumers, and there is no evidence that plaintiffs filed their consolidated complaint or sought settlement class certification that Subway would break its commitment to consumers.

B. Appellees identify no reason to distinguish *Aqua Dots*.

Frank noted that "every feature of this settlement that the district court highlighted as a reason to distinguish this case from *Aqua Dots* was present in *Aqua Dots*." OB15-17. The appellees provide no reason to think otherwise.

As Frank pointed out, the putative *Aqua Dots* class counsel sought injunctive relief, and the district court erred in distinguishing *Aqua Dots* from this case by claiming that class counsel's seeking an injunction made all the difference. OB15-16. Appellees never address Frank's argument or distinguish the injunction in this case from the injunctions sought in *Aqua Dots*, and simply repeat the district court's error. *E.g.,* DB22 ("Here, however, the plaintiffs' complaint sought injunctive relief"). Plaintiffs claim "Frank's argument essentially boils down to an assertion that when injunctive, as opposed to monetary, relief is awarded, counsel should not receive any attorneys' fees." PB13. Frank sounds monstrous by this false characterization, but he is not arguing that the *Brown v. Board* or *Obergfell* attorneys who actually benefited their clients with injunctive relief were not entitled to fees. Frank simply argues that it is not enough to yell "injunction" to get class certification (and the resulting fees): for example, imagine a settlement obtaining an injunction requiring Volkswagen's CEO to write "I will not defraud the class" a hundred times on a chalkboard. A proposed injunction has to provide effectual *benefit* to the class rather than deck-chair shuffling. This is true regardless of whether class counsel seeks fees under statutes providing for attorneys' fees or the common fund doctrine. PB24-26. And, again, the parties simply provide no record evidence demonstrating incremental benefit from the injunctive relief. *See, e.g., Pearson*, 772 F.3d 778, 785 (disparaging "superfluous" injunction). Nor do appellees

challenge *Reynolds*'s holding that a settlement is measured by its incremental benefit, or even mention *Reynolds*. *See* OB16 (citing *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277 (7th Cir. 2002), among other cases).

Plaintiffs argue that voluntary actions do not moot claims for injunctive relief. PB16-17. But Frank doesn't assert Article III mootness, only that injunctive relief was not properly sought and didn't benefit the class as required by Rule 23. *Cf. Milwaukee Police Ass'n*, 192 F.3d at 748 ("Cessation of the allegedly illegal conduct, though not rendering a claim moot, nevertheless may affect the ability to obtain injunctive relief, as by impacting the ability to show substantial and irreparable injury."). Anyway, plaintiffs' cites don't support their misstatement of "black-letter" law. *United States v. Gregg* involved defendants implausibly claiming that their mandatory compliance with a preliminary injunction (rather than the voluntary cessation here) mooted the case. 32 F. Supp. 2d 151, 158 (D.N.J. 1998). Defendants' argument in that case is obviously false (a defendant avoiding contempt when subject to a preliminary injunction doesn't disentitle a plaintiff to a permanent injunction), and has nothing to do with Frank's argument or with *Aqua Dots*. Moreover, *Gregg* expressly found that the defendants' past actions violating court orders and their current legal contentions meant that "the wrongful behavior of defendants could be reasonably expected to recur" and no such finding was made or could be made here. *Id.* at 158-59. And plaintiffs affirmatively misrepresent *American Fed. of Gov't Emps., AFL-CIO v. Brown*, 866 F. Supp. 16, 19 (D.D.C. 1994), which goes further than Frank and *Aqua Dots*: a claim for injunctive relief will be moot if "there is no reasonable expectation that the wrong will be repeated." *Id.*

(quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) and finding complaint for injunctive relief moot).

In any event, Frank isn't making the mootness argument Subway likely would have won had it litigated the merits. The *Aqua Dots* class certification standard doesn't mention, much less turn on, Article III mootness. The issue is one of Rule 23(a)(4) adequacy under *Aqua Dots*: a defendant's voluntary cure with no evidence of risk of a recurrent violation precludes moving forward with class certification, even if the plaintiffs are seeking an injunction, because that class certification imposes social costs without any hope of benefiting the class. Appellees are effectively arguing that *Aqua Dots* was wrongly decided because the courts should have permitted class certification over the injunction to require *Aqua Dots* to continue to provide refunds. But they never ask for *Aqua Dots* to be reversed; it remains applicable here.

Contrary to Subway's assertion (DB24), that this is a settlement class, rather than a litigation class, is irrelevant. Rule 23(a)(4) applies equally—and perhaps even more forcefully—in the settlement-only certification context. *E.g., Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 620 (1997) ("undiluted, even heightened, attention" demanded in settlement context); *Smith v. Sprint Communs. Co.,* 387 F.3d 612, 614 (7th Cir. 2004) (vacating nationwide settlement class on (a)(4) grounds where state law differed). Simply put, the right to adequate representation, in its *Aqua Dots*' manifestation, does not "properly belong[]" (DB25) to a defendant; rather, it belongs to the class. The "requirements for certification are not the defendant's to waive; they are intended to protect absent class members." Alexandra D. Lahav, *Symmetry and Class Action Litigation*, 60 UCLA L. REV. 1494, 1506 (2013).

Subway claims that the "fundamental difference between a (b)(3) class action—where notice and attorneys' fees are ultimately borne by class members, reducing their potential recovery—and (b)(2) class actions—where because class members recover no damages, they do not bear the transaction costs of the class-action mechanism." DB23. This is just utterly fictional economics as Frank and this Court pointed out. OB17 (citing cases). A defendant's willingness to expend money on settlement always reflects the transactions costs of the class-action mechanism, regardless of whether a class is (b)(2) or (b)(3); a defendant is indifferent between paying $1M in compensation, $1M in attorneys' fees, or expending $1M complying with injunctive relief. Subway acknowledges this is true: "no matter who paid the transaction costs in *Aqua Dots*, they were ultimately being paid by class members." DB23. So, too, here. Subway's implied rule that satisfaction of Rule 23(a)(4) under *Aqua Dots* turns on the factual question of whether class-action expenses are ultimately borne directly or indirectly by consumers and directly by insurers or franchisees or shareholders makes no public-policy sense. A class action that can provide no incremental benefit to its class members flunks Rule 23(a)(4) regardless of who ultimately bears the social cost. OB18-19; *cf. also Crowley*, 687 F.3d 314 (ordering dismissal of shareholder-derivative suit seeking injunctive relief that could only benefit attorneys without inquiring whether insurance would pick up the expense of litigation without cost to shareholders).

Though the appellees repeat the district court's fallacious reasoning at length, neither the district court nor the appellees explain how the *Aqua Dots* class members would be made any worse off than the class members here. *Aqua Dots* turned on the fact that "the principal effect of class certification… would be to induce the defendants to

pay the class's lawyers enough to make them go away." That's exactly what happened here, and as in *Aqua Dots*, there was no "effectual relief for consumers." The appellees never explain why this holding of *Aqua Dots* does not apply here beyond repeated assertions that there was an injunction—though, once again, the selfish *Aqua Dots* attorneys were seeking a more far-reaching injunction than the one here.

Subway asserts that "Frank does not explain how much proposed injunctive relief must benefit class members for a Rule 23(b)(2) class to be certifiable." DB23. Not so. *See* OB19 ("the action must be capable of affirmatively benefiting class members before imposing social costs on the courts and defendants").

Subway argues that Frank isn't *really* using *Aqua Dots* against class certification, but is making a "clandestine" Rule 23(e) challenge because Frank is arguing that the injunctive relief did not provide incremental benefit, concluding that Frank waived any Rule 23(e) argument. DB26. But that's hardly a defense of the improper class certification here—especially given the *Aqua Dots* rule that class counsel has to plausibly seek benefit for the class to meet Rule 23(a)(4). Moreover, even if this Court agrees that the appropriate framework to evaluate the case under *Aqua Dots* is Rule 23(e) rather than Rule 23(a)(4), *Aqua Dots* itself holds that there has been no "forfeiture." 654 F.3d at 752 (appellants "did not forfeit their arguments" by citing "the wrong subsection of Rule 23" when they "made the essential contentions"). A court of appeals is entitled to apply the controlling law even if the litigants failed to cite the best authority. *Id.* (citing *Elder v. Holloway,* 510 U.S. 510 (1994)).

Plaintiffs assert that "this case is nothing like *Aqua Dots*" because here there is no recall and no refunds. PB17. This is obtuse. If plaintiffs were seeking refunds, then *Aqua*

Dots would not apply, but they disclaimed damages here, and thus disclaimed one possibility of improving upon the status quo ante for class members. As in *Aqua Dots*, the only thing plaintiffs eventually sought in their amended consolidated complaint was that which the defendant was already offering and which there was no indication the defendant would cease to offer.

Aqua Dots applies here, and requires reversal of the class certification and settlement approval.

C. Appellees' public-policy arguments do not provide a reason to reverse *Aqua Dots*.

Subway complains that under *Aqua Dots* "a defendant could effectively defeat [a class certification] motion by voluntarily making the very changes sought by the class complaint and keeping them in place until the threat of class certification had passed." DB25-26. It is mysterious why Subway thinks this result is a bad thing, much less so obviously bad that it self-evidently refutes *Aqua Dots*. The correct answer is "so what?" This has been true for decades, so long as a defendant could show that there is no "cognizable danger of recurrent violation." *W.T. Grant Co.*, 345 U.S. at 632. Frank's opening brief cited *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001), permitting government entities to not only escape injunctions, but also attorneys' fees for prevailing parties under 42 U.S.C. § 1988 (OB18); neither appellee mentions or addresses that precedent. If, for some reason, a defendant were foolish enough to immediately reinstate wrongful practices after defeating a class certification motion on the grounds that there was no risk of a recurrent violation,

plaintiffs (1) would be able to bring a new Rule 23(b)(2) class complaint ***and*** conclusively prove a "cognizable danger of recurrent violation"; and (2) could move for sanctions on what must have been the perjured promise of the defendant not to resume the behavior. Moreover, even if class certification seeking prospective injunctive relief were defeated, any meritorious claims for retroactive damages would remain; consumers are not hurt by the *Aqua Dots* rule.

Plaintiffs protest that it would be "unfair to allow the class to receive a benefit, while class counsel receives nothing." PB29. But this is a strawman; *Aqua Dots* doesn't preclude certification of class actions that can plausibly obtain a benefit for the class. The argument here is that a class action must provide a benefit to the class to be worth the candle and a court's time, and class counsel incapable of doing more than winning attorneys' fees for themselves without any "incremental benefit" to the class cannot be granted class certification. Plaintiffs fail to demonstrate any possible incremental benefit from their settlement or from their consolidated class-action complaint, and that is why they lose under *Aqua Dots*. Had class counsel actually obtained a benefit for the class through continued litigation, then class counsel would under *Pearson* and *Redman* be entitled to fees proportionate to the benefit won, and Frank has never argued differently. But that's not the issue where there's no benefit to the class and no cognizable possibility of a benefit to the class. Class counsel's parade of horrors is beside the point and provides no reason not to follow *Aqua Dots*.

Frank explained why proper application of *Aqua Dots* creates the appropriate incentives for defendants to engage in voluntary correction of alleged wrongs and for plaintiffs' attorneys to focus on actual wrongdoing rather than rent-seeking. OB18-19.

Subway ignores this and asserts that *Aqua Dots* creates "bizarre incentives." DB28. By Subway's lights, defendants in an *Aqua Dots* regime might avoid correcting challenged conduct because it would make Rule 23(b)(2) class certification more difficult. *Id.* Subway's argument is puzzling: would a defendant really insist on making its customers mad because it would prefer to pay rent-seeking plaintiffs' attorneys rather than to take steps to save money by deterring a pointless lawsuit that accomplishes nothing for consumers? (And Subway's argument further assumes that such a defendant would face no augmented risk of Rule 23(b)(3) retrospective damages that continue to grow with time.)

Any defense counsel recommending that his client avoid remedial measures because it might defeat class certification in future litigation is committing malpractice. Subway's argument is ultimately an empirical one. There's no evidence that *Buckhannon* prevents governments from engaging in voluntary compliance, rather than encourages such voluntary compliance. *Aqua Dots* was already the law and didn't prevent Subway from making corrective changes. A ruling that Subway doesn't need to pay $525,000 to rent-seeking plaintiffs' attorneys who accomplished nothing for their putative clients isn't going to deter a future defendant from making corrective changes if they run afoul of their customers.

III. Plaintiffs concede that the Gordon declaration does not support settlement approval or a finding that the settlement created incremental benefit.

Plaintiffs insult Frank with false accusations for critiquing the bogus Gordon declaration. PB29-30. But as Frank stated in his opening brief, and plaintiffs do not and

cannot deny, Frank only briefed the issue because plaintiffs repeatedly refused to stipulate that they would not rely on that declaration in this appeal. OB11; OB20.

Given the nature of plaintiffs' insults of Frank, some background is worthwhile. Plaintiffs filed the Gordon declaration under seal; the district court denied Frank's motion to strike the declaration. A28. On March 30, counsel for Subway asked the parties whether they would be relying upon the Gordon declarations on appeal. Class counsel immediately responded the same day that "we will need them in the record." Based on class counsel's representation, there were several rounds of briefings and filings and orders in this Court over the sealing of the Gordon declarations and Frank's appendix. In an April 15 filing responding to Subway's motion to seal and to this Court's April 14 Order, Frank noted that the Gordon declaration was worthless, and again asked appellees to disclaim using it. Appellate Dkt. No. 12. Plaintiffs waited until April 28, three business days before Frank's opening brief was due, to respond, and refused to stipulate that they would not use the Gordon declaration. Appellate Dkt. No. 13.

As a result, when Frank filed his opening brief and appendix on May 3, he was required to assume that plaintiffs would rely upon the Gordon declaration as an alternative ground for affirmance and that Frank needed to brief the district court's erroneous denial of Frank's motion to strike the declaration, lest Frank be accused of forfeiting on appeal a challenge to its admissibility. Frank's briefing expressly acknowledged twice that the district court did not rely upon the Gordon declaration. OB10; OB21.

As it turned out, class counsel misled Subway and Frank, did not rely upon the Gordon declarations in their briefing and never mentioned it in its argument or statement of facts. If class counsel had been willing to commit to this in March or April instead of vexatiously multiplying proceedings, Frank would not have needed to preempt the issue in his opening brief.

But worse, having wasted everyone's time by sandbagging the questions of whether Frank needed to brief the issue and whether Subway and Frank needed to make multiple motions to seal the record and appendix, class counsel has the unmitigated *chutzpah* to complain that the issue is a "strawman" and to falsely accuse Frank of misleading this Court by "simply ignor[ing] the opinion" that the district court did not rely upon the Gordon declaration, even though Frank stated that fact twice. *Compare* PB29-30 *with* OB10 ("Ultimately, the district court chose not to rely on the Gordon declaration, but it denied Frank's motion to strike. A12; A28."); OB21 (similar). Plaintiffs' assertion that "Frank's argument on this point is indicative of his persistent refusal to recognize the actual facts and procedural history of this case" (PB30) is especially galling given class counsel's misstatements in the same paragraph and their repeated need in the district court to withdraw false *ad hominems* about Frank and fictitious case citations to avoid Rule 11 sanctions. OB7-8.

For what it's worth, plaintiffs' *ipse dixit* that Frank's argument against Gordon is "wrong" because it is "unsupported arguments by a layperson who is totally unqualified to contradict expert opinion" (PB30) is as bogus as the Gordon declaration is. Plaintiffs neither defend Gordon's lapses in math or logic, nor cite any reason why an expert can reliably assume a disputed conclusion without any basis in fact. OB20-25.

When an "expert" commits basic multiplication errors multiple times, a layperson is surely qualified to correct the math. But because plaintiffs, contrary to their earlier representations to Subway and Frank, are not claiming that the Gordon declaration is relevant to the appeal, the question is moot. No one contends that the Gordon declaration supports settlement approval or a finding of incremental benefit, and for the reasons stated in Frank's opening brief, no one could plausibly do so.

Conclusion

This Court should vacate and reverse the settlement approval and class certification.

Dated: June 23, 2016

Respectfully submitted,

/s/ Theodore H. Frank

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I hereby certify that on June 23, 2016, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Seventh Circuit using the CM/ECF system, thereby effecting service on counsel of record who are registered for electronic filing under Cir. R. 25(a).

/s/ Theodore H. Frank
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