NO. 15-3228
Consolidated with Nos. 15-3221, 15-3227, and 15-3254

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE: MOTOR FUEL TEMPERATURE SALES PRACTICES LITIGATION
ZACHARY WILSON, *et al.*,
Plaintiffs-Appellees,
v.
BP CORPORATION NORTH AMERICA, INC., *et al.*,
Defendants,
and
CHEVRON USA, INC., *et al.*,
Defendants-Appellees,
v.
Melissa Holyoak, *et al.*,
Objectors-Appellants.

On Appeal from the United States District Court for the District of Kansas
Case No. 2:07-md-01840-KHV
The Honorable Katherine H. Vratil, Presiding

Reply Brief of Appellants Amy Alkon, Theodore H. Frank, Melissa Holyoak, Nicolas S. Martin, and Adam Schulman

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Glossary of Terms

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AB: Opening Brief filed by Alkon Appellants in 15-3228

ATC: Automatic Temperature Compensation

CEC: California Energy Commission

Dkt.: Docket in No. 2:07-cv-MD-01840-KHV (D. Kan.)

OB: Opening Brief filed by Speedway Appellants in 15-3221

PB: Brief filed by Plaintiffs-Appellees in 15-3228

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Introduction

Academics discussing this case have been uniformly appalled about these settlements. Michael I. Krauss, *Possibly The Worst Class Action Settlement Ever Approved*, Forbes.com (Feb. 18, 2016); LESTER BRICKMAN, LAWYER BARONS 365-66 (2011). For good reason: they benefit only the attorneys; make most class members worse off; substitute the district court's inconsistent and economically fantastic analysis for that of the state regulators and legislators closest to the issue; and impermissibly compel absent class members to subsidize political speech. It was reversible error to approve the settlement and certify the class, and the red herrings thrown by class counsel should not distract this Court from the central issues on appeal.

Argument

I. Rule 23(e) prohibits class counsel from using the settlement process to enrich themselves at the class's expense by releasing class members' claims for negative benefit (or, at best, no consideration) while providing themselves millions in fees.

Plaintiffs do not dispute that class actions present conflicts of interest between class members and class counsel, *see* AB16-20, or that Rule 23(e) prohibits class counsel from using the settlement process to make themselves better off at the expense of the class. Instead, they rest on the district court's analysis of the four factors from *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180 (10th Cir. 2002). PB37. But none of the *Rutter* factors address the critical issue here: whether the *allocation* of settlement benefit between class counsel and the class reflects impermissible self-dealing by class counsel.

In re Dry Max Pampers Litig., 724 F.3d 713, 717 (6th Cir. 2013). And the cases plaintiffs cite (PB37-38) do not support their argument that the *Rutter* factors are sufficient to evaluate settlement fairness because none of those cases involved a challenge to the allocation of settlement benefit between the class and its attorneys. Every other Circuit to have considered the question has held that multi-factor tests like *Rutter* are *not* the exclusive avenues of inquiry under Rule 23(e). AB19-20 (citing cases); *see generally* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.05 *comment a* (2010) (criticizing thoughtless reliance on multifactor tests); Jonathan R. Macey & Geoffrey P. Miller, *Judicial Review of Class Action Settlements*, 1 J. LEGAL. ANALYSIS 167, 170-74 (2009) (same).[1] This Court should decline plaintiffs' invitation to create a circuit split by holding that the *Rutter* test is exhaustive when *Rutter* never considered the question here of allocation between class counsel and the class. "Splitting the circuits always is something we approach with trepidation." *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1521 (10th Cir. 1991); *accord United States v. Games-Perez*, 695 F.3d 1104, 1115 (10th Cir. 2012) (Murphy, J., concurring in denial of rehearing).[2]

[1] Note for example that the fourth *Rutter* factor is "the judgment of the parties." But if the parties do not think a settlement fair and reasonable, they wouldn't have agreed to it and there would be nothing to apply this factor to. Similarly, the second *Rutter* factor is made entirely irrelevant by the third *Rutter* factor: if the ultimate outcome of the litigation isn't in doubt, then the quantification of future relief is more than a "mere possibility."

[2] The "additional factors" proffered by plaintiffs similarly provide no assurance that the interests of the class have not been compromised. That there were experienced attorneys negotiating the settlements with "extensive discovery culminating in a trial"

Plaintiffs fight desperately to avoid the allocational inquiry—comparing what class members receive with what class counsel receives—because it reveals that class counsel is the *only* beneficiary under the settlements. *First*, the district court erred in analyzing the settlement benefit because it ignored the expert report of Dr. Henderson and basic economic principles: the costs of the ATC conversion would be passed on to consumers and would thus greatly outweigh the penny-per-year benefit the ATC conversion might provide. *Second*, plaintiffs cannot identify an economic benefit to class members other than a *de minimis* "informational benefit." And *third*, the admittedly nonexistent marginal benefit to class members compared to non-class-members is necessarily insufficient consideration for waiver of class members' claims.

A. The district court's erroneous findings of settlement benefits cannot be justified.

1. The district court's findings were reversible error.

Plaintiffs do not dispute that *Alleghany Ludlum* and *Transcraft* preclude affirming reasoning that's economically "fantastic" and "methodologically flawed." AB5. Nor do they dispute the central tenet of Alkon's argument: the district court failed to consider the effect of ATC conversion on fuel prices for drivers. *See* PB14 (acknowledging that district court relied solely on informational benefit and dismissed as irrelevant increased

(PB39) may affect the size of the settlement, not the allocation. *Pampers*, 724 F.3d at 717. As for opt-outs (PB39-40), it is unsurprising that a significant number of class members did not go to the trouble of objecting or opting out, particularly where, as here, individual stakes cannot be improved by an increase in the size of the settlement or a reduction in attorneys' fees. *Redman v. RadioShack Corp.*, 768 F.3d 622, 628 (7th Cir. 2014) ("naïve" to rely on lack of objections or opt-outs in approving settlement).

fuel prices for consumers). Plaintiffs suggest that because the district court's finding of settlement benefit "did not depend on any reduction in motor fuel prices," PB32, the ability of retailers to pass on the higher cost of ATC to consumers is irrelevant to the court's approval, PB22. This argument is both a red herring and an admission that the district court's analysis was critically deficient.

It is a red herring because it wrongly suggests that Alkon is arguing that the settlement must realize a reduction in fuel prices. But that's not Alkon's argument. AB20. Rather, the net settlement benefit must account for associated costs. For example, if a settlement with a bank resulted in a coupon to each class member for a free cup of coffee offset by a new $20 annual checking-account fee, it would be error to solely consider the coupon in finding that the class benefited. If the settlement raised the price of gasoline $0.10/gallon, but there was evidence that consumers would irrationally pay an extra $0.20/gallon to know that they weren't losing a penny a year from hidden temperature differentials, then the benefits would exceed the costs; of course, there was no such evidence here or any evidence that consumers care about anything other than minimizing cost. The point is that settlement "benefits" from injunctive relief do not exist in a vacuum; any valuation must account for associated marginal costs before a court declares a settlement beneficial to the class, and that valuation must be based on sound and consistent methodology. The district court's analysis failed in both respects.

As plaintiffs agree, the district court approved the settlements based on the "informational" benefit of ATC to consumers. PB14. And as plaintiffs further acknowledge, the district court relied upon the CEC Report's finding that ATC

provides an informational benefit, calculated as worth about $250,000 per year for California consumers—or about one cent per driver per year. PB11 & n.3. But the CEC also found that retailers would raise fuel prices in response to the switch to ATC at their stations to reflect the larger average "gallons" sold to consumers and the increased costs of maintenance. SA7870 ("The conclusion, therefore, is that retail station owners will in fact raise their fuel prices to compensate for selling fewer units, all other things being equal."). In the competitive environment acknowledged by the district court, then, consumers' costs would increase and more than offset the calculated 1-cent-per-year informational benefit to drivers. *See id.* (describing CEC's "find[ing] that the balance of evidence points to complete or near-complete pass-through of ATC-related costs from the retail station owners to consumers"). Even plaintiffs' own expert's incoherent report assumed that such pass-through costs of installation would occur. SA8005; AB10-11; SA8040.

The district court nevertheless concluded, and later reiterated, that retailers would "need to keep fuel prices competitive to attract class members and other fuel purchasers" and therefore were unlikely to adjust prices to account for the effects of ATC. A2052; A7513. This conclusion is directly at odds with the CEC Report and basic principles of economics. In a competitive environment, prices close in on the marginal cost to retailers and stay there. AB21-23.

Plaintiffs attempt to manufacture a dispute by arguing that the CEC "'acknowledge[d] uncertainty'" on the issue of whether retail station owners would be able to pass through ATC-related costs to consumers. PB11 n.3 (citing SA7870, which in turn cited a single "stakeholder" economist); they also point to the district court's

finding that the CEC did "not address whether competitive market forces will allow the settling defendants to raise fuel prices when not all retailers are implementing ATC." PB18; A7512-13. These are mischaracterizations of the CEC Report, whose findings of pass-through were not predicated upon universal adoption and concluded from "the balance of the evidence" that retail station owners will, in fact, be able pass through costs. SA7870-71. Moreover, the district court's reasoning simply demonstrates its fatal methodological flaw: the informational benefit plaintiffs and the district court rely upon in the CEC Report was expressly premised upon 100% "mandated implementation of ATC," because only then consumers be able to "perform accurate value comparison" through advertised prices. SA7871-72; *see also* SA7986-87 (Alaska Study finds that permissive standard of incomplete ATC adoption worst option because it reduces transparency). Plaintiffs and the district court can't have it both ways, and adopt the weaker CEC finding while ignoring the stronger one on the basis of incomplete ATC adoption. Either both go or both stay, or the pass-through stays and the informational benefit goes, but the district court chose the internally contradictory option to reach its own policy preferences.

The district court's analysis of settlement benefit was methodologically flawed, contradicted the record, and cannot be affirmed. That analysis underpinned the court's approval of settlements in which class counsel allocated the overwhelming majority of the benefit to themselves and their preferred regulatory agenda while leaving the class worse off. AB21-27.

2. The district court erroneously failed to consider the Henderson report and the effect of cross-subsidization.

Plaintiffs claim incorrectly that the court "considered Dr. Henderson's opinion and noted its flaws." PB33. They also claim incorrectly that the district court "squarely considered and reasonably rejected" Alkon's argument that, due to cross-subsidization, any benefits to consumers from ATC can come only at the expense of other consumers. PB36. The record shows otherwise.

Plaintiffs rely on the district court's argument that the "'objection was hypothetical' because there is no evidence that consumers can determine whether they tend to purchase motor fuel at below-average temperatures." PB36. But *nothing* in Henderson's analysis requires consumers to *know* whether they tend to purchase motor fuel at below-average temperatures. SA8039-44. It is a simple mathematical fact that about half of the gallons purchased at any given station are purchased at a temperature below the average of the station: this is not Lake Wobegon, where every purchase is above average. If this is plaintiffs' best shot at defending the court's reasoning, it proves reversible error. There's nothing hypothetical about basic arithmetic. Indeed, these passages in the district court's order, rather than addressing whether or how cross-subsidization affects the purported benefit of ATC for class members or other consumers, address a separate issue: whether there is an intra-class conflict under Fed. R. Civ. P. 23(a)(4) between named plaintiffs and class members who routinely purchase fuel at below-average temperatures such that separate representation is required. A7504-05.[3]

[3] Frank raised the meritorious 23(a)(4) issue below. A5445. Appellate word limits precluded adding it as an issue on appeal, but the district court's analysis was faulty for

Similarly: "the region covered by the litigation has higher temperature motor fuel than average" (PB36), an argument not made by the Court, is another red herring: the Henderson report considers "average temperatures" *at each station*, rather than "average temperature" across the country. SA8042-43. If the average temperature at a station is an above-average 86 degrees, that doesn't change the fact that, in the competitive market assumed by the court, the CEC, and Dr. Henderson, the customers at that station who are purchasing gas above 86 degrees are cross-subsidizing the customers who are purchasing gas below 86 degrees. Again, plaintiffs only argue against Henderson by using a straw-man characterization of his argument rather than addressing his actual analysis and Alkon's actual arguments.

Plaintiffs' other arguments against Henderson depend on the mischaracterization of a patchwork of different court orders, including one that the district court issued before Alkon even filed the Henderson report and one in which the district court made no mention of Dr. Henderson. *See* PB33 (citing A2052 and A7512 n.55).

First, plaintiffs rely on an order issued *before* the Henderson report was submitted to claim that the district court disagreed with Dr. Henderson's testimony. *Id.* Even if some of the district court's early reasoning differed from Dr. Henderson's expert analysis, that only underscores why it was error for the court not to consider his testimony rebutting the erroneous analysis. SA8040-41. The district court stated that it "ha[d] no reason to believe that market pressures would allow [Costco to raise fuel

similar reasons: that the subclasses are not ascertainable does not mean that the settlement's purported benefits are not at the expense of other class members because of the cross-subsidization.

prices after installing ATC]." A2052. Dr. Henderson's subsequent testimony provided the district court "reason to believe" by explaining, *inter alia*, that in a competitive environment, companies will alter their prices to reflect increased marginal costs. He further explained that retailers using ATC pumps could raise their fuel prices as compared to retailers not using ATC pumps because "customers will become informed" that at a certain temperature, "customers will get more gasoline for a given gallon than its competitors are offering." SA8040-41.[4]

Dr. Henderson's conclusion is consistent with the CEC's conclusion that retailers that switched to ATC would be able to raise their fuel prices to account for the higher costs. *See* Section I.A.1 above. After making its "no reason to believe" statement, the district court accepted the CEC Report's finding of small informational benefits to approve the settlements. As discussed above, the district court gives internally

[4] Plaintiffs assert that Dr. Henderson gave this opinion "without support." PB34 n.9. Not so. Dr. Henderson described his economic reasoning in detail, with reference to plaintiffs' own inconsistent analysis. SA8040-41. He employed reliable, broadly accepted economic concepts that fit the facts of this case, and he has superb qualifications as an expert in the field of economics. SA8037-38. In any event, if Dr. Henderson's report was deficient, plaintiffs could have moved to exclude it under Federal Rule of Evidence 702, but, tellingly, they neither did that; nor identified any relevant documents in the record that Dr. Henderson failed to analyze; nor deposed Dr. Henderson; nor used Dr. Safir to rebut Dr. Henderson. Rather, they made an indefensible argument claiming cross-subsidization never happened outside of antitrust violations, though any economist could have told them this was false. Dkt. 1663 at 2; AB11; SA8043. Plaintiffs on appeal don't attempt to defend their abusively false briefing below.

inconsistent and thus methodologically flawed reasons to pick and choose from the CEC's findings and analysis.

Second, the district court expressly declined to "address" the conflicting opinions given by Dr. Henderson and the parties' experts regarding settlement benefit. The court believed that it did not need to consider that evidence to approve the Costco settlement because it found the settlement provided an "informational benefit." A3144 & n.24. That the district court threw up its hands and declared it "impossible" to know "with certainty the price which Costco or any other gas retailer will charge for future motor fuel sales," A3144, does not show the court found "flaws" in the expert testimony. Rather, it demonstrates conclusively the court's failure to consider Dr. Henderson's report. In its order approving the 28 other settlements, the district court failed to mention the Henderson report at all. A7471.

Third, plaintiffs claim that "opinions of other economists" support the district court's analysis. PB33-34. Even assuming *arguendo* that there was admissible expert testimony supporting the analysis, that does not change that the district court neither adopted that testimony nor performed a coherent economic analysis on its own. Rather, the district court declined to address the merit of any relevant expert testimony or even the admissibility of those that were subject to motions to exclude. AB11-13. This was independent reversible error.

B. Plaintiffs identify no valuation of settlement benefit other than the *de minimis* "informational benefits."

The district court approved the settlements based on the informational benefit that they purportedly provide consumers. *See* A3145 n.24; A7513. Plaintiffs do not

dispute that the district court relied on the CEC's finding that the informational benefit was worth about $258,000 per year in California, *i.e.*, about 1 cent per driver per year.[5] *See supra* section I.B.1. Plaintiffs can point to nothing else in the record indicating that the district court quantified the purported settlement benefit. PB35. Plaintiffs seem to argue that the settlement benefit is greater than the *de minimis* valuation calculated by the CEC because the district court secretly assigned some value to "price transparency and fairness" separate from the overarching "informational benefit."[6] The distinction appears to be hair-splitting at its finest, but does not support plaintiffs' supposition. They point to no evidence that the district court actually assigned any value or relied upon a source quantifying the value of settlement benefit other than the CEC Report.

Implicitly recognizing the material deficiency in their position, plaintiffs argue that it was not clear error for the district court to rest its determination of settlement benefit "on eight years of experience with this litigation." PB35. This is wrong. A district

[5] Plaintiffs argue that a previous CEC estimate of the informational benefits was higher. PB36 n.11. So what? The district court did not rely upon that earlier estimate, which the CEC called "simplistic." SA7939. For good reason: the CEC's final version was based on "a more technical econometric methodology for measuring the costs of information asymmetry" that accounted for elasticity and the variability of information effects. SA7939-40.

[6] "Price transparency" is just another name for the informational benefit, so is duplicative of the $258,000 informational benefit. A7871. And of course, there's no record evidence that consumers would be willing to pay even a penny more for gasoline that was priced "fairly" to eliminate the infinitesimal cross-subsidization between class members—especially given plaintiffs' own argument that class members have no idea *ex post* whether they're purchasing below- or above-average temperature gasoline (PB36) and thus won't know *ex ante* whether they will be cross-subsidizing or cross-subsidized.

court cannot approve a settlement based on its *ipse dixit*; rather, it must provide a reasoned response for its decision, "show[ing] *how*, and on what basis, the court analyzed [the] objections." *New England Health Care Employees Pension v. Woodruff*, 512 F.3d 1283, 1291 (10th Cir. 2008) (emphasis in original). This Court emphasizes that it is "unwilling to guess at the path the district court followed in resolving serious legal issues." *Id.* "To survive appellate review, the district court must show that it has explored comprehensively all factors and must give a reasoned response to all non-frivolous objections." *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012) (internal quotations and citation omitted).

That the district court has not yet ruled on a fee award for class counsel hardly prevents this Court from finding that the attorneys made themselves the "primary beneficiaries" of the settlements and, as a result, the settlements are unfair under Rule 23(e). Plaintiffs argue that the settlements cannot constitute self-dealing because the district court ultimately has discretion to award attorneys' fees and, unlike the cases relied upon by Alkon, has not yet awarded any fees at the time of appellate briefing. PB40-41. Under Rule 23(h), the district court has such discretion in *every* class action. The district court's authority to award fees less than the $24.7 million to which class counsel deemed itself entitled or the $18.7 million that the magistrate judge recommended, and Alkon's right to subsequently challenge the award, does not change class counsel's "selfish" allocation of 100% for itself and nothing for the class. *See Pearson*, 772 F.3d at 787; *see also* AB27.

As Alkon detailed, a defendant cares only about minimizing its total settlement payment and is indifferent to how that payment is allocated between class counsel and

the class. AB16-18. Given this reality, the settling defendants here were willing to put a certain amount on the table to settle this class action to get out from under the litigation expense that plaintiffs and the district court imposed—especially given that the settlements would impose costs on non-settling defendants like Speedway. When one compares how that total settlement amount was divided between the class and its attorneys, the conclusion that the settlements constitute impermissible self-dealing is inescapable: In a best case scenario, class members realize a *de minimis* informational benefit, while class counsel reserved $24.7 million for themselves—over half of which defendants agreed not to object to, a red flag. *E.g., Bluetooth*, 654 F.3d at 947.

The settlements' structure reinforces the unfairness. Class counsel was allowed to seek, often with clear sailing, fees of up to 30% of the "common funds" created by the Regulator Fund settlements. AB7-8; A7485-91. The remaining amount will be paid to third-party state regulators and, in some cases, retailers, to reimburse expenses associated with their respective transition to ATC. *E.g.*, A5763-64. Thus, even if the district court reduces the fee award, class members will not realize any increased benefit. They still receive, at most, a *de minimis* informational benefit, more than offset by the costs of increased prices.

Nor will class members realize any additional settlement benefit if the district court awards less than the $7.7 million that the defendants agreed to pay in the ATC-Conversion settlements. *See* PB42. The only beneficiary of a fee reduction would be the

defendants, who would be liable for a smaller amount of fees, while class members will still receive, at most, the same *de minimis* informational benefit.[7]

C. Class members receive no marginal benefit compared to non-class-members and thus received no consideration for the waiver of their claims; plaintiffs' insufficient response to this argument constitutes waiver.

Plaintiffs do not dispute that (1) all future fuel purchasers, regardless of class membership, receive the same alleged benefit; (2) past-only fuel purchasers do not receive any benefit; (3) only class members (past purchasers) release their claims against defendants; and (4) a settlement must provide a marginal benefit in consideration for a waiver of claims. *See* PB37. Plaintiffs' half-hearted arguments denying that any such non-class-members exist are facially false.

Plaintiffs claim that non-class members "do not purchase fuel" (PB37) ignores both opt-outs and the fact that new drivers come on the road every day. Meanwhile, plaintiffs' claim that past fuel purchasers "are likely future fuel purchasers" (PB37) is phrased in terms of coincidental overlap and ignores that many drivers undergo life changes that alter their status as drivers (perhaps they die while they are waiting for an inefficient regulation to be imposed). More fundamentally, plaintiffs' meager defense is

[7] Plaintiffs cite *In re Southwest Airlines Voucher Litigation*, 799 F.3d 701, 713 (7th Cir. 2015) for the proposition that settlements that provide the same relief that plaintiffs might obtain if they prevailed at trial are presumptively fair. But that's not what happened here. The *Southwest* class "lost the value of drink coupons," and received "replacement drink coupons, on a one-for-one basis." *Id.* at 711. Here, the class allegedly suffered and sought monetary damages, but will receive zero dollars.

directly at odds with the district court's correct statement that "the settlements do not confer individual benefits unique to class members." A7511.

Under the law of this circuit, "issues will be deemed waived if they are not adequately briefed." *Utahns for Better Transp. v. U.S. Dept. of Transp.*, 305 F.3d 1152, 1175 (10th Cir. 2002). Thus, plaintiffs' failure to either contest the lack of marginal benefit or identify a legal reason why a settlement that provides no marginal benefit to the class can be approved is waiver. *Phillips v Calhoun*, 956 F.2d 949, 954 (10th Cir. 1992) (dispute not "followed by any argument on the merits of the claims involved" "waived under the general rule that even issues designated for review are lost if they are not actually argued"). The fact that the settlement provides no consideration for class members' waiver of claims that it doesn't gratuitously provide to non-class members—even if one believes the injunctive relief a net benefit—is independent reason to reject the settlement.

II. By imposing policies properly developed through legislative and regulatory processes, the settlements violate separation of powers principles.

Plaintiffs try to pass off these settlements as run-of-the-mill consumer class actions. But these settlements seek to blow up a decades-old legislative and regulatory scheme and replace it with a system that legislators and regulators specifically rejected. Plaintiffs observe that the Federal Rules of Civil Procedure are presumptively constitutional. But this is a strawman: a district court cannot use the Rules to enlarge its statutory, much less its Article III, authority. 28 U.S.C. § 2072. It cannot make legislative judgments contrary to those made by legislators constitutionally vested with that

authority and the regulators to whom they have delegated that authority simply by claiming to adhere to the mandate of Rule 23. Alkon is not challenging the constitutionality of Rule 23(e), but approval of *these* extraordinary settlement agreements, which exceed judicial authority *as applied in this case.*

Plaintiffs argue that the district court "only did precisely what" Rule 23 required. PB44. Under Rule 23, however, a court's role to ensure a fair, adequate and reasonable settlement is constrained by constitutional limitations. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 613 (1997) ("Rule 23's requirements must be interpreted in keeping with Article III constraints[.]"). Approval of the settlement agreements here exceeds the bounds of Article III because they enlist the judiciary in quintessentially legislative policymaking and because the agreements with Valero and Costco purport to release future conduct unrelated to settled claims.

As FRAP 28(i) permits, Alkon adopts by reference Section II of Speedway's Reply Brief.

A. The judiciary should not legislate.

Plaintiffs make much of the fact that settlement approvals alone will not force regulators to allow ATC, but they fail to rebut the legislative nature inherent to the relief. Contrary to plaintiffs' claims, the settlements do, in fact, "interfere" with the states' regulation of fuel sales. Specifically, the settlements aim to induce state regulatory bodies to approve ATC sales by promising funds for the transition to the court-approved agenda of ATC at retail and by forbidding opposition to the change.

Contrary to plaintiffs' characterizations, the Fund Settlements do not establish a monetary fund for the direct benefit of the class and thus constitute "proper resolution[] of a class action." PB46-47. Class members cannot make claims against the fund. Instead, the Fund Settlements earmark funds for government agencies that submit to class counsel's lobbying campaign seeking to implement its and the district court's preferred regulatory regime: adoption of ATC for fuel sales.[8]

The intended effect is unprecedented and far-reaching. The settlements contemplate the systematic introduction of a new method of dispensing fuel, which not only has never been used in this country but has been *rejected* by state and federal regulators and legislators. All class recovery in the Fund Settlements is diverted to government agencies for the purpose of foisting novel public policy upon class members and non-members alike. This audacious "relief" does not resemble any injunctive or monetary relief ratified by other courts. In that regard, it is telling that plaintiffs do not cite a single case in which recovery is completely diverted to serve

[8] Plaintiffs insist that these funds do not constitute (compelled) speech by the class because class counsel "voluntarily" agreed to perform the lobbying required by the agreements. PB54 n.21. This distinction is fictional. The approved agreements have the obvious aim to encourage states to adopt ATC, as the district court found in approving them. The agreements simultaneously require the establishment of settlement funds (including clear sailing for 8-figure attorney fees) *and* an obligation to seek approval for ATC (*i.e.* lobby government). Class counsel cannot insulate from scrutiny the settlements' legislative ends and compelled political speech by characterizing the implementation of the settlements *by their authors* as coincidental "voluntary" efforts. The agreements are *designed* to lobby the legislative branch with political issue advocacy.

legislative ends. No prior approved, nor even proposed, settlement has so brazenly violated separation of powers principles.[9]

Plaintiffs do not dispute that the district court behaved as a legislator in rejecting one proposed settlement that allegedly provided "little to no benefit" to the public at large, only to approve the present settlements which it believed provided such a benefit. AB40. (The reality is that it likewise provides no benefit, *see* section I above, but even assuming a benefit *arguendo*, the district court exceeded its powers.). Under the guise of Rule 23(e), the district court resolved complex, legislative tradeoffs to arrive at a preferred policy, and steered the settlement to its preferred regulatory outcome. The court also approved the settling parties' scheme to influence legislators based on this preferred policy. The district court exceeded its judicial role and entered the realm of deliberative lawmaking. AB36-37. It is "the kind of polycentric problem for which courts are ill-suited." *Kansas City S. Ry. Co. v. McNamara*, 817 F.2d 368, 377 (5th Cir. 1987).

[9] Plaintiffs mischaracterize Alkon's objection as opposing all judicial "prospective arrangements." PB46. But Alkon does not deny that private injunctive relief might be acceptable. For example, a settlement might enjoin Volkswagen to either purchase or retrofit vehicles of consumers economically injured by VW's environmental fraud, matching the prospective injunctive relief to the retrospective injury of class members. Furthermore, Alkon acknowledges that the judiciary may intervene in the process of coordinate branches of government when those processes are dysfunctional. AB41-43. Plaintiffs make no argument that such intervention is necessary here. Nor can they: the model government standard for fuel sales is reviewed and updated annually. AB42.

The lawmaking purpose of the district court is confirmed because it lost sight of class members' interests, upon which courts are obligated to act as fiduciaries. Plaintiffs cannot dispute that the district court expressly found that the settlements confer no benefits unique to class members. The court's approval of these settlements was thus premised entirely on an assessment of what was best for all consumers, regardless of their status as class members, a judgment unmoored by statutory guidance. The judiciary lacks such creative policymaking power. AB43.

Plaintiffs mischaracterize *Winzler* and *Authors Guild*, which are both animated by Article III principles. Alkon does not contend that the underlying controversy is prudentially moot.[10] Rather, separation of powers suggests courts ought not meddle with legislative and executive prerogatives. *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1210 (10th Cir. 2012).

Plaintiffs argue that *Winzler* is inapplicable because in *Winzler*, Congress and the Executive had committed to ensuring that plaintiffs received the relief sought, but here, "no political branch has implemented a remedial scheme" for the relief sought. PB47. It is not that the legislature or regulators have failed to act here, but instead, plaintiffs just don't like the result they reached. Regulators have repeatedly considered *and rejected* the very scheme plaintiffs seek to implement. AB30. Indeed, legislative policymaking is *always* inappropriate for courts, even if the legislature has failed to make *any*

[10] Alkon departs from Speedway here. Alkon contends that the *approval* of these extraordinary settlements exceeds Article III. It would have been possible to settle the case without impinging upon the legislature with an award of damages to the class proportionate to the benefit to the attorneys.

determination. *E.g., Golan v. Holder*, 132 S.Ct. 873, 894 (2012) (declining to formulate copyright policy based on the orphan works problem unresolved by Congress).[11] Oddly, plaintiffs distinguish *Authors Guild* based on the incredible argument that the settlements here do not "interfere with any legislative scheme." PB48. To the contrary, the settlements were structured to influence and lobby third-party regulators and legislators to change the law and impose a new regulatory regime, and to put a thumb on the scale by preventing speech in favor of the optimal status quo.

Judicial approval of a so-called "private agreement" to release the claims of absent parties does not excuse Article III courts from their constitutional limitations. *Amchem*, 521 U.S. at 613. While such agreements are negotiated by class counsel and defendants, courts may not resolve an Article III controversy by approving a settlement to set substantive policy or lobby coequal branches of government.

B. The Valero and Costco settlements impermissibly release the claims of class members concerning future use of ATC.

Plaintiffs admit that the settlements "provide that Costco and Valero may not be sued for installing ATC pumps, as required by the settlements." PB51-52. Plaintiffs also

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[11] *Golan* also explicitly rejects plaintiffs' characterization of *Authors Guild* as solely about Rule 23 fairness. *Compare id. with* PB49. Plaintiffs cite *In re Literary Works* for the proposition that it was appropriate to approve a copyright settlement superficially similar to the *Authors Guild* settlement with future releases. PB49. This is wrong for at least two reasons. *First*, *Literary Works* based its holding on finding that the settlement only released claims with an "identical factual predicate" to those settled—the same test Alkon proposes and plaintiffs concede is correct. 654 F.3d at 248; Section II.B below. *Second*, *Literary Works* vacated settlement approval under Rule 23(a)(4); the court did not address separation of powers.

admit that a proper class action settlement may only release conduct that "arises out of the identical factual predicate as the settled conduct." PB51.

These releases lack the "identical factual predicates" plaintiffs concede are required. Cases plaintiffs rely upon like *Berry v. Schulman*, 807 F.3d 600, 616 (4th Cir. 2015), and *Literary Works*, 654 F.3d at 248 endorsed releases covering future conduct that was a continuation of past conduct occurring during the class period. *See also Moulton v. United States Steel Corp.*, 581 F.3d 344, 350 (6th Cir. 2009). But that's not what we have here.

Plaintiffs do not and cannot show that future sales of fuel using ATC plausibly arises out of identical factual predicates as the underlying case. Plaintiffs dismiss the possibility that future claims are released by asserting that the agreements only require Valero and Costco to install ATC where it is "already decided that the sale of motor fuel by ATC pumps can be legal and non-fraudulent." PB52. This is a peculiar argument considering that the underlying litigation is essentially premised on the claim that selling fuel by volume is fraudulent, even though it has always been legal to sell fuel this way. Obviously, controversies can arise out of conduct that is allowed or even required by regulation.

The approved agreements with Valero and Costco snuff out unrelated claims that selling fuel *with* ATC is deceptive or fraudulent. Specifically, claims that ATC sales are inherently deceptive or constitute breach of contract would be precluded under *res judicata* on the face of the approved agreements. Such claims are not fanciful. The agreements require Valero and Costco to install ATC pumps where it is not positively illegal. A2078; A4420. The agreements thus compel these defendants to install ATC

where no regulatory decision has been made about its propriety. Yet this untested conduct is immune from claims by the class members.

If implemented, ATC pumps will always dispense *less* volume than 231 cubic inches per ATC "gallon" when the temperature of the fuel is below 60 degrees. SA7801. A claim of consumer fraud based on ATC systematically short-changing "gallons" in cool weather is a heck of a lot more colorable than the claim that volumetric sales of gallons unfairly sell volumetric gallons that necessarily conform to elementary-school laws of physics. (If one buys a dozen eggs, a retailer doesn't get to substitute eleven larger-than-average eggs.) The Valero and Costco settlement agreements release tens of millions of class members' claims for this future conduct.[12] Plaintiffs assert that claims based on negligence or pricing schemes are not released, but even if true, the settlement agreements immunize Valero and Costco from liability for dubiously legal future conduct radically dissimilar to the underlying claims.

The "novel" future conduct the Valero and Costco settlements release is not identical to—it is diametrically opposite from—the conduct complained of. James Grimmelmann, *Future Conduct and the Limits of Class Action Settlements*, 91 N.C. L. REV. 387, 442 (2013). Therefore, the district court's approval improperly released claims that are not ripe and therefore independently exceeds the case or controversy requirement of Article III. AB31-36.

[12] To the extent plaintiffs suggest that the settlement does not require installation of ATC sales in jurisdictions where courts have not decided whether such sales might constitute a fraud, then the purported consideration is completely illusory. There has never been an opportunity for plaintiffs to test consumer-fraud claims against ATC sales.

III. Rule 23(b)(3) certification was improper because the class action is not a superior form of adjudication for this litigation.

Alkon argued that because the district court found it would be infeasible to distribute damages to class members if the litigation was successful, then Rule 23(b)(3) superiority cannot be satisfied and, accordingly, the classes cannot be certified. AB43-45. Fundamentally, plaintiffs fail to explain how a class action can be a superior method of adjudication when individual class members cannot feasibly recover damages and are being subjected to a settlement that releases their claims in exchange for *exactly* what they would get if they opted out. A steadfast fiduciary for class members would not counsel absent class members to submit to this settlement; let alone foist it upon them in the first place.

Plaintiffs try to muddle the issue by quoting generalized comments about the non-necessity of monetary recovery in a settlement. But they rely almost exclusively on appellate cases in which (b)(3) superiority was not challenged and which therefore do not help their cause. PB29-31. *Berry*, for example, involved a challenge only to a settlement class certified under Rule 23(b)(2), which has no superiority requirement. 807 F.3d at 606. *Lane* and *Hughes* primarily addressed when *cy pres* is an appropriate remedy, without any discussion of superiority or challenge to (b)(3) certification. *Lane v. Facebook*, 697 F.3d 811, 816 (9th Cir. 2012); *Hughes v. Kore of Indiana Enterprise, Inc.*, 731 F.3d 672 (7th Cir. 2013).

Beyond the key legal differences, plaintiffs' cases are also different factually. *Marshall* found that the settlement fund directly benefited *each* class member. *Marshall v. NFL*, 787 F.3d 502, 510 (8th Cir. 2015). The district court here made the opposite

finding that "the settlements do not confer individual benefits unique to class members." A7511. *Hughes* involved the unique circumstances of a case where statutory damages were limited by statute to 1% of the defendant's net worth, or $10,000, which would be consumed largely by administrative costs.

Mace v. Van Ru Credit Corp., 109 F.3d 338 (7th Cir. 1997), is irrelevant: the settlement provided claiming class members with $12 or more for the release of their claims. Here, the district court found that distribution of any amount was infeasible.

Another court agrees with Alkon since she filed her opening brief. *Gallego v. Northland Group, Inc.*, 814 F.3d 123 (2d Cir. 2016), held a settlement where class members were eligible to claim only 16.5 cents if the entire class participated in the settlement was not a superior method to adjudicate the claims. "[A]bsentee class members' interests would not be best served by a settlement that required them to release any and all claims relating to [alleged wrongs] in exchange for as little as 16.5 cents… ." *Id.* at 129-30.

So, too, here. But class members are not even getting 16.5 cents. Even if the possibility of attaining statutory damages through an individual suit is unlikely, that possibility is not inferior to releasing claims for no compensation. *Cf. Brown v. Wells Fargo & Co.*, No. 11-1362, 2013 U.S. Dist. LEXIS 181262, at *16-*17 (D. Minn. Dec. 30, 2013); *Sonmore v. CheckRite Recovery Servs.*, 206 F.R.D. 257, 265-66 (D. Minn. 2001).

If the district court is not clearly erroneous that it is infeasible to distribute settlement funds to individual class members, then Rule 23(b)(3)'s superiority requirement is not met, and the district court erred as a matter of law in certifying the classes.

IV. The Regulator Fund Settlements impermissibly compel political speech in violation of the First Amendment.

Under Rule 28(i), Alkon adopts by reference Section IV of Speedway's Reply Brief. Alkon adds one point: whether or not Plaintiffs successfully argue that Valero and Dansk voluntarily stifled their own speech, Plaintiffs' response that the settlements are purely private arrangements devoid of any state action has no persuasive force as applied to the millions of absent class members compelled to donate funds to support a controversial political cause.

V. Plaintiffs' standing argument is incomplete.

Plaintiffs argue that Alkon Appellants have appellate standing only to challenge the ten settlements of which they are class members. PB26. Alkon doesn't claim otherwise. AB2; AB9; AB12. That said, the district court found that piecemeal Rule 54(b) judgments were inappropriate; the parties organized their affairs so that twenty-eight settlements were approved in a single order; and Alkon has appealed that order and associated single final judgment. A3815; A7471; A7565; Dkt. 4864. This Court, if it vacates that order and judgment as legally erroneous, has the discretion to decide the scope of a resulting remand. "Appellate courts review judgments, not opinions." *Gilbert v. Illinois St. Bd. of Educ.*, 591 F.3d 896 (7th Cir. 2010).

Conclusion

The settlement approvals must be reversed and class certification rejected. At a minimum, remand is required to determine whether, after costs and benefits are fully weighed, class counsel is the primary beneficiary of these settlements.

Dated: June 17, 2016

Respectfully submitted,

/s/ Theodore H. Frank

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Certificate of Service

I hereby certify that on June 17, 2016, I electronically filed the foregoing Appellants' Reply Brief with the Clerk of the United States Court of Appeals for the Tenth Circuit using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

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1. This brief complies with the type-volume limitation of Fed. R. App. Proc. 32(a)(7)(B) because this brief contains 6,996 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ Theodore H. Frank

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/s/ Theodore H. Frank