IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 11-4156

In re: DRY MAX PAMPERS LITIGATION

DANIEL GREENBERG,

Objector-Appellant,

ANGELA CLARK, *et al.*,

Plaintiffs-Appellees,

v.

PROCTOR & GAMBLE COMPANY; PROCTOR AND GAMBLE PAPER PRODUCTS CO.; PROCTOR AND GAMBLE DISTRIBUTING LLC,

Defendants-Appellees.

On Appeal from the United States District Court
For the Southern District of Ohio, No. 1:10-cv-00301 TSB

Principal Brief
of Appellant Daniel Greenberg

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CORPORATE DISCLOSURES

Pursuant to 6th Cir. R. 26.1, Daniel Greenberg makes the following disclosures:

1. Said party is not a subsidiary or affiliate of a publicly owned corporation.
2. There is no publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome.

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Statement in Support of Oral Argument

Pursuant to 6th Cir. R. 34. Appellant Daniel Greenberg, a former Arkansas state legislator, respectfully requests that the Court hear oral argument in his case because it presents significant issues concerning settlements in class action cases. These issues, regarding the requirements of Fed. R. Civ. Proc. 23 and the federal Constitution, are meritorious, and many have not been authoritatively settled in the Sixth Circuit.

While many appeals of class-action settlement approvals are brought by so-called "professional objectors" in bad faith to extort payments from the settling parties, this is not the practice of Greenberg's attorneys, who have never settled an appeal for a *quid pro quo* payment, and bring this objection and appeal in good faith to overturn an unfair settlement. *See generally, e.g.,* Ashby Jones, "A Litigator Fights Class-Action Suits," *Wall St. J.* (Oct. 31, 2011). Greenberg's counsel has previously argued and won landmark appellate rulings improving the fairness of class-action settlement procedure. *E.g.*, *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011). A favorable resolution in this case would improve the class action process by deterring other class-action settlements designed to benefit attorneys at the expense of their putative clients. This appeal raises complex but recurring questions of civil procedure; their exploration at oral argument would aid this Court's decisional process and benefit the judicial system.

Statement of Subject Matter and Appellate Jurisdiction

The district court had diversity jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2)(A). The case is a class action brought, *inter alia*, under state consumer fraud laws, involving a nationwide class of more than 100 class members, the amount in controversy exceeds the sum of $5,000,000, and no statutory exception to 28 U.S.C. § 1332(d)(2) applies. For example, lead plaintiff Angela Clark is a citizen of Michigan, and defendant Proctor & Gamble Co. ("P&G") is an Ohio corporation headquartered in Cincinnati.

The court's final judgment issued on September 28, 2011. RE #73. Objector Daniel Greenberg filed a timely notice of appeal under Fed. R. App. Proc. 4(a)(1)(A) on October 20, 2011. RE #75.

This court has appellate jurisdiction because this is a timely-filed appeal from a final judgment under 28 U.S.C. § 1291. As an objector, Greenberg has standing to appeal a final approval of a class action settlement without the need to intervene formally in the case. *Devlin v. Scardelletti,* 536 U.S. 1 (2002).

Statement of the Issues

1. May a Rule 23(b)(2) mandatory class ever discharge claims for monetary relief?

Standard of Review: Questions of law about the interpretation of the Federal Rules of Civil Procedure are reviewed *de novo*. *Kalamazoo River Study Group v. Rockwell Intern. Corp.*, 355 F.3d 574, 583 (6th Cir. 2004).

2. In the alternative, did the district court err in certifying the class as a mandatory class under Rule 23(b)(2), when the complaint asserted predominantly monetary claims, the settlement release waived putative class members' non-injunctive equitable claims and burdened the assertion of their damages claims, and the class was composed of consumers of diapers who had no necessary ongoing relationship with the defendant?

Standard of Review: Certification of a class is reviewed for abuse of discretion. *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 643 (6th Cir. 2006). A court abuses its discretion if it relies "on erroneous findings of fact, applies the wrong legal standard, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment." *Id.* at 644. Questions of law about the interpretation of the Federal Rules of Civil Procedure are reviewed *de novo*. *Kalamazoo River Study Group*, 355 F.3d at 583.

3. Rules 23(e)(1) and (5) respectively require class members to be given reasonable notice of any pending settlement and to be granted the right to object to the settlement. Does it violate these rules to certify a class that is defined to include

persons acquiring Dry Max diapers "through Final Judgment," well after the objection deadline, thus binding these class members without notice or opportunity to object?

Standard of Review: Questions of law about the interpretation of the Federal Rules of Civil Procedure are reviewed *de novo*. *Id.* "Whether a particular class action notice program satisfies the requirements of Fed. R. Civ. P. 23 and the Due Process Clause is a legal determination [reviewed] *de novo*." *Fidel v. Farley*, 534 F.3d 508, 513 (6th Cir. 2008) (internal quotation omitted).

4. The Ninth Circuit recently held that a district court evaluating the fairness of a settlement should consider "signs that class counsel have allowed pursuit of their own self-interests" to unfairly "infect the negotiations." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011). All three indicia noted—attorney-fee requests disproportionate to class relief, clear-sailing agreements, and "kickers" providing reversions to the defendant—are present in this settlement. Did the district court err as a matter of law when it failed to consider these indications of self-dealing in evaluating the fairness of a settlement?

Standard of Review: A district court decision to approve a class action settlement is reviewed for abuse of discretion. *In re Telectronics Pacing Sys. Inc.*, 221 F.3d 870, 876–77 (6th Cir. 2000). A failure to apply the correct law is an abuse of discretion. *Reeb*, 435 F.3d at 644. Questions of law about the interpretation of the Federal Rules of Civil Procedure are reviewed *de novo*. *Kalamazoo River Study Group*, 355 F.3d at 583.

5. Did the district court abuse its discretion by failing to draw an adverse inference from the refusal of P&G to produce data regarding the likely return to the class of its money-back guarantee program?

Standard of Review: Whether the district court abused its discretion depends upon "[w]hether or not the District Court had before it sufficient facts intelligently to approve the settlement offer." *In re Gen. Tire & Rubber Co. Sec. Litig.*, 726 F.2d 1075, 1084 n.6 (6th Cir. 1984) (internal quotation omitted).

6. *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748 (7th Cir. 2011) held that a class action brought for the benefit of class counsel and the representatives without additional relief to the class not already available fails the Rule 23(a)(4) adequacy of representation inquiry. Here, the named plaintiffs obtained incentive fees and the attorneys secured $2.73 million, but the putative class received only valueless prospective relief and a limited, inconvenient money-back program that was previously offered by the defendant to a sizable portion of the class. Did the district court err as a matter of law in failing to apply *Aqua Dots* to its finding of (a)(4) adequacy?

Standard of Review: Certification of a class is reviewed for abuse of discretion. *Reeb,* 435 F.3d at 643. A failure to apply the correct law is an abuse of discretion. *Id.* at 644. Questions of law about the interpretation of the Federal Rules of Civil Procedure are reviewed *de novo*. *Kalamazoo River Study Group*, 355 F.3d at 583.

7. Did the district court abuse its discretion or violate Rule 23(h) when it awarded more in fees and expenses to class attorneys than the value of what the class received in settlement without stating the methodological basis of its award?

Standard of Review: An attorneys' fees award is reviewed for abuse of discretion. *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 779 (6th Cir. 1996). Questions of law about the interpretation of the Federal Rules of Civil Procedure are reviewed *de novo*. *Kalamazoo*, 355 F.3d at 583. In its "exercise of discretion, the district court must provide a clear statement of the reasoning used in adopting a particular methodology and the factors considered in arriving at the fee." *Rawlings v. Prudential-Bache Properties*, 9 F.3d 513, 516 (6th Cir. 1993).

8. Was the class notice defective because it failed to apprise class members of both the main beneficiary of the *cy pres* component of the settlement and the aggregate amount of incentive awards that would be sought by class representatives?

Standard of Review: "Whether a particular class action notice program satisfies the requirements of Fed. R. Civ. P. 23 and the Due Process Clause is a legal determination [reviewed] *de novo*." *Fidel*, 534 F.3d at 513.

Statement of the Case

On May 11, 2010, the seven original named plaintiffs in this action filed a putative class-action complaint against P&G alleging a variety of consumer fraud and contractual violations relating to Pampers brand Dry Max diapers' alleged propensity to cause diaper rash and other negative health reactions. RE #1. Twelve similar suits

were consolidated; on August 25, 2010, the plaintiffs filed a consolidated complaint on behalf of 48 named plaintiffs alleging similar causes of action to the initial complaint, seeking significant monetary relief. RE #25. In October 2010, the defendants filed motions to strike the class allegations and to dismiss the complaint in its entirety. REs #39, 40.

Before these motions were decided, the parties settled and moved for certification and for preliminary approval; the plaintiff-representatives now comprised 59 named individuals. RE #54. The district court granted preliminary approval of the settlement on June 7, 2011. RE #55.

Class member and appellant Daniel Greenberg timely objected. RE #60. Two other class members objected. REs #62, 63.

On September 28, 2011, the same day as a fairness hearing, the district court issued final judgment and an order approving the settlement; it awarded the full $2.73 million in attorneys' fees and expenses requested by the plaintiffs. REs #73, 74.

Greenberg filed his notice of appeal on October 20, 2011. RE #75.

Statement of the Facts

A. Diaper Rash and the Lawsuit.

P&G is a multinational corporation with more than 20 billion-dollar brands, including Pampers brand disposable diapers. RE #60, Objection at 21. In March 2010, P&G began marketing Pampers with Dry Max technology in the U.S.. RE #25, Consolidated Complaint at 2. A substantial percentage of all infants will suffer diaper

rash naturally; when some Dry Max users suffered diaper rash, social-media-fed rumors inferred a causal connection. This public dissatisfaction caused Pampers to establish an informational hotline in April 2010; in May 2010, the Consumer Product Safety Commission ("CPSC") began investigating whether there was a relationship between Dry Max diapers and chemical burns, skin rashes, or other ailments. RE #68, Motion for Final Approval at 3. Almost immediately, the plaintiffs filed this lawsuit.

About a month before the plaintiffs filed their August 2010 consolidated complaint, P&G announced a refund program for consumers who were dissatisfied with their Dry Max diapers; the offer continued through the end of 2010. RE #60, Objection at 26; RE #68, Final Approval Motion at 9 n.27; RE #69, Reply in Support of Motion for Attorneys' Fees at 6.

In August 2010, the CPSC released the results of its investigation in conjunction with Health Canada; after a review of 4,700 incident reports, there was no discernible link between Dry Max and diaper rash. RE #68, Final Approval Motion at 7.

Notwithstanding the findings of the agencies undercutting the premise of the lawsuit, class counsel continued litigating. RE #54, Motion for Preliminary Approval at 3. Before pending motions to dismiss and strike class allegations were decided, the parties proposed a settlement for preliminary approval on May 27, 2011. RE #54-2 ("Settlement").

B. The Settlement Agreement.

The plaintiffs had sought certification under every 23(b) subsection other than (b)(2) (RE #25, ¶¶ 160–62); the defendants had previously argued that the class could not be certified because of the prevailing individual factual differences that abounded among the various plaintiffs. RE #39, Motion to Strike Class Allegations. Nevertheless, under the settlement, the parties asked the court to certify a mandatory class pursuant to Rule 23(b)(2) defined as "All persons in the United States and its possessions and territories, who purchased or acquired (including by gift) Pampers brand diapers containing Dry Max Technology from August 2008 through Final Judgment." Settlement § III.

The settlement called for token prospective injunctive relief and *cy pres*. First, P&G agreed to a two-year modification of the packaging label of their diapers, which would instruct consumers to "consult Pampers.com or call 1-800-Pampers" if they had common diapering questions. Settlement § V.B.1.a. Second, P&G agreed to a two-year modification of their website, which would include rudimentary information about diaper rash and two hyperlinks to outside sources. Settlement § V.B.2. Third, P&G would provide $300,000 to "fund a pediatric resident training program at leading children's health centers." Settlement § V.B.3.a. Neither the settlement itself nor the notice to class members explained the parameters of this *cy pres* component. To Greenberg's knowledge, the recipient of this money remains undetermined. *See* RE #68, Final Approval Motion at 43. Fourth, P&G would give the American Academy

of Pediatrics $100,000. Settlement § V.B.3.b.[1] Fifth, Pampers agreed to reinstate the money-back guarantee program that was in place during the latter half of 2010 for a period of one year. Settlement § V.B.4. This program is governed by the terms of the initial offer, which requires the customer to mail in the original receipt and the UPC and limits refunds to one package per household. RE #60, Objection at 26 (citing Pampers.com website).

The general settlement release does not limit itself to injunctive claims; instead, it contemplates that class members will release "all equitable claims" involving Pampers with Dry Max diapers. Settlement § VIII.A. From this general release, the settlement carves out lawsuits for "personal injury or actual damages claimed to have been caused by or related to the Pampers with Dry Max product," but only if those lawsuits are brought individually and not on behalf of a class. *Id.* An expansive class action waiver purports to bar any class member from "seeking to use the class action procedural device in any future lawsuit against [P&G], where the lawsuit asserts Claims that were or could have been brought in State or Federal Court in this Action…" Settlement § VIII.C. The waiver is not limited to claims related to Dry Max Pampers.

The settlement provided that class counsel could request a total of fees and expenses of $2.73 million. Settlement § VII.A. The settlement contained a clear sailing

[1] There is a residuary *cy pres* clause that appears intended to deal with leftover money, but that clause contains incorrect referents and appears a nullity. Settlement § V.B.3.c.

clause prohibiting P&G from challenging the fee request and a "kicker" (i.e., any reduction in the attorneys' fees would benefit P&G, not the class). Settlement §§ VII.A, B. The 59 named plaintiffs also secured the right to Representative Plaintiff Awards of "$1,000 per affected child for each Plaintiff." Settlement § VI.A. Two weeks after the objection deadline passed, the plaintiffs revealed that the aggregate incentive awards would total $51,000. RE #68, Final Approval Motion at 42.

C. The Greenberg Objection and Fairness Hearing.

Daniel Greenberg is a citizen of Arkansas and a father of three young children. Through his repeated purchases of Pampers with Dry Max diapers since August of 2008, he is a class member, and has timely objected to the settlement. RE #60.

Greenberg objected, *inter alia*, to the certification of a mandatory (b)(2) class in a consumer class action, where monetary claims predominate (*Id.* at 4–23); that the class definition would deprive certain class members of their rights of notice and objection guaranteed by Fed. R. Civ. Proc. 23(e) (*Id.* at 23–25); the adequacy of class notice (*Id.* at 27–32); and the fairness of the settlement, the adequacy of class counsel, and the adequacy of the named representatives in light of the terms of the settlement (*Id.* at 25–27, 32–33). In order to ensure that the attorneys' fees were commensurate with the benefits obtained by the class, Greenberg requested that the district court review data regarding the number of refunds issued when the money-back program was in place in 2010. *Id.* at 26.

The district court held its fairness hearing on September 28, 2011; Greenberg was represented by counsel. RE #76, Transcript at 20–29.

D. The Court Approves the Settlement and Fee Award.

At the end of the fairness hearing, the district court ruled from the bench that it would approve the settlement and award the entirety of the attorneys' fees sought. *Id.* at 32–36. The court summarily found the notice and class definition adequate. *Id.* at 34. With no consideration of the inclusion of predominating monetary claims, or of the composition of the class, the court found the prerequisites of 23(b)(2) satisfied on the basis that the "action seeks injunctive relief." *Id.*. It found that 23(a)(4) was satisfied, that "[p]laintiffs and lead counsel fairly and adequately protected and represented the interests of the class." *Id.*

The court further found the settlement fair, reasonable, and adequate because of the size of the relief in relation to the strength of the plaintiffs' case, the public policy in favor of settlement, the stage of proceedings, the opinions of experienced counsel, and the absence of fraud or collusion. *Id.* at 32–35. The court did not consider the fairness of the settlement in terms of the degree to which it favored the attorneys rather than the class members.

The court awarded class counsel their full $2.73 million fee request, noting that it was a number that "the retired federal judge proposed to the parties," and claiming that it was perfectly appropriate in light of the fact that "it is less than what the lodestar calculation would reflect, and it properly compensates counsel for extraordinary work." *Id.* at 35. This was the extent of the methodological clarification issued by the district court. Nowhere did the court present any valuation of either the settlement benefits or of the plaintiffs' lodestar figure.

The district court's formal written orders, issued the very afternoon of the fairness hearing, were a series of conclusory findings that did not expand on the reasoning of its oral ruling or address Greenberg's objection. REs #73, 74. The order awarded representative awards in the amount of $1,000 per affected child. RE #73 at 10; RE #74 at 1.

Greenberg filed his notice of appeal on Oct. 20, 2011. RE #75.

Summary of the Argument

The settlement approved by the district court will pay the class attorneys $2.7 million, as-yet-to-be-fully-identified third-party charities $400,000, and the class members themselves nothing—unless class members have retained the UPC code on a used package of diapers ***and*** have not previously requested the money-back guarantee already available to class members before the consolidated complaint was filed. On its face, the disproportion between attorney recovery and class recovery makes the settlement unfair. *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011). But the settlement has other fatal problems as a matter of law.

There are several independent reasons for this Court to vacate the settlement approval and fee award.

First, the district court improperly certified the settlement-only class as a mandatory 23(b)(2) class, despite the predominance of monetary claims demonstrated by the complaint, the settlement release, and the class itself.

Second, defining the temporal boundary of the class as extending "through Final Judgment" meant that numerous class members did not become class members until

after the deadline to object, violating their rights to notice of the proposed settlement under 23(e)(1) and to object under 23(e)(5).

Third, the district court committed an error of law when it failed to consider inequitable settlement provisions: a disproportionate fee request coupled with a clear-sailing provision and a reversionary "kicker" to the defendant is presumptive evidence of unfair self-dealing, as the Ninth Circuit held in *Bluetooth* and this Circuit suggested in *UAW v. GMC*, 497 F.3d 615, 635 (6th Cir. 2007).

Fourth, the court's approval of the settlement without disclosure of relevant evidence regarding the value of the injunctive relief was an abuse of discretion. Given that the settling parties were claiming that the money-back guarantee had a substantial value that made the settlement fair, there was no reason for the court not to draw the appropriate adverse inference from the refusal of P&G to disclose how much relief class members had received from the first iteration of the money-back guarantee program.

Fifth, the specifications of the settlement raised fundamental questions about the adequacy of representation, both of counsel and of the named representatives. The district court erred in failing to consider them.

Sixth, Fed. R. Civ. Proc. 23(h) requires the court to probe any fee requests as well as explicate the methodological basis of the award. In a consumer class action, it does not permit the court to award far more to the attorneys than the value of what the class receives without any explanation.

Seventh, the class was not informed of material elements of the settlement, including the beneficiary of a third-party donation and the aggregate amount of incentive awards sought.

Each of these seven independent reasons, many of which involve errors of law, requires reversal.

A common thread unites many of these shortcomings: a failure to respect the autonomy of absent class members. This defect manifests itself in certifying the class as a mandatory (b)(2) class rather than as a more suitable (b)(3) class; in proposing a class definition that would deprive certain class members of notice and the opportunity to object entirely; in implementing a notice plan that omits facts that are material to the fairness of the proposed settlement; and in forcing absent class members into waiving their future right to seek to use the class action mechanism.

Note that this is not an argument that the settlement is not large enough. Greenberg is not claiming that the settlement must be $31 million or $6 million instead of $3.1 million. But when parties agree to settle a class action for a total of $3.1 million, it is inherently unfair for the class attorneys to negotiate the lion's share of that amount—in this case nearly ninety percent—for itself. It was reversible error to approve the settlement.

Argument

I. The Class Cannot Be Certified as a Mandatory 23(b)(2) Class.

Although a court certifying a settlement-only class need not consider the manageability problems that a trial would present, the "other specifications of [Rule 23]—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Fed. R. Civ. Proc. 23(b)(2) lacks two paramount procedural protections that are afforded to absent class members in a (b)(3) class: the right to exclude oneself and the right to the "best notice practicable." Given this state of affairs, courts should be even more vigilant in their enforcement of the prerequisites of (b)(2), which protect absent class members against "unwarranted or overbroad class definitions." The most forceful textual protection is the requirement that "final injunctive relief or corresponding declaratory relief is appropriate with respect to the class as a whole." Fed. R. Civ. Proc. 23(b)(2).

Reeb v. Ohio Dep't of Rehab. & Corr., 435 F.3d 639 (6th Cir. 2006), explains this requirement. First, (b)(2) classes may not be certified when they assert non-incidental claims for monetary damages because "such individual claims for money damages will always predominate over requested injunctive or declaratory relief." *Id.* at 641. *Accord Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011). Second, a properly certified (b)(2) class must have a "homogeneity of interests" that justifies mandatory class treatment. *Reeb*, 435 F.3d at 649; *accord Wal-Mart*, 131 S.Ct. at 2557. This putative

settlement class fails to meet either requirement; for these two independent reasons, it should not have been certified as a matter of law.

A. Monetary Claims Cannot Be Discharged in a Mandatory (b)(2) Class.

In the last thirty years, both the Supreme Court and this Circuit have, with increasing frequency, suggested that 23(b)(2) class actions—which do not permit absent class members to opt-out—cannot accommodate claims for monetary relief. Greenberg asks this court to respond to these decisions' invitations and set a bright-line rule: a 23(b)(2) class cannot discharge monetary claims.

When *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812 (1985), held that absent class members have a due process right to opt-out from class actions involving predominantly money damages, it conspicuously left one question undecided: namely, whether due process compelled the right of opt-out in actions which did not seek primarily money damages. *Id.* at 811–12 n.3. Since *Shutts*, the Supreme Court has repeatedly suggested that due process demands the right of opt-out in any action containing any claim, even a non-predominant one, for monetary relief. In *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994), in dismissing certiorari as improvidently granted, the Court declared that there is "at least a substantial possibility" that "in actions seeking [any] monetary damages, classes can only be certified under 23(b)(3), which permits opt out." *Id.* at 121. Five years later, the Court warned again that certifying a mandatory class that includes money damages might compromise the Seventh Amendment and the due process rights of absent class members. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845–46 (1999).

Most significantly and most recently, the Court determined in *Wal-Mart* that the "serious possibility that [the inclusion of monetary claims without a right to opt out would violate due process] provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here." 131 S.Ct. at 2559. The Court reasoned that

> The mere "predominance" of a proper (b)(2) injunctive claim does nothing to justify elimination of Rule 23(b)(3)'s procedural protections: It neither establishes the superiority of *class* adjudication over *individual* adjudication nor cures the notice and opt-out problems. We fail to see why the Rule should be read to nullify these protections whenever a plaintiff class, at its option, combines its monetary claims with a request—even a "predominating request"—for an injunction. [*Id.*]

Both *Wal-Mart* and *Ortiz* were decisions driven by the canon of constitutional avoidance, which counsels that courts should steer clear of any statutory interpretation that might create a constitutional problem. Thus, whenever a class action seeks monetary relief on the basis of individualized aggregated claims, as opposed to a unitary group claim, Rule 23 is best read as demanding 23(b)(3) certification. The Sixth Circuit has consistently held so: "such individual claims for money damages will always predominate over requested injunctive or declaratory relief." *Reeb v. Ohio Dep't of Rehab & Corr.*, 435 F.3d 639, 641 (6th Cir. 2006). This standard, much like the "incidental damages" standard of *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), effectively harmonizes the Supreme Court's recurrent constitutional concerns with the idea that (b)(2) certifications should go forward when money damages do not "predominate."

On multiple occasions this Circuit, while striking down improperly certified classes, has remarked upon the significance of the constitutional concerns of *Ortiz* and *Ticor*. *Reeb,* 435 F.3d at 647; *Coleman v. Gen. Motors Acceptance Corp.,* 296 F.3d 443, 447 (6th Cir. 2002); *In re Telectronics Pacing Sys. Inc.*, 221 F.3d 870, 881 (6th Cir. 2000) ("principles of sound judicial management and constitutional considerations of due process and the right to jury trial all lead to the conclusion that in an action for money damages class members are entitled to personal notice and an opportunity to opt out."). In doing so, this Court anticipated *Wal-Mart,* the Supreme Court's most forceful proclamation to date.

Greenberg briefed this argument below, but it elicited no response from either the settling parties or the district court. RE #60, at 4–7. He requests that this Court follow and expound on its holding in *Reeb* and hold that individuated monetary claims have no place in a mandatory class action.

B. Even if Monetary Claims Could Be Included in a (b)(2) Action Where Incidental, They Predominate in This Case.

In the alternative, this Court can choose to continue to leave open the question of whether Rule 23(b)(2) precludes discharging monetary claims and hold that existing precedent made the (b)(2) certification legally erroneous.

Although *Reeb* specifically holds that "individual claims for money damages will always predominate over requested injunctive or declaratory relief," it leaves open the possibility of non-predominating group-based claims for money damages; it approvingly cites the *Allison* incidental damages standard as a way to determine

whether money damages predominate. *Reeb*, 435 F.3d at 647–50. *Accord Wal-Mart* 131 S.Ct. at 2560.

A pre-certification settlement calls for heightened judicial scrutiny of the certification. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946–47 (9th Cir. 2011); *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 807 (3d Cir. 1995). In the context of a 23(b)(2) settlement, however, the analytical problems are all the more pronounced, because the judge must determine whether monetary or injunctive relief predominates. The (b)(2) analysis under *Reeb* is a comparatively easy two-step process: (1) look to the complaint and determine whether any monetary relief sought is incidental and thus non-predominant; and (2) make sure that the class has the requisite "homogeneity of interests."[2] This second inquiry is consistent with asking whether the injunctive relief is predominant from the perspective of the class definition and whether "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[3]

But because this is a settlement class, examinations of the complaint and the class by themselves should not end the inquiry. Due process concerns also require an examination of the release that is the vehicle for deprivation of an absent class member's right to sue. Thus, when certifying a (b)(2) settlement class, the court must ensure that the release does not include or burden non-incidental monetary claims. A

[2] *Reeb*, 435 F.3d at 649.

[3] Fed. R. Civ. Proc. 23(b)(2).

(b)(2) certification should thus consider two additional factors: (3) the actual relief obtained in the settlement; and (4) the claims released in the settlement.

This Court must find that certification of the (b)(2) class is inappropriate if either of the first two independent factors counsel against certification; it should also find certification in appropriate if either of the second two factors counsel against certification.

Here, monetary claims predominate for three independent reasons: they predominate from the perspective of the complaint, the class definition, and the release. The results of this inquiry are not trumped by the subjective desires of class counsel or representatives. Thus, the monetary claims cannot be held incidental and certification is inappropriate under *Reeb, Allison*, or their progeny.

1. Monetary claims predominate from the perspective of the complaint.

Monetary claims predominate from the perspective of the complaint. RE #60, Objection at 9–12. Initially, the settling parties correctly acknowledged that looking to the complaint can be of value when deciding whether injunctive or monetary claims predominate. RE #54, Preliminary Approval Motion at 16. They later backtracked (RE #68, Final Approval Motion at 29). But having won preliminary approval with their initial argument, judicial estoppel prohibits their new position. *New Hampshire v. Maine*, 532 U.S. 742, 749–50, 121 S. Ct. 1808 (2001).

Judicial assessment of the complaint and causes of action is customary procedure in courts of this Circuit and across the nation. *E.g., Reeb,* 435 F.3d at 642;

Daffin v. Ford Motor Co., No. C-1-00-458, 2004 U.S. Dist. LEXIS 18977, at *14–15 (S.D. Ohio July 15, 2004), *aff'd*, 458 F.3d 549 (6th Cir. 2006); *Christ v. Beneficial Corp.*, 547 F.3d 1292 (11th Cir. 2008); *Monreal v. Potter*, 367 F.3d 1224, 1236 (10th Cir. 2004); *Crawford v. Equifax Payment Servs.*, 201 F.3d 877, 882 (7th Cir. 2000); *cf. Bluetooth,* 654 F.3d at 945 n.8. "If recovery of damages is at the heart of the complaint, individual class members must have a chance to opt out of the class and go it alone—or not at all." *Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 530 (D.C. Cir. 2006). Although only *Crawford* and *Bluetooth* analyzed settlement-only classes in the cases above, examining the complaint remains valuable because it indicates situations where class members with authentic monetary claims are being involuntarily herded into unsuitable (b)(2) classes. *See Amchem*, 521 U.S. at 620; *cf. also Back Doctors Ltd. v. Metropolitan Property & Casualty Ins. Co.*, 637 F.3d 827 (7th Cir. 2011) (Easterbrook, J.) (adequate class representative cannot gerrymander claim to eliminate valid causes of action of individual class members).

The proper approach is to pinpoint the monetary relief sought and ask whether it is "incidental" (i.e., flowing directly from liability to the class as a whole without individualized determinations). *Allison*, 151 F.3d at 415. If it is not, then monetary relief predominates.

The complaint seeks medical expenses, costs of medical treatment, and "awards of actual, compensatory, treble, punitive and/or exemplary damages in such amount to be determined at trial and as provided by applicable law." RE #25, Consolidated Complaint at 206. These types of monetary claims are definitely not incidental. *Pilgrim*

v. Universal Health Card, LLC, 660 F.3d 943, 946 (6th Cir. 2011) ("Rule 23(b)(3) [is] the only conceivable vehicle for [a nationwide consumer fraud] claim"); *see also Daffin*, 2004 U.S. Dist. LEXIS 18977, at *17.

Even excluding any personal injury claims, the monetary claims under various state consumer protection acts[4] are not incidental. This is because these claims are "dependent in significant way[s] on the intangible, subjective differences of each class member's circumstances." *Allison*, 151 F.3d at 415. Compensatory damages or restitution amounts vary with the individual purchase price and quantity. Statutory liquidated damages vary depending upon the geographical location of the individual purchase. Furthermore, some consumer protection statutes take into account subjective notions like individual reliance. *See Avritt v. Reliastar Life Ins. Co.,* 615 F.3d 1023, 1036 (8th Cir. 2010) (affirming denial of (b)(2) certification of unfair and deceptive practices claim because defendant's "conduct cannot be evaluated without reference to the individual circumstances of each plaintiff," such as reliance).

For this reason alone, binding Sixth Circuit precedent requires reversal.

2. Monetary claims predominate from the perspective of the class definition.

Rule 23(b)(2) certification requires that the class display a "homogeneity of interests." *Reeb*, 435 F.3d at 649; *see also Romberio v. UnumProvident Corp.*, 385 Fed. Appx. 423, 432–433 (6th Cir. 2009); RE #60, Objection at 14–18. Those overlapping

[4] *See* RE #25, ¶¶ 197, 240, 248, 261, 271, 288, 298, 302, 311, 323, 327, 332, 337, 346, 350, 370, 374, 383, 399, 411, 417, 429, 439, 453, 459, 469, 482, 493, 507, 511, 520, 530 and all state statutes referenced therein.

interests must make appropriate the granting of final injunctive or corresponding declaratory relief. They do not. Here, there is a discontinuity between the class definition (i.e. former buyers), and the prospective injunctive relief sought in the complaint[5] and obtained in the settlement.[6] The settlement relief is tailored to benefit future purchasers of Pampers whereas the class comprises past purchasers. 98% of children are toilet trained by three years of age. RE #60, Objection at 15. We can thus expect that many class members, including Greenberg, no longer have any reason to purchase diapers. Moreover, any class member who claims injury from the Pampers product is not likely to purchase the product in the future simply because it has new labeling.

Courts have exhibited broad consensus in rejecting past attempts at shoehorning former customers, ex-employees, or any individuals who suffered a discrete harm in the past but currently lack an ongoing relationship with defendants into 23(b)(2) classes that offer prospective injunctive relief. *See e.g., Bacon v. Honda of Am. Mfg., Inc.*, 205 F.R.D. 466, 486 (S.D. Ohio 2001), *aff'd* 370 F.3d 565 (6th Cir. 2004); *Brown v. Kelly*, 609 F.3d 467, 482 (2d Cir. 2010); *McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 553 (5th Cir. 2003); *Bolin v. Sears, Roebuck & Co.,* 231 F.3d 970, 978 (5th Cir. 2000); *Mogel v. UNUM Life Ins. Co. of Am.*, 646 F. Supp. 2d. 177, 184 (D. Mass. 2009) ("[W]eighing the relative predominance of relief sought is unnecessary where class members do not stand to benefit from the injunctive relief sought: Of

[5] RE #25, Prayer for Relief B, C, at 205–06.

[6] Settlement § V.

course, certification under rule 23(b)(2) is appropriate only if members of the proposed class would benefit from the injunctive relief they request.") (quotation omitted). *Cf. also Synfuel Tech. v. DHL Express*, 463 F.3d 646, 654 (7th Cir. 2006) ("The fairness of the settlement must be evaluated primarily based on how it compensates class members for these past injuries."). If any doubt remained, after *Wal-Mart* it cannot:

> "[E]ven though the validity of a (b)(2) class depends on whether 'final injunctive relief or corresponding declaratory relief is appropriate respecting the class *as a whole,*' about half the members of the class approved by the Ninth Circuit have no claim for injunctive or declaratory relief at all. Of course, the alternative (and logical) solution of excising plaintiffs from the class as they leave their employment may have struck the Court of Appeals as wasteful of the District Court's time." [*Wal-Mart,* 131 S.Ct. at 2560.]

Certainly, a 23(b)(2) class can be appropriate when the class is composed of individuals who maintain an ongoing relationship with the defendant. The prototypical example is a desegregation injunction in a civil rights case. *See* Advisory Committee Notes, 39 F.R.D. 98, 102 (1966); *see also Senter v. Gen. Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976) ("Lawsuits alleging class-wide discrimination are particularly well suited for 23(b)(2) treatment since the common claim is susceptible to a single proof and subject to a single injunctive remedy."); *Daffin,* 2004 U.S. Dist. LEXIS 18977, at *16 ("23(b)(2) was plainly designed for to address [civil rights issues] rather than products liability ones.") (citing cases); *Casa Orlando Apts., Ltd. v. Fannie Mae*, 624 F.3d 185, 200–201 (5th Cir. 2010). A class of those who "discarded or

ceased using"[7] Pampers, on the other hand, is not benefited by prospective injunctive relief, nor is it benefited by reenacting a money-back guarantee that requires the production of a UPC code from diaper packaging that almost certainly has long since been discarded.

The settling parties' contention that the "injunctive relief achieved in the settlement is certain and substantial"[8] is unsound, based on the faulty idea that class members have an ongoing relationship with the defendant. District court cases that the settling parties cited as instances of approval of settlements without recovery of damages confirm as much. *See discussion* in RE #60, Objection at 17. Other recent cases in this circuit also demonstrate that proper (b)(2) classes must benefit from injunctive relief. *E.g., Olden v. Lafarge Corp.*, 383 F.3d 495, 510–11 (6th Cir. 2004) (allowing certification of a class of homeowners seeking an injunction against a cement company's pollution when the harm to plaintiffs was ongoing); *Shreve v. Franklin County*, No. 2:10-cv-644, 2010 U.S. Dist. LEXIS 131911 (S.D. Ohio Dec. 14, 2010) (prisoners).

The status of the class in relationship to the defendant, the type of claims at issue, and the relief sought and obtained all dictate that, if anything, this class should be certified as a 23(b)(3) class. *Ortiz*, 527 U.S. at 861–62. Even before *Wal-Mart*, courts have generally adhered to this framework, refusing to certify similar consumer claims to the ones at issue under (b)(2) but rather, if at all, under (b)(3). *E.g.*, *Daffin*,

[7] RE #25, at 2.

[8] RE #54, at 10 n.17.

2004 U.S. Dist. LEXIS 18977; *McManus,* 320 F.3d 545 (denying (b)(2) certification for a breach of implied warranty of merchantability claim). After *Wal-Mart*, there is no dispute whatsoever: "Individualized money damages belong in Rule 23(b)(3)." 131 S.Ct at 2558. The district court committed reversible error by holding otherwise.

3. Monetary claims predominate from the perspective of the release.

A thorough (b)(2) analysis must examine the preclusive effects that the settling parties intend to foist upon absent class members. *See USW v. Cooper Tire & Rubber Co.*, 474 F.3d 271, 282–83 (6th Cir. 2007) (rejecting certification of union dispute that would have preclusive effect on class members' ERISA claims); Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 Notre Dame L. Rev. 1057, 1068–73 (2002); RE #60, Objection at 12–14. Determining the preclusive effects is easier in the settlement context, because the agreement (here, Section VIII) will describe the scope of the released claims.

In a (b)(2) class settlement, the release should confine itself to future claims for injunctive relief, not encroach on absent class members' rights to bring claims for non-incidental (*i.e.*, individualized) monetary relief in the future. Mandatory settlements that purport to release claims for monetary relief should be held unfair as a matter of law. *Clarke v. Advanced Private Networks, Inc.*, 173 F.R.D. 521, 522 (D. Nev. 1997); *see also* Issacharoff, *supra*, at 1081 ("If the parties, particularly in the settlement context, try to cheat by compromising the ability to opt out and by short-circuiting the more exacting Rule 23(b)(3) certification standards, then they should be limited in their claim to have achieved finality.").

True, the settling parties made minor overtures toward the importance of retaining absent class members' right to sue for monetary relief. First, they specified that the release encompasses only equitable claims. Settlement § VIII.A. Second, they included a savings clause for personal injuries and actual damages caused by or related to the product. *Id.* But these limitations on the release do not meet the constitutional standards for a mandatory class.

As the Supreme Court recently emphasized in *Wal-Mart*, the proper division in the (b)(2) analysis is not between "equitable" claims and "legal" remedies but between "injunctive" and "monetary" ones. *Wal-Mart*, 131 S.Ct. at 2560. A bar on future "equitable" claims bars absent class members from seeking individualized monetary relief in the form of restitution for or rescission of the transactions with P&G.

Just as significant is the fact that the savings clause muddies the water. Through the interpretative canon of *expresio unius est exclusio alterius*, the settling parties imply that any claims against the defendant that assert neither personal injury nor actual damage from the product are relinquished. Relinquishment would surely include statutory liquidated damages claims arising out of the purchase, which in some states can reach at least one hundred dollars,[9] not to mention treble and punitive damages. It would likely include claims for actual, compensatory damages of the purchase price

[9] *E.g.*, Ala. Code § 8-19-10. *Compare with Shutts*, 472 U.S. at 809 ($100 average monetary claim requires opt-out).

for each unit purchased.[10] Consistent with (b)(2) and the Constitution, these non-incidental monetary claims cannot be released.

4. Class counsel's subjective preferences are not relevant to the (b)(2) inquiry.

The fact that the settling parties have decided to classify these claims as (b)(2) claims is not relevant: whether monetary claims predominate is not a matter of class counsel's subjective desire. RE #60, Objection at 18–19. Rather, the inquiry is objective.

"Rule 23(b)(2) certainly cannot be read as requiring the court to accept the plaintiffs' ranking in importance of the various forms of relief they seek in the action." *Bacon*, 205 F.R.D. at 485; *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 986–87 (9th Cir. 2011). Nor can the rule be read to allow the class representatives' subjective intentions to govern the predominance inquiry. *In re Monumental Life Ins. Co.*, 365 F.3d 408, 415 (5th Cir. 2004). Professor Linda Mullenix has noted that despite "all the high-minded rhetoric plaintiffs' and defense attorneys may attach to the virtues of opt-outs, all such principles will be abandoned when plaintiffs' and defense interests converge on the utility of the mandatory classes." *No Exit: Mandatory Class Actions in the New Millennium and the Blurring of Categorical Imperatives*, 2003 U. Chi. Legal. F. 177, 241 (2003). That convergence occurs at settlement, when the defendants seek to expand the global peace they will attain through a release, and the plaintiffs would prefer not to have to

[10] Moreover, even if these claims are retained by absent class members, it is impermissible to subject monetary claims that are not released to a class action ban. *See infra* § I.C.

overcome the (b)(3) hurdles of predominance and superiority. Mullenix is not alone in this observation. *See Telectronics Pacing Sys.,* 221 F.3d at 880 ("The bootstrapping of a Rule 23(b)(3) class into a [mandatory] class is impermissible and highlights the problem with defining and certifying class actions by reference to a proposed settlement."); *Bolin*, 231 F.3d at 976; Brian Wolfman & Alan B. Morrison, *What the Shutts Opt-Out Right Is and What It Ought to Be*, 74 UMKC L. Rev. 729, 740 (2006); Elizabeth Chamblee Burch, *Optimal Lead Plaintiffs*, 64 Vand. L. Rev. 1109, 1119 (2011).

The case at bar exemplifies Mullenix's concern. In the complaint, the plaintiffs sought certification under 23(b)(1)(A), 23(b)(1)(B), and 23(b)(3):[11] that is, everything other than 23(b)(2). The defendants argued vociferously that the class could not be certified because of abounding individualized differences, such as reliance on the defendant's representations. RE #39, Motion to Strike. Now, however, the defendants meekly maintain that their "agreement to seek a Settlement Class under …23(b)(2) is based on the belief that any monetary damages sought by Plaintiffs… are properly viewed as merely incidental to the Injunctive Relief." Settlement § III.B. Class members are the sacrificial pawn. *See* Mullenix, *supra*, at 241. As such, the incentives for the settling parties to protect the interests of unnamed parties have vanished, and the district court failed to discharge its duty to independently evaluate whether monetary relief predominated before certifying the class.

[11] RE #25 ¶¶ 160-62.

C. A Class Action Waiver of Non-Incidental Monetary Claims Cannot Be Included in a Mandatory (b)(2) Class Release.

Another aberrant provision of the settlement is the almost limitless waiver of the right of absent class members to bring class actions against Proctor & Gamble. Settlement § VIII.C.[12] Despite being labeled as a "Limited Class Action Bar," the waiver language is startlingly broad. First, §VIII.C waives this right in suits seeking monetary relief for claims that are concededly non-incidental. *See* Settlement § III.B. Neither Rule 23(b)(2) nor the constitutional rule of *Shutts* permit waiver of a class member's ability to use the class action device when there is no right to opt-out. *See Crawford*, 201 F.3d at 880, 882 (disapproving of a near-identical waiver because class members "gain nothing, yet lose the right to the benefit of aggregation in a class."). The settling parties have implemented what amounts to a limited carve-out scheme for certain claims, a scheme that does not comport with the unabridged *Shutts* right of exclusion. *Cf. Ortiz*, 527 U.S. at 847 n.23 (limited opt-out mechanism doesn't satisfy *Shutts*).

Second, notwithstanding the parties' attempted disavowals (RE #76, at 11, 19, 30), the waiver language covers all claims that "could have been brought" in state or federal court—regardless of whether they relate to the manufacture, distribution, sale, purchase, or use of diapers, or alternatively whether they relate to claims involving

[12] It reads in significant part: "[A]ll members of the Settlement Class are hereby permanently barred and enjoined from seeking to use the class action procedural device in any future lawsuit against Released Parties, where the lawsuit asserts Claims that were or could have been brought in State or Federal Court in this Action prior to the entry of this Final Approval Order…"

another one of P&G's scores of brands, such as Crest, Scope, Duracell, or Metamucil. *Contrast with* Settlement § VIII.A. Because of Fed. R. Civ. Proc. 18(a)'s rule of permissive joinder, the only actual limitation on the class action waiver is a temporal one: the claim would have had to accrue before the entry of final judgment. This violates the principle that the released claims must share a factual predicate with the allegations of the complaint (*see e.g. Moulton v. United States Steel Corp.,* 581 F.3d 344, 349 (6th Cir. 2009)); in conjunction with P&G's breadth of product offerings, it evinces the sheer magnitude of the class action waiver.

Furthermore, the prohibition is unreasonably vague. It precludes class members from "*seeking* to use the class action procedural device." (emphasis added). What could this mean? Nowhere is it explained whether this proscription applies only to instituting a class action as a named plaintiff, or whether it also prohibits filing a claim as an absent class member in any future class action brought against the released parties, or even whether it prohibits encouraging others from bringing a class action suit. (Of course, a ban on speech encouraging class actions would be an impermissible prior restraint. *County Sec. Agency v. Ohio Dep't of Commerce,* 296 F.3d 477, 485 (6th Cir.2002); *Polaris Amphitheater Concerts, Inc. v. City of Westerville,* 267 F.3d 503, 507 (6th Cir. 2001).)

Even if one construes the waiver of rights as narrowly as possible (perhaps it only prohibits bringing an action as class representatives), it is still impermissible. Certainly, freedom of contract permits a class-action waiver: freely bargaining parties can choose to waive rights in exchange for other benefits. *See, e.g.*, *AT&T Mobility v.*

Concepcion, 131 S.Ct. 1740 (2011); *cf. also Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991); *Burden v. Check into Cash of Ky., LLC*, 267 F.3d 483, 492 (6th Cir. 2001). But a mandatory settlement is even more bereft of "a meaningful choice" than any so-called "contract of adhesion" that might result in application of unconscionability doctrine. No choice exists, because class members cannot opt-out.

In short, the precepts of 23(b)(2) and *Shutts* dictate that a mandatory class action waiver of monetary claims is improper. This is an independent reason to reverse the district court's class certification.

II. The Unbounded Class Definition Violates Rules 23(e)(1) and 23(e)(5).

Fed. R. Civ. Proc. 23(e)(1) requires the court to direct reasonable notice of the settlement to all members of the class who would be bound by it. Such notice lets class members assess the strengths and weaknesses of the case and the merits and demerits of the settlement in deciding whether to object or opt-out—when that right is available. 7B Charles Alan Wright et al., *Federal Practice and Procedure,* § 1787 at 220 (2d ed. 1986); 2 *Newberg on Class Actions,* § 8.04 at 8–17 ("[T]he purpose [of notice is] allowing the parties to make conscious choices that affect their rights in a litigation context."). Unless each package of Pampers contained a notice of impending settlement, and warned customers that by purchasing the product they would become class members, those who purchased the diapers immediately before final judgment did not receive adequate notice.

Even if these late-purchasing class members somehow learned of the settlement, they were impermissibly denied the right of objection. *Compare* RE #56,

Calendar Order (setting objection deadline of 8/29/2011) *with* RE #73, Final Approval Order (dated 9/28/2011) . Individuals who entered the class about or after the objection deadline were deprived of their Fed. R. Civ. Proc. 23(e)(5) right of objection. Were this proceeding merely a class certification and litigation to final judgment under 23(b)(2), there would be no concomitant statutory right to notice or objection—but as a 23(e) settlement, the class members have those rights and the class definition effectively eliminated that right for a substantial subclass.

A threshold requirement in any potential Rule 23 certification is that the named plaintiffs constitute an identifiable, unambiguous class. *In re Southeastern Milk Antitrust Litig.*, No. 2:07-CV-208, 2010 U.S. Dist. LEXIS 94223, at *14–15 (E.D. Tenn. Sept. 7, 2010) (citing *Reid v. White Motor Corp.,* 886 F.2d 1462, 1471 (6th Cir.1989)). This means that every class definition should include at least: (1) a specification of a particular group at a particular time frame and location who were harmed in a particular way; and (2) a method of definition that allows the court to ascertain its membership. *Bentley v. Honeywell Int'l, Inc.*, 223 F.R.D. 471, 477 (S.D. Ohio 2004). A class definition without definite end date, bounded only by the issuance of a final judgment order at an indeterminate future date, violates these principles.

The few district-court cases that have approved settlements where the class period runs until final approval both did so without evaluating the Rule 23(e) problems in certifying such a class.[13] Those courts that have rigorously analyzed the

[13] *Fresco v. Auto. Directions, Inc.*, No. 03-CIV-61063, 2009 U.S. Dist LEXIS 125233 (S.D. Fla. Jan. 16, 2009); *Laichev v. JBM, Inc.*, 269 F.R.D. 633 (S.D. Ohio 2008).

issue have unanimously reached the same conclusion: proposed classes with no fixed end date must be denied certification. *See In re Wal-Mart Stores, Inc.*, No. 06-02069, 2008 U.S. Dist. LEXIS 109446, at * 15–16 (N.D. Cal. May 2, 2008); *Trollinger v. Tyson Foods, Inc.*, No. 4:02-CV-23, 2007 U.S. Dist. LEXIS 88866, at *8–11 (E.D. Tenn. Dec. 3, 2007); *Saur v. Snappy Apple Farms, Inc.*, 203 F.R.D. 281, 285–86 (W.D. Mich. 2001); *Alaniz v. Saginaw Count.*, No. 05-10323, 2009 U.S. Dist. LEXIS 43340, at *5 (E.D. Mich. May 21, 2009); *Cruz v. Dollar Tree Stores, Inc.*, No. 07-2050 2009 U.S. Dist. LEXIS 62817, at *3–5 (N.D. Cal. July 2, 2009); *Wike v. Vertrue, Inc.*, No. 3:06-00204, 2010 U.S. Dist. LEXIS 96700, at *11–12 (M.D. Tenn. Sept. 15, 2010); *Mueller v. CBS, Inc.*, 200 F.R.D. 227, 236 (W.D. Pa. 2001); *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 85 n.2 (S.D.N.Y. 2001). *Cf. also In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 602–03 (3d Cir. 2009). The district court's failure to require the parties to modify the class definition was reversible error.

III. Even if Certifiable, The Settlement is Objectively Unfair.

Greenberg, *supra*, has urged this Court to overturn this settlement on various grounds that demonstrate that the underlying class cannot be certified as requested. These arguments can bleed into the corollary 23(e)(2) question of whether the settlement should have been approved as fair, reasonable and adequate. For instance, if final injunctive relief is not appropriate for the class as a whole, any settlement that offers only injunctive relief will be *per se* inadequate. Nonetheless, there are several independent reasons that this Court should reverse settlement approval under 23(e) even if it were to accept the class as viable.

A. A District Court Must Protect Absent Class Members' Interests.

A district court must conduct a "rigorous analysis" of the Rule 23 requirements before certifying a class. *Romberio,* 385 Fed. Appx. at 428 (citing *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982); *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998) (en banc)). A "district court ha[s] a fiduciary responsibility to the silent class members." *Grant v. Bethlehem Steel Corp.,* 823 F.2d 20, 23 (2d Cir. 1987). "Because class actions are rife with potential conflicts of interest between class counsel and class members, district judges presiding over such actions are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole." *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 785 (7th Cir. 2004). "Both the class representative and the courts have a duty to protect the interests of absent class members." *Silber v. Mabon*, 957 F.2d 697, 701 (9th Cir. 1992).

Settlements that take place prior to formal class certification require a higher standard of fairness. *E.g., Bluetooth,* 654 F.3d at 946–47. Courts "must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests … to infect the negotiations." *Id.* at 947 (*citing Staton v. Boeing Co.*, 327 F.3d 938, 960 (9th Cir. 2003)).

Appellate courts should not be afraid to admonish a district court when it has shirked its responsibility. *See e.g. Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). Such direction from above is appropriate where, as here, the district court perfunctorily approved the settlement without either addressing the objectors' arguments or taking

the requisite care in scrutinizing the value of the settlement benefits or examining attorneys' fees.

B. The $2.73 Million Attorneys' Fee Is Disproportionate to the Valueless Relief Obtained.

In analyzing the fairness of a proposed settlement under Rule 23(e), this Circuit commands district courts to "insure that the interests of counsel and the named plaintiffs are not unjustifiably advanced at the expense of unnamed class members." *Williams v. Vukovich,* 720 F.2d 909, 923 (6th Cir. 1983). The Ninth Circuit agrees; it recently identified three warning signs of an class action settlement that is inequitable as between class counsel and the class. *Bluetooth*, 654 F.3d at 947.

The first signal is "when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded." *Bluetooth*, 654 F.3d at 947. Greenberg alerted the district court to this deficiency. RE #60, Objection at 25–27. The parties' agreement permitted class counsel to seek, unopposed, an award of fees and costs of $2.73 million. Settlement § VII.A. With class counsel seeking the entire $2.73 million, to reach a proportionate 25% ratio,[14] the class benefit would have to be valued at $8.19 million.

It is impossible that the sum of the relief that this settlement offers is worth $8.19 million. The face value of the *cy pres* donation is $400,000. Settlement §V.B.3. The label change and "consumer education" information are essentially valueless, in

[14] *E.g.*, *Bluetooth*, 654 F.3d at 942; *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990).

that they duplicate what a simple Internet search would tell any class member; moreover, class members cannot benefit from these changes unless they continue to do business with P&G. Moreover, the label change is really a benefit to the defendant rather than the class: it is indistinguishable from an advertisement for Pampers. *See True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1077 (C.D. Cal. 2010) ("No changes to future advertising by [the defendant] will benefit those who already were misled by [the defendant]'s representations."). Therefore, the essential determinant is how much of a benefit the year-long prospective money-back guarantee is to the class.

Greenberg invited both the parties and the district court to investigate the prior indistinguishable money-back guarantee that P&G offered from July 2010 through December 2010. RE #60, Objection at 26; RE #76, Transcript at 29. Because the parties refused to volunteer this information, this Court should draw the negative inference that the reimbursements yielded by that program will not justify the $2.73 million fee award.

Even in the unlikely event that P&G issued over $8 million of money-back refunds over the next year, class counsel's fee would likely remain disproportionate. That is because the award of class counsel's fee request should be contingent upon the amounts actually received by their *clients*, the class. *Cf.* American Law Institute, *Principles of the Law of Aggregate Litig.* § 3.13(a) *and* comment *a* (citing cases). Because P&G requires the original receipt and the UPC code from the diaper packaging, because exceedingly few class members will have retained these materials but not have taken advantage of the previous money-back guarantee program, and the class

consists of those who have "discarded or ceased using" the diapers (RE #25, at 2), most participants in the refund program will necessarily be future purchasers, not class members. "The fairness of the settlement must be evaluated primarily based on how it compensates class members for these past injuries," not on how it benefits prospective customers. *Synfuel*, 463 F.3d at 654. This is especially true given that nothing in the settlement precludes P&G from raising its prices to reflect the anticipated costs of the money-back guarantee. Indeed, P&G regularly offers money-back guarantees for its products as a marketing tool. *See, e.g.*, http://www.swiffer.com (February 1, 2012 version of webpage for P&G's Swiffer-brand sweeper offers money-back guarantee); http://www.dentureliving.com (same for P&G's Fixodent-brand denture cream).

The incongruence between counsel's fees and the class benefit is an independent reason to reverse approval of the settlement. Failure to weigh or justify the disproportion is an error of law; it thereby constitutes an abuse of discretion.

C. The District Court Ignored Problematic "Clear Sailing" and "Kicker" Provisions That Demonstrate Improper Self-Dealing by Class Counsel.

The second and third indicia of an unfair settlement are the presence of a "clear-sailing" agreement, such that the defendant will not challenge the award of fees to plaintiffs' counsel, and of a "kicker," such that any reduction in those fees reverts to the defendant rather than redounding to the class' benefit (i.e. the kicker). *Bluetooth*, 654 F.3d at 947. Greenberg alerted the district court to these deficiencies. RE #60, Objection at 27.

Not only does the settlement contain a "clear sailing" provision (Settlement § VII.A) forbidding P&G from challenging the fee amount, but there is a "kicker" (Settlement § VII.B) providing that any reduction in the fee award reverts to P&G, rather than the class. This is inappropriate; it indicates that the class attorneys have negotiated provisions to protect their fee award at the expense of potential class benefits. *See Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 525 (1st Cir. 1991) ("[A clear-sailing] clause by its very nature deprives the court of the advantages of the adversary process."); *Bluetooth*, 654 F.3d at 949 ("[T]he kicker deprives the class of that full potential benefit if class counsel negotiates too much for its fees"). At a minimum, these two clauses serve as warning signs of a self-serving settlement that badly needs justification: why was this negotiated in such a manner to make the class worse off? *Id.*.

Greenberg advised that the settlement should be rejected unless the parties agreed to modify the settlement so that any reduction in the proposed fee award reverts to either the class or to the *cy pres*. RE #60, Objection at 27. The parties did not modify the settlement, nor did the district court appear to consider these clauses as a reason to give heightened scrutiny to the fairness of the settlement. This was an error of law and grounds for reversal.

D. The District Court Improperly Failed to Draw an Adverse Inference That the Injunctive Relief Was Valueless.

Noting the centrality of the money-back guarantee, Greenberg argued in his objection that P&G should provide data to the district court about the number of

refunds that were issued pursuant to the first iteration of the money-back program—to serve as a first estimate of the value of the injunctive relief. RE #60, at 26. The parties failed to do so, and Greenberg noted the omission at the fairness hearing. RE #76, at 29. Nevertheless, the district court failed to draw the appropriate adverse inference that the money-back program was so burdensome as to not provide any meaningful relief even prospectively.

Clay v. UPS, 501 F.3d 695, 712 (6th Cir. 2007), is directly on point:

> Having established that the relevant comparators in this case are the other drivers who signed the bid sheets, Clay asserts that because UPS failed to produce the bid sheets, the district court should have drawn an adverse inference against UPS. We agree. Clay should not be punished for his inability to point to the relevant comparators in this case; rather, UPS's failure to turn over the bid sheets in this case creates an adverse inference in Clay's favor. "[T]he general rule is that [w]here relevant information… is in the possession of one party and not provided, then an adverse inference may be drawn that such information would be harmful to the party who fails to provide it." *McMahan & Co. v. Po Folks, Inc.*, 206 F.3d 627, 632-33 (6th Cir. 2000) (second and third alteration in original) (internal quotation omitted).

Clay concluded that the district court erred when it failed to draw the adverse inference, and instead relied on less accurate data.

P&G refused to enter evidence about the degree to which its money-back guarantee program provided meaningful relief to class members. Thus, the district court had no data at all with which to have "sufficient facts intelligently to approve

the settlement offer." *In re Gen. Tire & Rubber Co. Sec. Litig.*, 726 F.2d 1075, 1084 n.6 (6th Cir. 1984) (internal quotation omitted). P&G's failure to put forward this evidence in its control, the district court should have drawn the adverse inference that the number was sufficiently low to be embarrassing to a claim that the settlement is fair, especially given the disproportionate $2.73 million fee to the class attorneys. The adverse inference is especially appropriate here given that the settling parties have the burden of proving a settlement fair. *Id.* at 1080. Because the district court failed to draw the adverse inference, or even give an explanation why it did not believe it necessary to do so, it committed reversible error. At a minimum, remand is needed for fact-finding on the value of the injunctive relief to class members given that the district court drew its factual conclusion without any data whatsoever.

IV. Adequacy of Representation Is Belied by the Terms of the Settlement.

This Circuit has held that "[t]here are two criteria for determining adequacy of representation: (1) The representative must have common interests with unnamed members of the class, and (2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *In re Am. Med. Sys.*, 75 F.3d 1069, 1083 (6th Cir 1996). "Oversight from the class representatives is particularly important in the context of settlements." *Olden v. Gardner*, 294 Fed. Appx. 210, 220 (6th Cir. 2008) (internal citation omitted). "Courts customarily demand evidence of improper incentives for the class representatives or class counsel—such as a promise of excessive attorney fees in return for a low-cost, expedited settlement—before abandoning the presumption that the class representatives and

counsel handled their responsibilities with the independent vigor that the adversarial process demands." *UAW*, 497 F.3d at 628. Greenberg can demonstrate a 23(a)(4) violation by all of these standards.

Here, we have a settlement where the class representatives will get approximately $51,000, the attorneys will get over $2.73 million, but the class gets nothing—unless in the future they have new infants, or unless they for some reason have retained the diapers' year-old original packaging and receipt and are eligible for the restitutionary relief, which is the only genuine relief in this settlement. Additionally, this remedy only duplicates one which the majority of the class already possessed via Pampers' initial money-back offer of July 2010 to December 2010, a fact that should raise serious doubts about adequacy of representation. *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011) (Easterbrook, J.) (lawsuit brought solely to seek relief already available is demonstration of (a)(4) inadequacy as a matter of law).

Moreover, the only class beneficiaries of the prospective relief are class members who are ***satisfied*** with Dry Max, still have children who will continue to use diapers, and wish to purchase Dry Max again in the future—*i.e.,* class members who have suffered no injury. The main beneficiaries of this settlement are the attorneys. Confronted with the distended fee awards and the clear-sailing and "kicker" provisions of the settlement, the district court should have "abandon[ed] the presumption" that class counsel and representatives discharged their duties with the appropriate vigor. *UAW*, 497 F.3d at 628; *see also Bluetooth, supra.* This raises the

question of Rule 23(a)(4) adequacy: were the class representatives and counsel in this case acting in the best interests of the class, or were they self-serving and acting in the best interests of class counsel? The question looms especially large in this case, where the underlying suit is based on the unsupported contention that Pampers with Dry Max caused diaper rash. RE #68, Final Approval Motion at 7.

Meritless class actions are socially wasteful: they raise costs to class members and transfer wealth from consumers to attorneys. It would be inequitable to reward the attorneys responsible for that waste with a multi-million-dollar payday. If "class counsel agreed to accept excessive fees and costs to the detriment of class plaintiffs, then class counsel breached their fiduciary duty to the class." *Lobatz v. U.S. West Cellular of Cal., Inc.,* 222 F.3d 1142, 1147 (9th Cir. 2000). A meritless class action brought for the benefits of class counsel against the best interests of the class fails the Rule 23(a)(4) inquiry. *Aqua Dots*, 654 F.3d at 752.

This fee-driven settlement demonstrates as a matter of law the inappropriateness of the class certification, and the district court decision approving the certification should be reversed under *Aqua Dots*.

V. The District Court Violated Fed. R. Civ. Proc. 23(h) by Failing to State the Methodological Basis for the Fee Award and by Unreasonably Awarding Far More than the Value of What the Class Received.

Fed. R. Civ. Proc. 23(h) authorizes the court to award "reasonable attorney's fees." Greenberg submits that the new provision supersedes pre-2003 case law that permitted district courts to elect to employ lodestar methodology in the commercial class action setting without regard to the value of the settlement received by the class.

E.g. Rawlings v. Prudential-Bache Properties, 9 F.3d 513 (6th Cir. 1993). Greenberg believes that this Court should, at least in consumer class actions claiming the right to pecuniary relief, join the majority of circuits and require attorneys' fees to bear some relationship to the recovery achieved for the class. "[N]umerous courts have concluded that the amount of the benefit conferred logically is the appropriate benchmark against which a reasonable common fund fee charge should be assessed." *In re Prudential Ins. Co. America Sales Practices Litig.,* 148 F.3d 283, 338 (3rd Cir. 1998) (quoting Conte, 1 *Attorney Fee Awards* § 2.05, at 37).[15] The amendments to Rule 23

[15] Appellees may argue that the settlement did not create a common fund. This should make no difference. "That the defendant in form agrees to pay the fees independently of any monetary award or injunctive relief provided to the class in the agreement does not detract from the need carefully to scrutinize the fee award." *Staton v. Boeing Co.,* 327 F.3d 938, 964 (9th Cir. 2003). A "defendant is interested only in disposing of the total claim asserted against it." *Id.* "The rationale behind the percentage of recovery method also applies in situations where, although the parties claim that the fee and settlement are independent, they actually come from the same source." *GM Pick-Up*, 55 F.3d at 820-21. "[P]rivate agreements to structure artificially separate fee and settlement arrangements cannot transform what is in economic reality a common fund situation into a statutory fee shifting case." *Id.* at 821. *See also id. at* 820 (severable fee structure "is, for practical purposes, a constructive common fund"). "[I]n essence the entire settlement amount comes from the same source. The award to the class and the agreement on attorney fees represent a package deal." *Johnson v. Comerica*, 83 F.3d 241 (8th Cir. 1996). "If an agreement is reached on the amount of a settlement fund and a separate amount for attorney fees" then "the sum of the two amounts ordinarily should be treated as a settlement fund for the benefit of the class, with the agreed-on fee amount constituting the upper limit on the fees that can be awarded to counsel." *Manual for Complex Litigation* (4th ed. 2008), § 21.71 at 525.

provide the basis for a change in that approach: under Rule 23(h), the "fundamental focus is the result *actually achieved* for class members." Advisory Committee Notes on 2003 Amendments to Rule 23 (emphasis added); *see also id.* ("it may be appropriate to defer some portion of the fee award until *actual payouts* to class members are known" (emphasis added)); *ALI Principles* § 3.13; Federal Judicial Center, *Manual for Complex Litigation (Fourth)* § 21.71(2004) ("the fee awards should be based only on the benefits *actually delivered*."); *see also, e.g.*, *Bluetooth*, 654 F.3d at 944-45 (requiring cross-check against class recovery when lodestar method used); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005); *In re Cendant Corp. Litig.*, 243 F.3d 722, 732 n.12 (3d Cir. 2001); *Powers v. Eichen,* 229 F.3d 1249, 1256–57 (9th Cir. 2000); *Swedish Hosp. Corp. v. Shalala,* 1 F.3d 1261, 1272 (D.C. Cir. 1993); *Camden I Condominium Ass'n v. Dunkle,* 946 F.2d 768 (11th Cir. 1991). *See generally* Charles Silver, *Due Process and the Lodestar Method: You Can't Get There From Here*, 74 Tul. L. Rev. 1809 (2000) (citing authorities that show a "broad consensus that percentage-based formulas harmonize the interests of agents and principals better than time-based formulas like the lodestar approach").

To do so will not require reversal of *Rawlings* because adopting a percentage-of-the-fund cross-check is not inconsistent with *Rawlings*. *Rawlings* held that it was not impermissible for a district court to use lodestar as a *ceiling* to cap attorneys' fees in a settlement to avoid a windfall to the class counsel. It did not hold that it was appropriate for a district court to use lodestar as a *floor* to justify a windfall disproportionate to the relief received.

The Advisory Committee Notes counsel that, regardless of methodology used, "[a]ctive judicial involvement in measuring fee awards is singularly important to the proper operation of the class action process," Advisory Committee Notes on 2003 Amendments to Rule 23(h), especially "since it is to be expected that class members with small individual stakes in the outcome will not file objections, and the defendant who contributed to the fund will usually have scant interest in how the fund is divided between the plaintiff and class counsel." *Rawlings*, 9 F.3d at 516.

The district court's engagement with the fee motion and explanation thereof were insufficient. RE #76, Transcript at 35; RE #74, Attorneys Fees Order. The recommendation of a neutral mediator does not absolve the district court of its responsibility to independently ensure that any fee is reasonable. *Bluetooth*, 654 F.3d at 948. Nor does a one-sentence *ipse dixit* explanation discharge that responsibility. RE #76, Transcript at 35, ln. 9–12. This court has not hesitated to vacate fee awards that are not adequately justified. *Moulton v. United States Steel Corp.*, 581 F.3d 344, 352 (6th Cir. 2009); *Geier v. Sundquist*, 372 F.3d 784, 792 (6th Cir. 2004); *Jordan v. Mark IV Hair Styles, Inc.,* 806 F.2d 695, 697 (6th Cir. 1986).

It is necessary to go beyond a remand in this case, however, because any exercise of reasonable discretion would have led to the conclusion that this fee request was unreasonable. If the court below was employing the percentage of recovery method, the "fundamental focus is results achieved *for class members*." Advisory Committee Notes on 2003 Amendments to Rule 23(h) (emphasis added). If the court below was employing the lodestar method, due to the fact that Greenberg

pointed out the limited nature of the relief, the district court should have "considered the relationship between the amount of the fee awarded and the results obtained." *Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983). *See also Bluetooth*, 654 F.3d at 942 (foremost consideration in adjusting the lodestar is the benefit obtained for the class); *Rawlings*, 9 F.3d at 517 ("[O]ne of the primary determinants of the quality of work performed is the result obtained."); *see also Sobel v. Hertz*, No. 3:06-CV-00545-LRH-RAM, 2011 U.S. Dist. LEXIS 68984, at *44 (D. Nev. Jun. 27, 2011) ("Class Counsel has requested for itself an uncontested cash award ... with only a modest discount from the claimed lodestar amount. In other words, the class is being asked to 'settle,' yet Class Counsel has applied for fees as if it had won the case outright."). Under either methodology, the fee is unreasonable and cannot stand.

Ordinarily an unreasonable fee need not be fatal to the fairness of a settlement, because the district court can lower the fee without depriving the class of the total that the defendant is willing to pay. However, because of the "kicker" provision, which denies the class the benefit of the reduction from the excess fee for "no apparent reason," the entire settlement should be considered unfair as a matter of law unless the settling parties can demonstrate a compelling reason for such a self-serving clause in the settlement at the expense of the class. *Bluetooth*, 654 F.3d at 947. District courts should "assure that counsel's fee does not dwarf class recovery." *Id.* at 945

(*quoting GMC Pick-Up*, 55 F.3d at 821 n.40). The failure to do so here should be reversible error.[16]

VI. Class Notice Was Defective Because Material Aspects of the Settlement Were Not Publicized in Either the Notice or the Settlement Agreement Itself.

As mentioned previously, *supra* § II, those class members who entered the class immediately preceding final judgment had virtually no way of receiving the "reasonable notice" to which they are entitled under 23(e)(1). This deficiency is exacerbated by the fact that even those class members who had entered the class early enough to receive notice did not receive "reasonable notice." Below, the settling parties argued that because this is a 23(b)(2) class, members are not entitled to 23(c)(2)(B)'s "best notice practicable." RE #54, Preliminary Approval Motion at 17. While they are correct that the "best notice practicable" is not required under 23(e)(1), notice of settlement is still subject to the constitutional constraints elucidated in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Notice must be "reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314; *see also Fidel v. Farley*, 534 F.3d 508, 514 (6th Cir.

[16] At the very least, any remand would need to clearly require the district court to make specific findings of fact regarding the value of the settlement benefit vis-à-vis the attorneys' fees. In necessary service of this evaluation, the district court should be instructed to compel P&G to submit the data requested by Greenberg, *supra*, § III.D.

2008). *Mullane* also has a content component. The notice must "reasonably convey the required information." 339 U.S. at 314.

"The required information" is that which is material to a reasonable class member's evaluation of the merits and demerits of the settlement, in determining whether to submit to the proposed settlement. *See In re Veritas Software Corp. Sec. Litig.,* 496 F.3d 962, 969 (9th Cir. 2007) ("It is clear that the purpose of the notice requirement is to allow class members to evaluate a proposed settlement."); *In re Domestic Air Transp. Antitrust Litig.,* 141 F.R.D. 534, 553 (N.D. Ga. 1992) (concluding that notice to class members "must contain information that a reasonable person would consider to be material in making an informed, intelligent decision…"); 7B Charles Alan Wright et al., *Federal Practice and Procedure,* § 1787 at 220 (2d ed.1986); 2 *Newberg on Class Actions,* § 8.04 at 8–17 ("[T]he purpose [of notice is] allowing the parties to make conscious choices that affect their rights in a litigation context.").

Below, Greenberg objected that two vital components of the settlement were not disclosed to class members: 1) the identity of the primary *cy pres* beneficiary under Settlement § V.B.3.a. and 2) the aggregate total of incentive awards sought on behalf of the named plaintiffs. RE #60, at 30–31. **None** of the preliminary settlement papers contained this information, despite the fact that each of these issues are material to any analysis of the overall fairness and adequacy of the settlement.

A. The Identity of the *Cy Pres* Recipient(s) and Substance of Its Charitable Program Are Material to the Fairness of the Settlement, But Were Not Disclosed to the Class.

To this date, the identity of the intended recipient(s) of three-quarters of the *cy pres* money ($300,000) has not been revealed—in the notice, in the settlement, or even at the fairness hearing. This information is material to the fairness of the settlement for multiple reasons. In an opt-out settlement, this information preserves the right of any absent class members to distance themselves from causes or institutions that they would rather not support. In the settlement at bar, the information can underpin a valid objection if there is an abuse of the *cy pres* mechanism. Abuses can occur, *inter alia*, when the intended recipient is related to class counsel or the defendant, or when there is a geographic incongruence between the class and the *cy pres* recipient. *See e.g. Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011); *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 362 F. Supp. 2d 574, 577 (E.D. Pa. 2005). If, as the parties implied below (RE #68, at 43), the recipient is only one health center, that fact is material and potentially problematic for the legitimacy of the third-party donation. Only a donation to a health center that is national in scope or multiple donations to various regional health centers would be properly tailored to the nationwide character of the class. Without notice to the class, class members would have no opportunity to object to a potentially problematic clause of the settlement.

Additionally, the contents of a skin treatment program that has not yet been produced cannot be adequately evaluated either by class members or the district court judge himself. This is objectionable. *See e.g.*, *True*, 749 F. Supp. 2d at 1076 (court

troubled by fact that the defendant-created educational DVD had not been produced at the time of settlement). Class members have a right to know to whom their money is going and how it will be utilized. *Cf. Klier v. Elf Atochem N. Am., Inc.,* 658 F.3d 468, 474 (5th Cir. 2011) ("The settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members.").

B. The Aggregate Amount of Incentive Awards Sought Is Material to the Fairness of the Settlement, But Was Not Disclosed to the Class.

Rule 23(h) also applies to incentive fee award applications and confirms that the class should have been given notice of all fee applications and an opportunity to object. *In re Excess Value Ins. Coverage Litig.*, 598 F. Supp. 2d 380, 392 (S.D.N.Y. 2005); *North Star Capital Acquisitions, LLC v. Krig*, No. 3:07-cv-264-J-32MCR, 2011 U.S. Dist. LEXIS 4596, at *14 (M.D. Fla. Jan. 10, 2011); *cf. also Hadix v. Johnson*, 322 F.3d 895, 898 (6th Cir. 2003) ("[I]ncentive awards are usually viewed as extensions of the common-fund doctrine"). Neither the notice nor the settlement agreement itself discloses the sum total that would be sought in incentive awards. All that is revealed was that the award would be $1,000 "per affected child for each plaintiff." Settlement Agreement § VI.A. A cursory mention of an award, without any revelation of its size, is insufficient. *See Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399, 410 (7th Cir. 2000) (affirming the denial of an incentive award while placing "significant weight" on the fact that although the notice to class members did allude to an incentive award, it did not specify the sum total of the award).

Further, the sum total of the awards is material because it sheds light on whether 23(a)(4)'s requirement of adequacy of representation is satisfied and whether the settlement as a whole is equitable for class members. *See Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006) (disproportionate incentive award of $3000 proof that "the class device had been used to obtain leverage for one person's benefit"). *Cf. also Young v. Higbee,* 324 U.S. 204 (1945) (breach of fiduciary duty for a party to bring litigation purportedly on behalf of corporation and then claim disproportionate share of benefits for oneself). Class members have a right to inquire into the relevant judicial question of whether "the interests of counsel and the named plaintiffs are [] unjustifiably advanced at the expense of unnamed class members." *Williams,* 720 F.2d at 923.

Here, the parties only announced the aggregate total two weeks after the objection deadline had passed. RE #68, Final Approval Motion at 42. Logically, this cannot constitute notice which "affords [potential objectors] an opportunity to present their objections" *UAW*, 497 F.3d at 629 (*quoting Mullane*, 339 U.S. at 314). This is especially true here, where the $51,000 in benefits to class representatives is likely to impermissibly exceed the amount of refunds given to class members for purchases made during the class period.

Failure to provide satisfactory 23(e) notice is reversible error. *See e.g., In re Katrina Canal Breaches Litig.*, 628 F.3d 185 (5th Cir. 2010). So is failing to provide satisfactory 23(h) notice. *See e.g., In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988 (9th Cir. 2010). The multiple infirmities in the notice require remand.

CONCLUSION

The district court committed multiple independent errors of law, each of which by itself requires vacation of the settlement approval and award of fees and remand for consideration under the correct standards of law with proper notice to the class. Decertification of the 23(b)(2) class is required. But this Court should go farther and take the opportunity to emphasize that Rule 23(e) has substance. Given the untenable disproportion between the fee award and the class relief, combined with a kicker preventing the class to recoup the excessive fee award, this Court should reverse with instructions to reject the settlement entirely.

Dated: February 2, 2012

Respectfully submitted,

/s/ Theodore H. Frank

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. PROC. 32(a)(7)(C)

This brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because this brief contains 13,957 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii) and 6th Cir. R. 28(b), as counted by Microsoft Word 2010.

This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Garamond font.

Executed on February 2, 2012.

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PROOF OF SERVICE

I hereby certify that on February 2, 2012, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Sixth Circuit using the CM/ECF system, which will provide notification of such filing to all counsel of record.

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ADDENDUM OF DESIGNATIONS OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to 6th Cir. R. 30(f)(1), Greenberg designates the following district court documents as relevant to this appeal:

RE #1, Complaint

RE #25, Amended Consolidated Complaint

RE #39, Defendant's Motion to Strike Consolidated Class Complaint

RE #54, Joint Motion for Class Certification and Preliminary Approval of Settlement

RE #54-2, Settlement Agreement and Release

RE #57, Motion for Attorneys' Fees

RE #60, Objection of Daniel Greenberg

RE #68, Joint Motion for Final Approval of Settlement

RE #69, Reply in Support of Motion for Attorneys' Fees

RE #73, Order Granting Final Approval and Final Judgment

RE #74, Order Awarding Attorneys' Fees

RE #75, Notice of Appeal of Daniel Greenberg

RE #76, Transcript of Fairness Hearing