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.

PROCTER & GAMBLE COMPANY; PROCTER & GAMBLE PAPER PRODUCTS CO.; PROCTER &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

Reply Brief of Appellant Daniel Greenberg

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules and Statutes

Other Authorities

INTRODUCTION

Greenberg is not asking this Court to do anything "novel" (Pl. Br. 16). The settlement and settlement approval took impermissible shortcuts that violate the Federal Rules of Civil Procedure and this Court's precedents for class certification. Furthermore, if the Rule 23(e) fairness hearing is to be anything other than a Potemkin sham, it cannot be the case that a settlement is "fair, adequate, and reasonable" when it awards the attorneys millions of dollars and the class representatives tens of thousands of dollars, but provides no compensation to unnamed class members for past injuries allegedly suffered. The "judgment of the litigants and their counsel" deserves no deference when the resulting settlement is entirely self-serving at the expense of absent class members. To affirm these abuses of the class action process is to divest Rule 23(e)(2) of meaning.

I. Binding Sixth Circuit and Supreme Court Precedent Precludes Certification as a Mandatory 23(b)(2) Class.

In his opening brief, Greenberg cites a long line of Sixth Circuit and Supreme Court cases that reject 23(b) certifications of mandatory classes asserting non-incidental claims for monetary damages and lacking the requisite cohesiveness and "homogeneity of interests." Opening Br. 16-30. In their response briefs, plaintiffs ignore this precedent entirely and defendants give it only scant treatment.

Plaintiffs argue that Rule 23(b)(2) certification is appropriate because the relief awarded is "equitable." Pl. Br. 41. This essentially concedes reversible error:

Rule 23(b)(2) "does not speak of 'equitable' remedies generally but of injunctions and declaratory judgments." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2560 (2011).

P&G relies upon *Olden v. Lafarge Corp.*, 383 F.3d 495, 510-11 (6th Cir. 2004). Def. Br. 20-21. But *Olden* is inapposite. *First*, the plaintiffs in *Olden* certified the class under both (b)(2) and (b)(3), such that the right to opt out was preserved. Thus, the objector's argument against the (b)(2) certification did not "make[] much sense" because the (b)(3) certification protected the opt-out right. *Id.* at 510. Here, there is no such protection. *Second*, *Olden* found it significant that the plaintiffs were undergoing continuous harm at the time of the certification. 383 F.3d at 511. *Olden* involved a class of homeowners subject to persisting pollution from a cement company. A prospective injunction served the interests of the class, thus distinguishing the case from *Coleman v. Gen. Motors Acceptance Corp.,* 296 F.3d 443 (6th Cir. 2002). *Id.* The case at bar is more like *Coleman* than like *Olden*: a prospective injunction can neither compensate a class of African-Americans discretely subject to discriminatory financing in *Coleman*, nor the class of past purchasers of diapers present in this case. 383 F.3d at 511; Opening Br. 23-27; *see also Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 892 (7th Cir. 2011) ((b)(2) certification is "necessarily improper" when money damages are an adequate remedy); *McNair v. Synapse Group Inc.,* No. 11-1743, 2012 U.S. App. LEXIS 4593 (3d Cir. Mar. 6, 2012) (plaintiffs seeking prospective injunctive relief of additional warnings lack standing). *Reeb v. Ohio Dep't of Rehab. & Corr.,* decided two years after *Olden*, is dispositive: mandatory classes demand a "homogeneity of interests"—a class without the divergent and individualized interests

that arise when only some class members benefit from the injunction and others will have no future dealings with the defendant and can only benefit from damages. 435 F.3d 639, 649-50 (6th Cir. 2006); *Bolin v. Sears Roebuck & Co.*, 231 F.3d 970, 978 (5th Cir. 2000).

P&G then asserts that (b)(2) requires only uniform conduct. Def. Br. 25 (citing *Gooch v. Life Investors Ins. Co. of Am.*, Nos. 10-5003/5723, 2012 U.S. App. LEXIS 2643, at *58 (6th Cir. Feb. 10, 2012)). In doing so, the defendants contort the reasoning of *Gooch*, ignore the holdings of *Wal-Mart*, and conflate the requirements of (b)(2) with the (a)(2) requirement of commonality.

Gooch dealt with the (b)(2) certification under a single count seeking declaratory relief. *Id.* at *59. (Requests for restitution and monetary damages were certified only under subsection (b)(3). *Id.* at *56-57.) Certainly, when a case centers on "a pattern or practice that is generally applicable to the class as a whole" (Def. Br. 25) such that class members stand in identical legal positions, it is reasonable to conclude that a unitary declaratory judgment is "appropriate respecting the class as a whole." Rule 23(b)(2). But it does not follow from this that all forms of injunctive relief are equally "appropriate respecting the class as a whole," which after *Wal-Mart* is indubitably the standard each form of relief must satisfy before (b)(2) certification. 131 S.Ct. at 2560. "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Id.* at 2557. As Greenberg has maintained, prospective injunctive relief is not appropriate respecting as a whole the class of past purchasers of Pampers. Opening Br. 25-26.

Wal-Mart further notes that the defendant's uniform conduct toward the class is the staple of (a)(2) commonality, not (b)(2) appropriateness. *Id.* at 2554-55. 23(b)(2) requires more than just a defendant's common conduct. *Vallario v. Vandehey*, 554 F.3d 1259, 1267 (10th Cir. 2009) ("Ensuring the provisions of Rule 23(b)(2) are met requires…a close look at the relationship between a proposed class, its injuries, and the relief sought.) (internal quotation omitted); *Lemon v. International Union of Operating Eng'rs*, 216 F.3d 577, 580 (7th Cir. 2000) (23(b)(2) plaintiffs must "seek to redress a common injury *properly addressed by a class-wide injunctive or declaratory remedy*") (emphasis added); *Clement v. Am. Honda Fin. Corp.*, 176 F.R.D. 15, 22 n.8 (D. Conn. 1997) ("enforc[ing] a common policy against, and act[ing] in a uniform manner with respect to the class" insufficient for a (b)(2) certification"). Even when (a)(2) is satisfied, (b)(2) is not necessarily so. *See e.g. E.g.*, *Daffin v. Ford Motor Co.*, No. C-1-00-458, 2004 U.S. Dist. LEXIS 18977 (S.D. Ohio July 15, 2004), *aff'd* 458 F.3d 549 (6th Cir. 2006); *McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545 (5th Cir. 2003).

P&G's attempt to reduce the requirements of (b)(2) to "a pattern or practice that is generally applicable to the class as a whole" improperly eliminates any distinction between (a)(2) and (b)(2). Such a framework ignores this Court's admonition that certification of a mandatory class "must be carefully scrutinized" because it lacks the protections of a Rule 23(b)(3) class. *In re Telectronics Pacing Sys. Inc.*, 221 F.3d 870, 881 (6th Cir. 2000). The "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).

A. While Obtaining Injunctive Relief Is Necessary to a (b)(2) Settlement Certification, It is Not Sufficient.

Both settling parties propose the theory that (b)(2) certification was justified here on the basis of obtaining injunctive relief in the settlement. Def. Br. 24, Pl. Br. 41. Although this is a necessary condition for certification of a (b)(2) settlement class, it is not a sufficient one.

Not only do the parties fail to adduce any case law in support of the idea that one should evaluate predominance on the basis of the relief obtained, rather than the complaint, definition, and release, this Circuit has affirmatively repudiated their position. "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." *Telectronics*, 221 F.3d at 880. Although *Telectronics* dealt with a 23(b)(1) class rather than a 23(b)(2) class, the rationales for looking outside of the settlement apply equally. *See* Opening Br. 20-22; 29-30 (citing authorities). *See also Reeb*, 435 F.3d at 658 (applying *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), to (b)(2) classes); *In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1545 (11th Cir. 1987) (equivalent limitations on (b)(1) classes and (b)(2) classes); *Daskalea v. Wash. Humane Soc'y*, No. 03-2074, 2011 U.S. Dist. LEXIS 88310, at *51-52 (D.D.C. Aug. 10, 2011) (*Wal-Mart* principles apply to (b)(1) and (b)(2) classes alike).

Crawford v. Equifax Payment Servs., 201 F.3d 877 (7th Cir. 2000), is on point. There, as here, the settlement entitled class members only to injunctive relief, yet the Seventh Circuit reversed the (b)(2) certification because class members "are entitled to personal notice and an opportunity to opt out of representative actions for money damages." *Id.* at 881-82. Defendants attempt to distinguish *Crawford* because the underlying law in that case (Fair Debt Collection Practices Act) provided only for monetary relief, but argue that the plaintiffs' causes of action here allow for injunctive relief. Def. Br. 29. This is factually incorrect: several of the state consumer protection laws in the complaint do not permit injunctive relief.[1] Simply put, as this Court has already held, Rule 23(b)(3) is "the only conceivable vehicle" for a nationwide consumer-protection law claim. *Pilgrim v. Universal Health Card, LLC,* 660 F.3d 943, 946 (6th Cir. 2011). Neither appellee cites or attempts to distinguish *Pilgrim.*

Examining only the relief obtained is not sufficient to ensure consistency with the past pronouncements of this Court that the class shares a "homogeneity of interests," *Reeb*, 435 F.3d at 649; *see also Romberio v. UnumProvident Corp.*, 385 Fed.

[1] *Compare*, *e.g., Brodsky v. Humanadental Ins. Co.*, No. 10-C-3233, 2011 U.S. Dist. LEXIS 12121, at *28 (N.D. Ill. Feb. 8, 2011) (Illinois CFA does not admit of injunctive relief claims) *with* RE #25 at 133-36; *Medical Soc. of New Jersey v. AmeriHealth HMO, Inc.*, 868 A.2d 1162, 1167-68 (N.J. Super. Ct. App. Div. 2005) (same for New Jersey CFA) *with* RE #25 at 153-54; *Palmetto Ford, Inc. v. Am. Appliance & TV, Inc.*, No. 2:99-667-23, 1999 U.S. Dist. LEXIS 23631, at *49 (D.S.C. July 28, 1999) ("The South Carolina Unfair Trade Practices Act reserves injunction actions to the South Carolina Attorney General.") *with* RE #25 at 164-65; Wis. Stat. Ann. §100.18(11) (confining injunctive actions to various departments of the state) *with* RE #25 at 172-73.

Appx. 423, 432-433 (6th Cir. 2009), or that class counsel is not impermissibly "bootstrapping… a (b)(3) class into a [mandatory] class," *Telectronics* 221 F.3d at 880; *see also Amchem*, 521 U.S. at 620. The fiduciary oversight role obliges the certifying court not only to look at the relief obtained, but at the causes of action in the complaint, the class's composition and, perhaps most importantly, the claims of class members released by the settlement agreement.

B. Reviewing the Complaint, Class Definition and Release Is Essential When Determining Whether Monetary Damages Predominate.

P&G incorrectly claims that Greenberg "admits that most of the cases he cites are inapposite because plaintiffs sought certification of a litigation class, not a settlement class." *Compare* Def. Br. 27 *with* Opening Br. 21-22. On the contrary, "undiluted, even heightened, attention [is demanded] in the settlement context" when considering the certification question. *Amchem*, 521 U.S. at 620. One reason that the complaint is a particularly good prism into whether an action is predominately for money damages is that it is at that time when the litigation is most adversarial, before the interests of class counsel and defense counsel have converged on settlement. Thus, it is important to look to the complaint in the settlement context. *Crawford*, 201 F.3d at 882.

P&G vacillates as to whether the release is relevant to the (b)(2) certification. *Contrast* Def. Br. 31 (not relevant) *with* Def. Br. 22 (relevant). Even assuming the appellees' joint motion for preliminary approval below did not estop them from adopting the position that the release is irrelevant (Opening Br. 21), the claim that the

release is irrelevant is insupportable. The defendants rely on three out-of-circuit cases that "upheld releases that discharged monetary claims in non-opt-out class actions." Def. Br. 42. But each of those cases predates *Wal-Mart* and *Ortiz*; one even predates *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Moreover, each was a shareholder suit wherein there was at least a colorable argument that monetary claims were incidental to stockholders' joint claims. This Circuit has reaffirmed that the preclusion of monetary claims is not permitted under (b)(2). *Gooch*, 2012 U.S. App. LEXIS 2643, at *59 n.16. *Gooch* permitted the piecemeal certification of a declaratory relief claim under (b)(2) only because there was no risk of preclusion of the monetary claims, which were to be certified under (b)(3). *Id.*; *see also generally* Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 Notre Dame L. Rev. 1057, 1068-73 (2002).

P&G admits that "the Settlement requires the Class to release certain future causes of actions (like restitution and rescission)." Def. Br. 24. This is dispositive: claims for equitable restitution are individualized and monetary; courts adjudge these claims to be non-incidental after *Wal-Mart*. *E.g., Morrow v. Washington*, No. 2-08-cv-288, 2011 U.S. Dist. LEXIS 96829, at *94 (E.D. Tex. Aug. 29, 2011); *Aho v. Americredit Fin. Servs.,* No. 10-cv-1373, 2011 U.S. Dist. LEXIS 80426, at *19-20 (S.D. Cal. July 25, 2011). Rescission, too, is non-incidental. *Andrews v. Chevy Chase Bank*, 545 F.3d 570, 577 (7th Cir. 2008). Neither is properly released in a (b)(2) proceeding.

The settling parties suggest that the release of restitution and rescission is acceptable because a legal claim for compensatory contract damages would allow class

members to recover their purchase price. Def. Br. 33; Pl. Br. 43. Even if one assumes that the parties are correct that these claims are preserved, they incorrectly characterize the remedy. The measure of compensatory damages on a breach of contract is not the purchase price but the difference between what was bargained for and what was received. *E.g.*, *Canady v. Crestar Mortg. Corp.*, 109 F.3d 969, 973 (4th Cir. 1997). Not all remedies are equivalent.

It is not for class counsel and the defendant to determine which monetary remedies will be available for class members to bring their individualized monetary claims and which will be eradicated via a mandatory release. Rule 23(b)(2), as construed with constitutional constraints in mind, demands that class members be permitted to make this decision on their own.

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

Even if this Court finds the scope of the individual releases satisfactory, the scope of the class action waiver, a self-evident burden on bringing future monetary claims, is independent grounds for rejecting the certification.[2] Both *Ortiz* and *Crawford*

[2] Defendants contend that the class action waiver is circumscribed by Rule 20, rather than Rule 18. Def. Br. 38. This is mystifyingly wrong: the relevant question is how to interpret the "Claims that were or could have been brought…" language of Settlement §VIII.C. Which *claims* may be brought is governed by Rule 18, not Rule 20. *American Lumber Corp. v. National R. Passenger Corp.*, 886 F.2d 50, 54-55 (3d Cir. 1989) (Rule 18 relevant to release of claims); *cf. also Thompson v. Bd. of Educ.*, 71 F.R.D. 398, 411-12 (W.D. Mich. 1976) (Rule 20 is inapplicable when case brought as rule 23 class action), *rev'd on other grounds*, 709 F.2d 1200 (6th Cir. 1983).

undergird Greenberg's view that *Shutts* demands a plenary right of opt-out. Opening Br. 31.

The two district-court cases P&G cites approving settlements that include class action waivers (Def. Br. 40) are inapposite and unpersuasive. In *In re Nationwide Fin. Servs. Litig.*, the restriction was limited to lawsuits "based on, or relating to, the claims and causes of action, and/or the facts and circumstances relating thereto, in the Shareholder Actions and/or the Released Claims." No. 2:08-cv-00249, 2009 U.S. Dist. LEXIS 126962 at *47 (S.D. Ohio Aug. 18, 2009). This type of limitation is wholly absent from §VIII.C in this settlement. Opening Br. 31 & n. 12. Similarly, it appears that *Fresco v. Auto. Directions, Inc.*, believed that the class action waiver was limited to the Drivers Privacy Protection Act-related claims. No. 03-CIV-61063, 2009 U.S. Dist LEXIS 125233 at *23 (S.D. Fla. Jan. 16, 2009). *Fresco*'s *ipse dixit* rejection of the objections without any analysis is not compelling, and provides no reasoning for this Court to follow suit. The parties give no public-policy reason why this Court should follow these district court cases and create a circuit split with the Seventh Circuit.

That the class action release is a bargained-for concession (Def. Br. 39-40) and that class members attempt (b)(3) certification will face serious challenges (Pl. Br. 20-21, 42) gets the parties nowhere; it does not distinguish this class action waiver from a release of individual damages claims in a similarly difficult case, which would be concededly improper. Defendants argue that the waiver is acceptable in a mandatory class because there is no substantive "right" to proceed as a class action. Def. Br. 41. This proves too much. The right for a class member to hire counsel, or to file a suit in

a convenient venue, or conduct discovery on claims are all "procedural" rights, but surely these rights could not be waived in a Rule 23(b)(2) class if the underlying substantive claim could not be waived in the same class. P&G could not enforce a *voluntary* agreement to waive procedural rights that have the effect of an impermissible waiver of the underlying substantive claim. *Compare In re American Express Merchants' Litig.*, 667 F.3d 204 (2d Cir. 2012) (striking class action waiver that made antitrust action impossible) *with AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011) (upholding class action waiver where arbitration clause sufficiently consumer-friendly to create incentive to bring small claims). P&G certainly cannot do so when the class member's agreement to the waiver is involuntary. Opening Br. 31-33.

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

Defendants argue that the unbounded class definition is acceptable because many of the cases Greenberg relies on (Opening Br. 35) involve the certification of (b)(3) classes whereas the class here was certified under (b)(2), and (b)(2) litigation classes do not require notice. Def. Br. 46-47. The argument is unavailing here: notice of a (b)(2) *settlement* is not optional, even if notice of a (b)(2) *litigation* class is. Fed. R. Civ. Proc. 23(e)(1) ("…must direct…").

In addition to Rule 23(e), "The Due Process Clause, … gives unnamed class members the right to notice of the settlement of a class action." *Fidel v. Farley*, 534 F.3d 508, 513 (6th Cir. 2008). The constitutional floor is that the notice must be "reasonably calculated… to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover*

Bank & Trust Co., 339 U.S. 306, 313 (1950). Such notice is indispensable to the (e)(5) right of objection, which exists for (b)(2) classes no less than for (b)(3) classes. It would be unfair if the same act that entered individuals into the class was to be considered a waiver of the right to object. Def Br. 47. Settling parties cannot abrogate this due-process-rooted right to object merely because defendants would prefer that a release apply to an open-ended class.

Even if Rule 23(e)(1) and (5) could be read to allow this open-ended class definition, the constitutional questions that arise under *Mullane* counsel against such an interpretation given the well-established canon of construction to avoid constitutional doubt. *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979).

While some courts have certified classes including individuals who would only enter the class at a future date (Def. Br. 45), those rulings failed to consider whether those individuals were entitled to notice and an opportunity to object.[3] Other courts and parties intuitively recognize that a class's end date should not reach beyond the notice date. *E.g., Fitzpatrick v. Gen. Mills, Inc.*, No. 09-60412, 2011 U.S. Dist. LEXIS 138939, at *4 (S.D. Fla. Dec. 2, 2011) (redefining the class as "all persons who

[3] Contrary to P&G's claims (Def. Br. 47), nothing in *In re Schering Plough Corp. ERISA Litig.,* 589 F.3d 585, 602-03 (3d Cir. 2009), "support[s] the class definition presented here." *Schering Plough* involved an interim litigation class certification, open-ended only because the end-date was to be established later to *narrow* the class after discovery determined the appropriate end date—and even that idiosyncratic definition was problematic. It did not endorse a class definition where settlement class members would be precluded from objecting because they joined the class after the objection deadline.

purchased…until the date notice is first provided…"); *Rikos v. Procter & Gamble*, No. 1:11-cv-226, 2012 U.S. Dist. LEXIS 25104, at *2 (S.D. Ohio Feb. 28, 2012) (class definition of "All persons who purchased Align[-brand probiotic supplement] until the date notice is disseminated") (denying certification on other grounds).

Accepting that 23(e)(1) and (5) limit the availability of classes that veer unbridled into the future is neither "unprecedented," nor need it be conceived of as a radical sea-change. Rather, class plaintiffs will be able to assert the same exact claims for the same exact relief; parties need only set a class end-date consistent with notice.

III. Even if the Class Could Be Certified, *Bluetooth* Demonstrates That the Settlement Is Objectively Unfair.

Defending the settlement's fairness, both parties argue that the plaintiffs' claims had a low likelihood of success. Def. Br. 48; Pl. Br. 18-20. This is a red herring: the lack of merit of plaintiffs' case certainly explains why the parties were willing to settle the case with P&G for about three million dollars. But Greenberg is not contending that the parties had to settle for six million or thirty million dollars. Greenberg is objecting that the class attorneys and representatives chose to allocate over 85% of the settlement amount to themselves, dividing the remainder between third-party cy pres recipients and class representatives, and leaving nothing for the class. It is not just absurd to suggest class counsel should garner a higher percentage of a settlement because they bring a low-merit case, but results in the perverse incentive that class attorneys would be better rewarded for bringing bad cases than meritorious ones.

Of course class counsel supports the settlement (Pl. Br. 36): so what? If class counsel did not support the settlement, there would not be a settlement, so class counsel's support tells us nothing about whether a settlement is fair if the fairness inquiry is to have any meaning. American Law Institute, *Principles of the Law of Aggregate Litig.* §3.05, *comment a* at 206 ("the lawyers who negotiated the settlement will rarely offer anything less than a strong, favorable endorsement"). After all, one would expect class counsel to support a self-serving settlement at least as much as one that meets the Rule 23(e) fairness requirement. A test that is always passed is no test at all. Rather, a "court should consider the presence or absence of an incentive for class counsel to recommend an inadequate settlement." *Id.* Here, the settlement is structured to pay off class counsel, even though the class receives nothing of value, and class counsel does not "share[] class members' interest in maximizing claim values." *Id.* The endorsement is thus legally meaningless.

The seven-factor test of *UAW v. Gen. Motors Corp.*, 497 F.3d 615 (6th Cir. 2007), goes to the fairness of the *size* of the settlement; none of the factors test for whether the settlement is impermissibly self-dealing. Thus consideration of the *UAW* factors "alone is not enough to survive appellate review." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (Ninth Circuit eight-factor test materially equivalent to *UAW* seven-factor test). Plaintiffs' lengthy explication of these and

other *UAW* factors is entirely beside the point, as those are not the grounds on which Greenberg challenges the settlement fairness.[4]

The disproportionate recovery of class counsel and the representatives is a primary indicator their own interests have been "unjustifiably advanced at the expense of unnamed class members." *Williams v. Vukovich*, 720 F.2d 909, 923 (6th Cir. 1983); *Bluetooth*, 654 F.3d at 947. Plaintiffs misconstrue Greenberg's position as a demand that the proof of purchase requirement be lifted from the money-back guarantee program. Pl. Br. 21. Not so: the parties can settle on whatever terms they like, so long as the attorneys are not benefiting themselves at the expense of the class, as they have impermissibly done here. Greenberg's complaint is that the reinstantiation of the money-back program has not provided value to the class, and the attorneys cannot justify their outsized fee on this term of the settlement. The appellees simply fail to rebut or acknowledge Greenberg's argument. Opening Br. 37-39. *First*, a large segment of the class (those who purchased during calendar year 2010 and before) already had the opportunity to participate in the money-back program; this settlement offers them nothing valuable. *Second*, the requirement of presenting the UPC code from the diaper packaging prevents the class, as described by the plaintiffs

[4] The generic endorsement of settlements in *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir. 1976) (Def. Br. 56) is inapposite. *Aro* enforced a voluntary settlement between two parties when one reneged; it certainly does not hold that Rule 23(e) and the rights of absent third-party class members are to be disregarded in the interests of settlement.

themselves,[5] from accessing the money-back offer. *Third*, when pressed to submit data regarding the first iteration of the money-back program, the parties failed to proffer evidence that they possessed.

The plaintiffs claim Greenberg waived the issue of adverse inference by not raising a discovery request before the district court. But it was the settling parties' burden to prove the value of the settlement that has been legitimately questioned. *In re Gen. Tire & Rubber Co. Sec. Litig.*, 726 F.2d 1075, 1080 (6th Cir. 1984). "Proponents of class action settlements bear the burden of developing a record demonstrating that the settlement distribution is fair, reasonable and adequate." *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983); *accord In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995); *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 196 (5th Cir. 2010). In the absence of this data, the court did not have "before it sufficient facts intelligently to approve the settlement offer." *Gen. Tire & Rubber*, 726 F.2d at 1084 n.6.

"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 Tech. v. DHL Express*, 463 F.3d 646, 654 (7th Cir. 2006). Neither appellee cites to *Synfuel*, much less distinguishes or rebuts its reasoning. Prospective injunctive relief affecting only future purchases regardless of whether they

[5] The suit was brought on behalf of those who "discarded or ceased using" the diapers. RE #25, Consolidated Complaint, at 2.

are made by a class member is not class relief. *Cf. McNair*, 2012 U.S. App. LEXIS 4593, at *29-30.

The settling parties fail to meaningfully legitimize the presence of *Bluetooth*'s two other warning signs: a "clear-sailing" agreement and a "kicker". Although *Bluetooth* was certified as a (b)(3) class (Pl. Br. 32), the fact that this case involves a mandatory (b)(2) class without an opt-out right cuts, as a matter of law, *against* the fairness of the abusive settlement terms. Opening Br. 29-30 (citing authorities); *In re Prudential Ins. Co.*, 148 F.3d 283, 323 (3d Cir. 1998) (whether class members have the right to opt-out is a factor in 23(e) equation).

While recently opining on clear-sailing clauses, this Circuit noted the problematic relationship between a disproportionate fee and a clear-sailing clause. *Gooch*, 2012 U.S. App. LEXIS 2643, at *51 (clear-sailing a non-issue where the fees are capped at 2.3% of the total expected value of the settlement). Where the fees exceed 85% of the settlement value—nearly forty times the amount at issue in *Gooch*—it is a different story.

The "kicker" provision cannot be justified by the fact that "there is no pool of monetary relief to which unawarded fees could revert" (Pl. Br. 50): *Bluetooth* had no pool of monetary relief either. Here, the remainder could have been used to amplify the terms of the money-back guarantee (perhaps offering money-back on more than one package per household, or offering money-back without presentment of the UPC code) or it could have been set to revert to the *cy pres* recipient (had one been properly designated). Alternatively, it was possible to structure the settlement as a *pro-rata*

claims-made settlement, such that the fund would have been administratively feasible given the size of the class and the typical ~1% claim rates. What is not acceptable is for the class attorneys to create a self-serving settlement term to protect their fees at the expense of the class.

IV. Plaintiffs Flunk a Legitimate 23(a)(4) Inquiry.

Plaintiffs argue against a straw man "claim of fraud and collusion." (Pl. Br. 31). But Greenberg has not alleged collusion; nor need he. While lack of collusion is *necessary* for a settlement to be fair, it is not *sufficient*. Courts "must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests … to infect the negotiations." *Bluetooth*, 654 F.3d at 947 (citation omitted). The Ninth Circuit warned that a pre-certification settlement such as this one "must withstand an even higher level of scrutiny for evidence of collusion ***or other conflicts of interest***." *Id.* at 946 (emphasis added). Greenberg's objection rests on an entirely different sort of conflict of interest than collusion: that of impermissible self-dealing by the class counsel "when counsel receive a disproportionate distribution of the settlement." *Id.* at 947 (9th Cir. 2011).

Greenberg is not claiming that the defendants were required to settle the case for a larger amount. He does dispute, however, that class counsel can arrange such a settlement where class counsel collects the vast majority of the class benefits, a share of the class benefits well in excess of the 25% benchmark,[6] with no hope of the class

[6] *E.g., Gooch*, 2012 U.S. App. LEXIS 2643, at *51 (citing *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1294 (11th Cir. 1999)).

recapturing the overage of the unreasonable fee request. Such a settlement is unfair, but it does not require collusion, just a defendant's indifference to class counsel's conflict of interest. *Staton v. Boeing*, 327 F.3d 938, 964 (9th Cir. 2003) (*quoting GM Pick-Up*, 55 F.3d at 819-20 (3d Cir. 1995)).

When class counsel negotiates more monetary benefits for itself than for the class in a consumer class action over quantifiable pecuniary claims (as opposed to, for instance, class actions over civil rights), it must structure the settlement to permit the district court to potentially cure the self-dealing. Instead, class counsel negotiated a "kicker" clause in a successful attempt to shield their fee request: the fees would come from a separate pot of money, and any reversion would go to the defendant, rather than the class. This adversely affected the class's interests without any offsetting benefit: P&G was willing to put up $3 million in cash to settle the litigation, agreeing not to challenge the fee request by the attorneys. For "no apparent reason" other than self-dealing (*Bluetooth*, 654 F.3d at 949), class counsel ensured that most of that money could not go to their own clients or to the *cy pres* recipients. This is the precise "evidence of improper incentives" which should have triggered "abandoning the presumption that the class representatives and counsel handled their responsibilities [as 23(a)(4) demands]" *UAW*, 497 F.3d at 628.

The settling parties here stress the presence of a mediator. Def. Br. 17, 54-55; Pl. Br. 32-33, 54-55. That same argument did not impress the Ninth Circuit. *Bluetooth*, 654 F.3d at 948. As Judge Alsup notes,

> There is no substitute for the requirement of district courts vetting the proposed settlement under Rule 23(e). It is also no answer to say that a private mediator helped frame the proposal. Such a mediator is paid to help the immediate parties reach a deal. Mediators do not adjudicate the merits. They are masters in the art of what is negotiable. It matters little to the mediator whether a deal is collusive as long as a deal is reached. Such a mediator has no fiduciary duty to anyone, much less those not at the table. Plaintiffs' counsel has the fiduciary duty. It cannot be delegated to a private mediator. [*Kakani v. Oracle Corp.*, No. C 06-06493 WHA, 2007 U.S. Dist. LEXIS 47515, at *31 (N.D. Cal. June 19, 2007).]

If anything, recognizing the interests of absent class members interferes with the mediator's goal of settling the case, as every dollar going to an absent class member is a dollar not going to class counsel who must agree to go forward with the settlement. It is altogether impermissible for a federal court to delegate and outsource its oversight role, especially when absent class members have no opportunity to object to the mediator about being frozen out by self-serving class counsel. Nothing in Rule 23(e) permits the parties to negotiate a self-serving agreement just because the parties used a mediator.

The terms of the settlement belie any finding of adequate representation. *See Amchem*, 521 U.S. at 619-20 (inspection of settlement terms when evaluating adequacy "altogether proper"). Plaintiffs argue that the named plaintiffs demonstrated their adequacy by releasing their individual damages claims, supposedly for the benefit of the rest of the class. Pl. Br. 39. But they were well compensated for doing so: consideration of $1,000 per child, far more than any individual class member could hope to receive. The only class beneficiaries of the prospective relief are class

members who have children who will continue to use diapers, and wish to purchase Pampers again in the future—*i.e.,* class members who are currently satisfied enough with Pampers to continue to use the product, and thus are without injury. The only class beneficiaries of the reimbursement relief is that small subset of class members who purchased Pampers after the first money-back guarantee period terminated and, defying class counsel's own characterization of the class as those who "discarded" diapers (RE #25 at 2), saved the bulky diaper packaging for over a year in the hopes a class action would provide a refund. This vanishingly small subset of class that might benefit shows not just why the class definition is problematic, but why this case is entirely within the ambit of *In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748 (7th Cir. 2011). The answer to the question of whether 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 themselves and class counsel, is obvious, and demonstrates the lack of adequate representation.

To satisfy Rule 23(a)(4), class plaintiffs and counsel must do more than present an arms-length negotiation. They must propose a settlement that does more than "leverage[s] the class device" for their own benefit, for to do so would violate 23(a)(4) by "unjustifiably advanc[ing their own interests] at the expense of unnamed class members." *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006); *Williams*, 720 F.2d at 923.

V. Fed. R. Civ. Proc. 23(h) Requires Scrutiny Into the Results Achieved.

Fed. R. Civ. Proc. 23(h) devolves a duty of "[a]ctive judicial involvement in measuring fee awards" upon the district court. Advisory Committee Notes on 2003 Amendments to Rule 23. As with the oversight of class certification and 23(e) fairness, this duty must be personally discharged and can no more be delegated to a private mediator than it can be to the settling parties themselves. But in its brief explanation of the fee's "reasonableness," this is what the district court did, as even plaintiffs admit. RE #76, Tr. at 35:6-8; Pl. Br. 55.

Whether the district court used a lodestar or "percentage of the fund" methodology, the district court should have attempted to value the relief obtained. The relief obtained is a "primary determinant" for calculating lodestar. *Rawlings v. Prudential-Bache Properties*, 9 F.3d 513, 517 (6th Cir. 1993); *Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983); *Bluetooth*, 654 F.3d at 942; *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."). Thus, even under lodestar methodology, the fee is unreasonable and cannot stand.

Greenberg previously detailed how a percentage of recovery cross-check in entirely consistent with the decision in *Rawlings*. Opening Br. 46-47. While the value of injunctive relief is sometimes difficult to quantify and manipulable by overreaching attorneys (Pl. Br. 48), in this case there was specific hard data that the district court

could have had the defendants submit to ground such a determination. In the alternative, the court could have withheld fees until a "final accounting" of benefits was provided. *ALI Principles* § 3.13(e) and *comment a*. Plaintiffs rely on *Staton* (Pl. Br. 48), but *Staton*'s solution was not to employ a straight lodestar calculation: instead it excised the non-quantifable injunctive relief from the common fund and—setting the quantifiable relief as the denominator—conducted a percentage of the recovery analysis using the lodestar and non-quantifiable relief as factors in adjusting to a higher or lower percentage. 327 F.3d at 974.

VI. Class Members Were Neither Apprised of Nor Given Adequate Opportunity to Object to Material Aspects of the Settlement.

Whether the skin treatment program is denominated as "*cy pres*" or as "injunctive relief" makes no difference as to whether class members need be informed of details of the program. The identity and location of the recipients and the constitution of their program is a material element of the relief, perhaps the only material relief in the settlement. If a *cy pres* recipient was simply an immaterial "administrative detail" (Def. Br. 59-60), courts would not invalidate distributions on the grounds that the recipient was improperly selected. *E.g. Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011); *In re Airline Ticket Commission Antitrust Litigation*, 268 F.3d 619, 625-26 (8th Cir. 2001); *see also* Sam Yospe, Note, *Cy Pres Distributions in Class Action Settlements*, 2009 Colum. Bus. L. Rev. 1014, 1027-41 (2009). Under Rule 23(e), class members must have notice and a fair opportunity to object to this material aspect of the settlement.

P&G asserts that the sum total of incentive awards is immaterial to the Settlement. Def. Br. 61. But the total incentive payout is quite significant to the 23(e) fairness of the distribution and the 23(a)(4) adequacy of the class representation. 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.

The problem is not that the class notice lacked this information; it is that the information was unavailable altogether. The parties only announced the aggregate incentive award total two weeks after the objection deadline; to this date, the class still has no way of finding out who the *cy pres* recipient is. Indeed, the *district court* did not know anything about the *cy pres* program when the settlement was adjudged fair; there is no guarantee that the money will not end up in the pocket of a relative of class counsel or a class representative or an entity related to the defendant, each of which would be objectionable. *ALI Principles* §3.07, *comment b* at 219. Rule 23(e) demands more.

VII. The Silence of the Class Is Not Consent to an Unfair Settlement.

Plaintiffs argue that the small number of objectors is a reason to find a settlement fair. Pl. Br. 37. This is wrong. Given the structure of class actions, the number of objectors will invariably be small relative to the size of the class. In a consumer class action, no class member has the financial incentive (or even the time, given short notice periods) to organize millions of class members to oppose an unfair settlement; any individual class member's objection will be relatively meaningless at

the margin, meaning that individual class members will rationally prefer to free ride off of those who do object. Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 Fla. L. Rev. 71, 73 (2007). It is a mistake, as many courts and the American Law Institute have recognized, to infer class approval from the fact of a small number of objectors. "[A] combination of observations about the practical realities of class actions has led a number of courts to be considerably more cautious about inferring support from a small number of objectors to a sophisticated settlement." *GM Pick-Up*, 55 F.3d at 812 (*citing In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 217-18 (5th Cir. 1981)); *see also Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.*, 834 F.2d 677, 680-681 (7th Cir. 1987) (Posner, J.) ("[W]here notice of the class action is, again as in this case, sent simultaneously with the notice of the settlement itself, the class members are presented with what looks like a *fait accompli*."). "Acquiescence to a bad deal is something quite different than affirmative support." *In re GMC Engine Interchange Litigation*, 594 F.2d 1106, 1137 (7th Cir. 1979).

Thus, "class reaction factor" does not weigh in favor of approval, even when there is low number of objectors in large class, when "those who did object did so quite vociferously." *GM Pick-Up*, 55 F.3d at 813; *ALI Principles* §3.05, *comment a* at 206. This Court should so hold.

CONCLUSION

Because of the multiple legal errors in certifying the class and approving the settlement, the district court's approval of the settlement should be reversed.

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Respectfully submitted,

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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 6,970 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 April 6, 2012.

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PROOF OF SERVICE

I hereby certify that on April 6, 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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