UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

GUOLIANG MA, ELIZABETH PEGUERO, SHARON MANIER, and KIN FAI LAU, on behalf of themselves and others similarly situated, Plaintiffs, v. HARMLESS HARVEST, INC., Defendant.	No. 16-cv-7102 (JMA) (SIL)
ANNA ST. JOHN, Objector.	

OBJECTION OF ANNA ST. JOHN TO PROPOSED SETTLEMENT

Adam E. Schulman (*pro hac vice*)
COMPETITIVE ENTERPRISE INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1310 L Street NW, 7th Floor
Washington, DC 20005
Phone: (610) 457-0856
Email: adam.schulman@cei.org

Attorney for Objector Anna St. John

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Rules and Statutes

Other Authorities

INTRODUCTION

There's nothing organic about this settlement. It fails to produce any compensatory value for class members; yet it still earmarks $575,000 for class counsel and the named representatives. It codifies labeling changes that the defendant voluntarily implemented well before this case was even filed. It adds a consultant to defendant's payroll for two years. None of this generates class value.

In structure and design, the proposed settlement is a close cousin of those repudiated by the Sixth Circuit in *In re Dry Max Pampers Litig.* ("*Pampers*"), 724 F.3d 713 (6th Cir. 2013) and by the Seventh Circuit in *In re Subway Footlong Sandwich Mkt'g and Sales Practices Litig.* ("*Subway*"), 869 F.3d 551, 2017 WL 3666635 (7th Cir. Aug. 25, 2017). As in those cases, this settlement's provisions sustain class counsel, the named representatives, and the defendant, but disserve class members through valueless practice changes that provide no incremental benefit over the status quo. "A class settlement that results in fees for class counsel but yields no meaningful relief for the class is no better than a racket." *Subway*, 2017 WL 3666635, at *4 (quoting *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 724 (7th Cir. 2016)). That statement is equally true here and yet the situation is worse because at least *Pampers* and *Subway* were settlements of genuine Article III controversies. This action comes before the Court as part of a prepackaged "case," genetically engineered for the purpose of granting the defendant global peace, without which it would not be willing to give class counsel and the named plaintiffs their $575,000 award.

The central problem with the settlement itself is one of allocation. If a proper case were presented, St. John would not object to Harmless Harvest resolving its liability for just over half a million dollars, but class counsel cannot capture that entire economic benefit themselves with the class receiving nothing. *E.g. Pampers*; *Subway*; *In re Bluetooth Headset Prods. Liab. Litig.* ("*Bluetooth*"), 654 F.3d 935 (9th Cir. 2011).

Class counsel owes a fiduciary duty to their client—but the client is not a free-floating abstract entity akin to the general public; rather it is the class of discrete individuals who meet the class definition by purchasing Harmless Harvest coconut water over the last half-dozen years. Rule

23's subsections afford these individuals numerous protections, several of which are flagrantly violated by this settlement. *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 617, 620, 623 (1997). This settlement flouts subsection (b)(2) because injunctive relief does not befit a class of past purchasers, especially not when defendant has already removed the allegedly unlawful representations. It flouts (a)(4), (e)(2), and (g)(4) by waiving class members' claims while allocating the entirety of the settlement proceeds to class counsel and the named representatives. *See, e.g., Gallego v. Northland Group*, 814 F.3d 123, 129 (2d Cir. 2016); *Subway; Pampers.*

BACKGROUND

The complaint alleges that Harmless Harvest has violated several consumer protection statutes through the advertising of "100% organic" or "100% raw" coconut water when in reality certain coconuts used in its manufacturing process were "greenwashed" and not organic. Dkt. 1 at ¶¶30-95. The essential procedural history is as follows:

- Mid-2015: Harmless Harvest voluntarily removes alleged misrepresentations from its label. *See* Ray Latif, *Harmless Harvest Drops "100% Raw" From Labels*, https://www.bevnet.com/news/2015/harmless-harvest-drops-100-raw-from-labels (Aug. 4, 2015) (last visited Sept. 27, 2017); Declaration of C.K. Lee (Dkt. 16) ¶35.
- October 2015: Class counsel "venture[s] into the farmlands of rural Thailand, inspecting coconut farms" and conducting interviews. Lee Decl. ¶23.
- November 2015, January 2016: Class counsel sends two demand letters to defendant. *Id.* at ¶25.
- Mid-2016: Parties mediate, negotiate, reach and sign settlement. *Id.* at ¶¶28-31.
- December 2016: Plaintiffs file complaint to effectuate class settlement and immediately thereafter move for preliminary approval. *Id.* at ¶¶32; Dkts. 1, 6.

I. Objector Anna St. John is a member of the class, and intends to appear through counsel at the fairness hearing.

Anna St. John is a member of the putative class; she purchased, at retail and for personal use, bottles of Harmless brand coconut water during the class period from a Whole Foods Market in New Orleans, Louisiana. *See* Declaration of Anna St. John ¶4. St. John, an attorney with the Competitive Enterprise Institute's Center for Class Action Fairness ("CCAF") is resident of Louisiana, Orleans Parish. St. John Decl. ¶¶2-3. Her business address is 1310 L Street NW, 7th Floor, Washington, DC, 20005 and her phone number is (917) 327-2392. St. John Decl. ¶3. St. John qualifies as a class member, with standing to object to the settlement and fee request. Compare St. John Decl. ¶¶4-5 *with* Settlement Agreement and General Release ("Settlement") (Dkt. 7-1) ¶ 2.25. Her signature can be found at the end of this objection.

St. John's colleague at CCAF, Adam Schulman is representing her *pro bono* and has been granted admission *pro hac vice*. His contact information and bar identification number can be found in the signature block of this document. As described in her Notice of Intent to Appear, St. John intends to appear at the fairness hearing. She joins any objections not inconsistent with the objections she makes below.

CCAF represents class members *pro bono i*n class actions where class counsel employs unfair procedures to benefit themselves at the expense of the class. *See e.g., Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (observing that CCAF demonstrated "why objectors play an essential role in judicial review of proposed settlements of class actions"); *Pampers*, 724 F.3d at 716-17 (describing CCAF's client's objections as "numerous, detailed, and substantive."); *Richardson v. L'Oreal USA, Inc.*, 991 F. Supp. 2d 181, 205 (D.D.C. 2013) (describing CCAF's client's objection as "comprehensive and sophisticated" and noting that "[o]ne good objector may be worth many frivolous objectors in ascertaining the fairness of a settlement."); Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 13, 2013, at A12 (calling CCAF's director "[t]he leading critic of abusive class-action settlements").

Since it was founded in 2009,[1] CCAF has "recouped more than $100 million for class members" by driving the settling parties to reach an improved bargain or by reducing outsized fee awards. Andrea Estes, *Critics hit law firms' bills after class-action lawsuits,* BOSTON GLOBE (Dec. 17, 2016); *see, e.g., In re Citigroup Inc. Secs. Litig.*, 965 F. Supp. 2d 369 (S.D.N.Y. 2013) (reducing fees by $26 million after CCAF objection). Unlike bad faith objectors, CCAF refuses to engage in *quid pro quo* settlements, does not extort attorneys, and has never withdrawn an objection in exchange for payment. It is funded entirely through charitable donations and court-awarded attorneys' fees.

Nonetheless, to preempt any possibility of a false and unjustifiable accusation of objecting in bad faith and seeking to extort class counsel, St. John would gladly stipulate to an injunction prohibiting herself from accepting compensation in exchange for the settlement of this objection. *See* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623 (2009) (suggesting inalienability of objections as solution to objector blackmail problem). St. John brings this objection through CCAF to protect the interests of the class.[2]

II. The Court has a fiduciary duty to absent members of the class.

"Class-action settlements are different from other settlements. The parties to an ordinary settlement bargain away only their own rights—which is why ordinary settlements do not require court approval." *Pampers*, 724 F.3d at 715. Unlike ordinary settlements, "class-action settlements affect not only the interests of the parties and counsel who negotiate them, but also the interests of unnamed class members who by definition are not present during the negotiations. *Id.* "[T]hus, there is always the danger that the parties and counsel will bargain away the interests of unnamed class

[1] In 2015, CCAF merged with the Competitive Enterprise Institute and became a division within CEI's law and litigation program.

[2] St. John objects to the blanket threat to depose objectors contained in the settlement and class notice. Such a threat is based not on a tailored need for discovery but simply to dissuade ordinary consumers from exercising their right of objection. *See, e.g., Corpac v. Rubin & Rothman LLC,* 2012 WL 2923514 (E.D.N.Y. Jul. 18, 2012) (quashing subpoena served on objecting class member).

members in order to maximize their own." *Id.* To forestall this danger, "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." *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 175 (3d Cir. 2013). The representatives assume a fiduciary obligation to the class, and the Court, through its oversight responsibility, itself assumes a derivative fiduciary obligation to the class. *Plummer v. Chemical Bank*, 668 F.2d 654, 658 (2d Cir. 1982).

The Court's oversight role does not end at making sure that the settling parties engaged in arm's length settlement negotiations. "In class-action settlements, the adversarial process—or what the parties here refer to as their 'hard-fought' negotiations—extends only to the amount the defendant will pay, not the manner in which that amount is allocated between the class representatives, class counsel, and unnamed class members. For the economic reality [is] that a settling defendant is concerned only with its total liability, and thus a settlement's allocation between the class payment and the attorneys' fees is of little or no interest to the defense." *Pampers*, 724 F.3d at 717-18. Thus, although it is *necessary* that a settlement is at "arm's length" without express collusion between the settling parties, it is not *sufficient. See Redman v. RadioShack Corp.*, 768 F.3d 622, 628 (7th Cir. 2014). Due to the defendant's indifference as to the allocation of the settlement funds, courts must look for "subtle signs that class counsel have allowed pursuit of their own self-interest and that of certain class members to infect the negotiations." *Pampers*, 724 F.3d at 718 (internal quotation omitted).

III. The settlement-only class certification does not satisfy the requirements of Rule 23(a)(4), 23(b)(2) or 23(g)(4).

The judicial duty to vouchsafe the rights of the absent plaintiffs extends to the decision to grant class certification, obliging district courts to conduct a "rigorous analysis" to ensure compliance with the Rule 23 certification prerequisites. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011).

Aside from trial manageability concerns, that burden is no lighter when the Court is confronted with a settlement-only class certification. In fact, the specifications of Rule 23(a) and (b) are "designed to protect absentees by blocking unwarranted or overbroad class definition" and

"demand undiluted, even heightened, attention in the settlement context." *Amchem*, 521 U.S. at 620; *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.* ("*Payment Card*"), 827 F.3d 223, 235 (2d Cir. 2016) ("added solicitude"); *Pampers*, 724 F.3d at 721 ("These requirements are scrutinized more closely, not less, in cases involving a settlement class"). Put another way, "it is not the mission of Rule 23(e) to assure the class cohesion that legitimizes representative action in the first place." *Amchem*, 521 U.S. at 623. The same "rigorous analysis" applies. *In re Target Corp. Customer Data Sec. Breach Litig.*, 847 F.3d 608, 612 (8th Cir. 2017). The proponents of certification bear the burden to demonstrate compliance with the subsections of Rules 23(a) and (b). *Johnson v. Nextel Comms. Inc.*, 780 F.3d 128, 137 (2d Cir. 2015).

Plaintiffs fail to satisfy the requirements of subsections 23(a)(4), 23(b)(2), and 23(g)(4).

A. The settlement demonstrates inadequate representation of absent class members in violation of Rule 23(a)(4) and 23(g)(4).

Rule 23(a)(4), grounded in the Due Process Clause of the Constitution, conditions class certification upon a demonstration that "the representative parties will fairly and adequately protect the interests of the class." 23(g)(4) imparts an equivalent duty on class counsel, especially weighty "when the class members are consumers, who ordinarily lack both the monetary stake and the sophistication in legal and commercial matters that would motivate and enable them to monitor the efforts of class counsel on their behalf." *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 917 (7th Cir. 2011). Together these provisions demand that the named representatives and class counsel manifest "undivided loyalties to absent class members." *Broussard v. Meineke Discount Muffler Shops*, 155 F.3d 331, 338 (4th Cir. 1998).

Here, the prospective injunctive relief-only settlement juxtaposed against a sizable $575,000 award to counsel and the named representatives, combine to indicate inadequate representation. *See, e.g., Pampers*, 724 F.3d at 721; *see also Gallego*, 814 F.3d at 129-30; *In re Razorfish, Inc. Sec. Litig.*, 143 F. Supp. 2d 304, 311 (S.D.N.Y. 2001) (Rakoff, J.) ("an excessive compensation proposal can cast in doubt the ability of proposed lead counsel to adequately represent the class.").

Subway, decided just last month, is directly on point. 2017 WL 3666635. Plaintiffs there alleged that the sandwich mega-chain had perpetrated a massive consumer fraud by selling "Footlong" sandwiches that only measured 10 or 11 inches. *Id.* at *1-*2. They settled for $1000 incentive awards to the named plaintiffs, $525,000 to class counsel and a potpourri of prospective injunctive relief for class members, including, for example, the requirement that Subway locations keep a measuring tool on the premises. *Id.* at *2-*3. The problem was that "[a] simple comparison of the state of affairs before and after the settlement" revealed the relief to be "utterly worthless." *Id.* at *4. Due to natural variability in the baking process, both before and after the settlement there was "still the same small chance that Subway will sell a class member a sandwich that is slightly shorter than advertised." *Id.* Since the representatives and counsel were extracting the only value from the settlement, the Seventh Circuit reversed the certification as contrary to 23(a)(4). *Id.* at *5.

Subway announces the general rule: "If the class settlement does not provide effectual relief to the class and its principal effect is to induce the defendants to pay the class's lawyers enough to make them go away, then the class representatives have failed in their duty under Rule 23 to fairly and adequately protect the interests of the class. And if the class representatives have agreed to a settlement that provides meaningless relief to the putative class, the district court should refuse to certify…the class." *Id.* at *4 (internal quotations omitted). Here, both class counsel and the named represented have now signed off upon a settlement that divides the entirety of the $575,000 settlement proceeds between themselves, leaving absent class members with an injunction that does not improve upon the status quo. Such representation is inadequate.

Subway's reasoning has roots in *In re Aqua Dots Prods. Liab. Litig.*, a case brought on behalf of purchasers of aqua dots,[3] toy beads that can be crafted into designs using water as an adhesive. 654 F.3d 748 (7th Cir. 2011). Children became ill after ingesting beads and it was learned that a cost-cutting Chinese manufacturer had substituted in a chemical that metabolized into the date-rape drug

[3] https://en.wikipedia.org/wiki/Bindeez

GHB. *Id.* at 749-50. The defendant instituted a voluntary recall, but plaintiffs sought to duplicate that remedy. The class failed on 23(a)(4) grounds: "A representative who proposes that high transaction costs (notice and attorneys' fees) be incurred at the class members' expense to obtain [relief] that already is on offer is not adequately protecting the class members' interests." *Id.* at 752. This settlement certification fails for the same reason as *Aqua Dots*; the representatives propose a settlement under which the defendant will "represent that it has removed all 'raw' and '100% Organic' labels from the packaging of products shipped into the United States and agrees that such labeling will remain in effect." Settlement ¶ 5.1. The settling parties cannot show that the settlement provides any significant benefit beyond Harmless Harvest's preexisting voluntary labeling changes, implemented in 2015, before the settlement, indeed before the complaint was filed. Lee Decl. ¶35. Under *Aqua Dots*, it is fatal to class certification that the plaintiffs' have not proven that the Settlement's supposed "relief" does anything for class members beyond duplicating the status quo.[4]

When the settlement is reduced to its only concrete component—the $575,000 allocated to the attorneys' fee and incentive awards—it is clear that the class counsel have prosecuted the suit "just in their interests as lawyers"[5] and that all representatives have "leverage[d]" "the class device" for their own benefit. *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006). A settlement class cannot be certified where the attorneys are the central beneficiary of that agreement; it should be "dismissed out of hand." *Subway*, 2017 WL 3666635, at *1 (quoting *Walgreen*, 832 F.3d at 724).

In fact, the path of these proceedings confirms the impression that this settlement revolves around the $575,000 fee rather than any "vigorous[] prosecut[ion] [of] the interests of the class." *Pampers*, 724 F.3d at 721. "[W]hen a plaintiff begins a lawsuit with the desire to negotiate settlement

[4] Nor can any benefit be ascribed to the defendant's agreement to hire a consultant to review its organic certifications and advise on labeling. Settlement ¶¶5.4-5.5. It requires "egocentrism" to believe that absent class members are concerned with the ongoing business operations of defendant. *Pampers*, 724 F.3d at 720; *see also infra* Section V.A. The designated consultant will serve as an employee of *Harmless Harvest*, not of *absent class members*.

[5] *Creative Montessori*, 662 F.3d at 917.

rather than the desire to be 'made whole,' and does not even press his attorney to conduct discovery to determine the likelihood of victory on the merits or to give some context to the terms of the settlement offer, the Court [should be] concerned that such a plaintiff will not vigorously prosecute the interests of a class." *Day v. Whirlpool Corp.*, 2014 WL 12461378, at *5 (W.D. Ark. Dec. 3, 2014); *see also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*("*GM Trucks*"), 55 F.3d 768, 801 (3d Cir. 1995) (doubting adequacy of representation given "the lack of significant discovery and an extremely expedited settlement of questionable value accompanied by an enormous legal fee"). The Second Circuit has expressed the need for special caution where "plaintiffs have negotiated to the verge of settlement before suit is brought." *Plummer*, 668 F.2d at 658 (distinguishing several settlements entered after robust discovery and litigation).

Of course it is even worse here. Plaintiffs negotiated beyond the verge of settlement before bringing suit, engaging in no litigation, discovery or otherwise, on the class's behalf at all before inking the settlement. As this illustrates, a defendant will fight much harder when being asked to fork over real money than when being asked to codify its existing practices in injunction form.

Federal courts have seen—and rejected—arrangements like this before. In *Pampers*, the class representatives had signed off on a settlement that granted them "incentive awards" of $1000 each per affected child, afforded class counsel a hefty fee, while leaving absent class members with prospective injunctive relief and the right to participate in a money-back guarantee program that was already available to them before the settlement. 724 F.3d 713. The Sixth Circuit found that under the terms of the agreement, adequacy of representation was lost because upon attaining the defendant's consent to supercompensatory recovery, the class representatives had no remaining "interest in vigorously prosecuting the interests of unnamed class members." *Id.* at 722. In other words, they are no longer in the same boat as class members. The negotiated settlement here mirrors *Pampers*: the named plaintiffs obtain $5000 service awards, class counsel obtains a double-lodestar fee, and absent class members receive only injunctive relief that was already available to them. Courts "should be most dubious of incentive payments when they make the class representatives whole, or (as here)

even more than whole; for in that case the class representatives have no reason to care" about the relief to absent class members. *Id.*; *see also Radcliffe v. Experian Info Solutions, Inc.*, 715 F.3d 1157, 1165 (9th Cir. 2013) (observing that incentive awards can induce a named representative to be "more concerned with maximizing [their own gain] than with judging the adequacy of the settlement as it applies to class members at large.").

Finally, in *Gallego v. Northland Group* the Second Circuit addressed a proposed settlement that provided $35,000 in attorneys' fees, a $1000 payment to the named representative, and allotted the 100,000 absent class members the right to claim a share of $16,500. 814 F.3d 123, 125-26. The district court rejected the certification as failing to meet the superiority requirement of 23(b)(3). 102 F. Supp. 3d 506, 510-11 (S.D.N.Y. 2015). The Second Circuit affirmed this rationale *and* independently remarked that there was reason to doubt whether the representation was adequate. 814 F.3d at 129. "The conclusion is reasonable that absentee class members' interests would not be best served by a settlement that required them to release any and all claims relating to similar letters from [Defendant] in exchange for as a little as 16.5 cents—or for no money at all, if they succumbed to the mass indifference predicted by [Plaintiff] himself." *Id.* at 129-30. The proposal here fares poorly even by comparison to *Gallego*. If a settlement that purports to release class claims for 16.5 cents of benefit per capita displays inadequate representation, then *a fortiori* so too does this settlement—one that confers 0 cents of benefit per capita.

Class members would be unequivocally better off opting out; yet their fiduciaries intend to bind them to a general release in exchange for no meaningful relief. Plaintiffs fail to demonstrate that the class representation satisfies either (a)(4) or (g)(4).

B. 23(b)(2) class certification is inappropriate because the class is composed of past purchasers and Harmless Harvest has already removed the offending labeling.

Rule 23(b)(2) allows a class action to be maintained if, *inter alia*, "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." For at least two reasons, injunctive relief is not appropriate with respect to the class as a whole.

First, when class members are "victims of a completed harm with no reference to ongoing injury or risk of future injury," when the definition "ensure[s] that every member would be entitled to damages, but not that every member would have standing to seek injunctive relief," (b)(2) certification is improper. *Hecht v. United Collection Bureau*, 691 F.3d 218, 223-24 (2d Cir. 2012); *accord Wal-mart*, 564 U.S. at 365 (declaring that it was error to certify a (b)(2) class for prospective relief when "about half of the class" was no longer employed by defendant). Likewise here, the class is defined as past purchasers of the product; inevitably there are many members of the class who will never purchase the product again (perhaps some decided to try coconut water on a lark and were less than impressed).

Second, when the class no longer faces a threat of harm because defendant has removed the objectionable labeling or otherwise eliminated the allegedly unlawful conduct, (b)(2) certification is not appropriate. *In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 408 (S.D.N.Y. 2015). Just as in *Scotts EZ*, the defendant here removed the offending labeling and the class no longer faces a threat of harm necessarily to justify (b)(2) certification.

Especially given defendant's remedial action, this Court should not be satisfied that "a reasonable plaintiff, based on…economic calculus, would have sued solely for [injunctive relief], not merely that a lawyer could have been found who would have located a plaintiff and brought a class action in the hope of a fee." *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1122 (8th Cir. 2005) (quoting *In re Rezulin Prods. Liab. Litig.,* 210 F.R.D. 61, 73 (S.D.N.Y. 2002)).

IV. Having already reached settlement with the defendant, this action does not present a "case or controversy" within the meaning of Article III.

The lack of adequate representation is the symptom of a bigger problem—there is no "case or controversy" here. In an irregular cart-before-the-horse maneuver, plaintiffs first negotiated a classwide settlement with defendant and only then filed this case in efforts to bind absent class members to the prepackaged agreement. *See* Settlement ¶¶1.6-1.7. As a result, the most nuclear element of any Article III "case or controversy"—adverseness between the two parties—has been lacking since the inception and this action should be dismissed as non-justiciable.

To initiate proceedings in federal court, one "must demonstrate, among other requirements… an ongoing interest in the dispute on the part of the opposing party that is sufficient to establish concrete adverseness." *Bond v. United States*, 564 U.S. 211, 217 (2011) (internal quotation omitted); *accord Evans v. Lynn*, 537 F.2d 571, 591 (2d Cir. 1975) (*en banc*) ("presence of adverse interests" is the "hallmark of a case or controversy"). "There is simply no rational means of defining the terms 'case' or 'controversy' to include a proceeding in which, from the outset, nothing is disputed and the parties are in complete agreement." Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 548 (2006) (hereinafter "Redish"). Here, there is no concrete adverseness; the parties settled their dispute and are cooperating to seek the same legal outcome: certification of the class and approval of the executed settlement. A cursory inspection of the 17 entries on the case docket reveals as much—not a single contested motion. "[T]he absence of a genuine adversary issue between the parties" means that the "court may not safely proceed to judgment." *United States v. Johnson*, 319 U.S. 302, 304 (1943). The case must thus be dismissed.

Article III requirements are not relaxed merely because the putative case is a class action. *Denney v. Deutsche Bank AG,* 443 F.3d 253, 263 (2d Cir. 2006); *see also Cent. States Se. & Sw. Areas Health and Welfare Fund v. Merck-Medco ManagedCare*, 433 F.3d 181, 197 (2d Cir. 2005) (vacating and remanding for further consideration of constitutional standing issue). Thus, the rule from bilateral litigation applies: "When both parties affirmatively desire the same result, no justiciable case is presented." *Kirkland v. New York State Dep't of Corr. Servs.*, 1988 WL 108485, at *3 (S.D.N.Y. Oct. 12, 1988) (citing *Moore v. Charlotte–Mecklenburg Bd. of Educ.*, 402 U.S. 47 (1971)). "Judicial power is not exercised…to review and confirm the wisdom of private settlements already reached and honored." Wright, Miller & Cooper, 13 FEDERAL PRACTICE AND PROCEDURE § 3530 (2017).

In *Lord v. Veazie,* a seminal case on adverseness, the Supreme Court confronted litigants who, though formally independent, were cooperating to achieve the same legal result:

> The objection in the case before us is . . . that the plaintiff and defendant have the same interest, and that interest adverse and in conflict with the interest of third persons, whose rights would be seriously affected if the question of law was decided in the manner that both of the parties to this suit desire it to be. A judgment entered under such circumstances, and for such purposes, is a mere form. . . . A judgment in form, thus procured, in the eye of the law is no judgment of the court. It is a nullity, and no writ of error will lie upon it.

49 U.S. 251, 255-56 (1850).

The antebellum Court could not have anticipated the class action device, let alone prepackaged class action settlements, but it describes the dynamic precisely. The parties here had exactly the same interest in the lawsuit *from the moment it was filed*—certifying the class and settling the case. As such, neither will present an aggressive case that the class is not certifiable. The interests of "third persons"—class members—would be "seriously affected" by the ruling the parties seek: they would be bound by the certification and settlement, and stripped of their claims, even those claims that have not yet accrued. *See* Settlement ¶8. This is a "merely colorable dispute[] got up to secure an advantageous ruling from the Court," precisely the type of "collusive" suit rejected by the Supreme Court in *Lord. Poe v. Ullman*, 367 U.S. 497, 505 (1961).[6] Under such circumstances, the case should be dismissed. *Kirkland*, 1988 WL 108485, at *3 (citing *Lord*, 49 U.S. 251).

"The only conceivable reason that class counsel in this position files a complaint and request for certification with the court, rather than simply embodying the terms of their private agreement in an enforceable contract, is to bind absent class members to a settlement negotiated in their absence." Redish at 563. This arrangement serves the defendant's desire for global peace and counsel's desire for handsome personal payments, but it does not serve the interests of the class, nor the interests of the judiciary in staying within the limits of Article III's Judicial Power.

[6] We do not mean to evoke images of perfidious conspiracies hatched in smoky backrooms. By "collusive," we refer simply to the "far broader" Article III meaning that "includes any suit in which, from the outset, the parties are in agreement as to the outcome. It includes fully open prelitigation agreements between the parties, and those that are not, on their face, deemed to be unethical or unfair." Redish, *supra* at 551.

The concrete adverseness requirement of Article III serves several valuable prophylactic ends, both public and private, including but not limited to protecting the future-looking interests of absent third-parties from judgments that are not result of a properly adversarial adjudication (literally absent class members here). Redish at 570-587. It also "serves as a fulcrum of performance of the judiciary's proper role within our governmental framework" thus preventing the judiciary from straying into legislative or executive domains. *Id.* at 549-50; *see also id.* at 584-87.

Adherence to the adverseness requirement reduces the possibility of a "reverse auction", "a technique by which the defendant solicits a settlement…by organizing individual settlement negotiations with various plaintiffs' attorneys. Pursuant to these negotiations, plaintiffs' counsel compete against one another to secure position as class counsel, motivated by the attorney's fees that will accompany settlement. The lowest bid for the value of the class's claims wins. This practice has been widely thought to deprive class members of the fair value of their claims." Redish at 558-59; *see also* Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951, 960-62 (2014) (discussing the pitfalls of reverse auctions); *Reynolds v. Beneficial Nat. Bank*, 288 F.3d 277, 283 (7th Cir. 2002) (although "no proof that the settlement was actually collusive in the reverse-auction sense" circumstances such as agreement to expand class beyond previously-pleaded definition "demanded closer scrutiny"). Although St. John does not suggest a reverse auction occurred here, it does not change the fact that approving settlements signed before the filing of a complaint is fertile ground for the breeding of reverse auctions.

CCAF has objected to dozens of settlements that preceded certification and has never objected that any of those lacked the adverseness necessary under Article III. That is because there is a qualitative difference between a situation where a class settlement follows the inception of adversarial litigation and the situation here where the settlement preceded the initiation of the entire litigation. In the former situation, "an Article III court has the jurisdiction to enter any order—including dismissal or settlement approval—that is incidental or ancillary to the underlying, justiciable proceedings." Redish at 570 n.100; *see U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship.*, 513

U.S. 18, 21 (1994) (authorizing federal courts, after a settlement moots a case, to "make such disposition of the whole case as justice may require" including "enter[ing] orders necessary and appropriate to the final disposition of a suit"). In the latter situation, the dispute between the parties never ripens into a case because by the time the matter reached the courthouse steps, the parties are no longer adversarial. "[W]hen a suit that is adverse at the outset settles, we can be reasonably assured that the suit was not brought solely for the purpose of legally or practically binding future litigants." Redish at 580.

We are aware of only two cases where similar objections to the Article III adverseness requirement were raised in connection with a putative class settlement entered before the filing of a class complaint. Both decisions held that there was no Article III problem. *In re Asbestos Litig.*, 90 F.3d 963, 988-89 (5th Cir 1996); *Carlough v. Amchem Prods. Inc.*, 834 F. Supp. 1437, 1462-65 (E.D. Pa. 1993). And both decisions were later reversed on appeal without reaching the Article III question. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (reversing *sub nom. Asbestos Litig.*); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1993), *aff'd sub nom Amchem Prods. Inc. v. Windsor*, 521 U.S. 591 (1997) (reversing *sub nom Carlough*). Although they did not decide the Article III issue, the Supreme Court in both *Amchem* and *Ortiz* urged that "Rule 23's requirements must be interpreted in keeping with Article III constraints." 521 U.S. at 613; 527 U.S at 831.[7]

As in *Amchem* and *Ortiz*, the lack of adverseness has contributed to other violations of Rule 23's strictures, most notably the inadequacy of the class's representation. Because there is no case or controversy, the Court should dismiss the action as non-justiciable.

[7] *Amchem* and *Ortiz* each found issues involving Rule 23 prerequisites to be "logically antecedent" to the issue of justiciability. This Circuit has interpreted that language to call for case-by-case discretion as to the order in which the court addresses the two issues. *Mahon v. Ticor Title Ins.*, 683 F.3d 59, 65 (2d Cir. 2012). All other sections of this objection presume that the Court either believes it has been presented with a justiciable Article III controversy, or wants to reach those issues first.

V. Even if the class is certifiable, and the case justiciable, this settlement is not fair.

As discussed *supra* §§ II-IV, this Court should reject the requested class certification or dismiss the action for lack of justiciability. Certification arguments can bleed into the corollary 23(e)(2) question of whether the settlement is "fair, reasonable and adequate." For instance, if final injunctive relief is not appropriate respecting the class as a whole, any settlement that offers only injunctive relief will be *per se* inadequate. Similarly, when the terms of settlement manifest inadequate representation of absent class members, it follows that the settlement is often itself unfair. Nonetheless, there are independent reasons that this Court should reject the settlement under 23(e) even if it accepts that the class certification itself is viable.

Namely, the conjunction of attorneys' fees, incentive awards, and no monetary relief for class members signals an unfair, lawyer-driven settlement. The settlement agreement permits class counsel to seek, unopposed, an award of fees, costs, and class representative awards totaling up to $575,000. Settlement ¶10.1. If any amount less than the full fee is awarded, it for "no apparent reason" is structured to revert to the defendant. *Blueooth*, 654 F.3d at 949. Putative class members are entitled only to injunctive therapeutic relief that offer no demonstrable improvement over the status quo ante. Settlement ¶5. As in *Pampers*, the signs of an unfair deal that affords preferential treatment to class counsel are "not particularly subtle." 724 F.3d at 718.

The burden of proving settlement fairness rests with the moving party. *Pampers*, 724 F.3d at 718 (compiling cases and authorities). And because the settlement here is pre-certification, (*pre-complaint* even!), an even higher degree of careful scrutiny is required. *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (citing cases). Approval of a pre-certification settlement will occasion appellate review of "the entire settlement, paying special attention to the terms of the agreement containing convincing indications that the incentives favoring pursuit of self-interest rather than the class's interest in fact influenced the outcome of negotiations." *Dennis v. Kellogg Co.*, 697 F.3d 858, 867 (9th Cir. 2012) (internal quotation omitted).

The plaintiffs belabor the nine *Grinnell*[8] fairness criteria in their preliminary approval papers. Memorandum in Support of Preliminary Approval ("MPA") (Dkt. No. 6) at 12-18. While satisfaction of those factors is necessary for approval under Rule 23(e), it is not sufficient. Like the multi-factor tests of other circuits[9]—the *Grinnell I* factor test is not exhaustive. *Grinnell I*'s test simply does not provide an exclusive list of reasons to reject a settlement. *See, e.g.*, *Payment Card*, 827 F.3d 223 (reviewing settlement and remanding to cure intra-class conflict); *Denney*, 443 F.3d 253 (reversing approval due to a provision that was unfair to a non-settling defendant); *Plummer*, 668 F.2d at 660 (affirming rejection of settlement due to "preferential treatment" afforded the named plaintiffs).

The most common settlement defects are ones of allocation. Again, this is because the adversarial process does not safeguard the rights of those absent from the table. Allocational issues cannot be waived away simply by structuring the settlement to provide "separate" attorneys fees, rather than as a traditional common fund. *See Pampers*, 724 F.3d at 717-18; *Bluetooth*, 654 F.3d at 943. "That the defendant in form agrees to pay the fees independently of any monetary award or injunctive relief does not detract from the need carefully to scrutinize the fee award." *Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003). Nor does the presence of a mediator assure a fair allocation. *Bluetooth,* 654 F.3d at 948-49 (neither presence of neutral mediator nor separation of fee negotiations from other settlement negotiations demonstrates that a settlement is fair).[10]

---

[8] *Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) (*Grinnell I*).

[9] *See, e.g., Pampers*, 724 F.3d at 718 (looking beyond Sixth Circuit's seven-factor test to find settlement unfair when it constitutes "preferential treatment" for class counsel); *In re Baby Prods Antitrust Litig.*, 708 F.3d 163, 174 (3d Cir. 2013) (adding to Third Circuit's nine-factor fairness test, a new consideration: "the degree of direct benefit provided to the class"); *Bluetooth*, 654 F.3d at 946 (consideration of eight-factor test "alone is not enough to survive appellate review).

[10] *See also Kakani v. Oracle Corp.*, No. C 06-06493 WHA, 2007 WL 179377 (N.D. Cal. Jun. 19, 2007); James Richard Coben, *Creating a 21st Century Oligarchy: Judicial Abdication to Class Action Mediators*, 5 PENN ST. Y.B. ARB. & MEDIATION 162, 163 (2013) (deference to mediators "is an abdication of

As the Second Circuit has described it, "The concern is not necessarily in isolating instances of major abuse, but rather is for those situations short of actual abuse, in which the client's interests are somewhat encroached upon by the attorney's interests." *In re Agent Orange Prods. Liab. Litig.*, 818 F.2d 216, 224 (2d Cir. 1987). In accord with *Agent Orange's* directive to root out situations where the class's interests are encroached by the attorneys' interests, the Ninth Circuit has identified three warning signs of a class action settlement that is inequitable as between class counsel and the class: 1) a disproportionate fee allocation; 2) a clear sailing clause; and 3) a fee reversion/kicker clause. *Bluetooth*, 654 F.3d at 947-48.

A. Disproportionate fees

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." *Id. Accord GM Trucks*, 55 F.3d at 803 ("[N]on-cash relief…is recognized as a prime indicator of suspect settlements."); *Richardson*, 991 F. Supp. 2d at 204 (denying approval of settlement that allocated nearly $1 million to attorneys; $1000 to each class representative, and only prospective labeling changes for the class members); *Allen v. Similasan Corp.*, 318 F.R.D. 423 (S.D. Cal. 2016) (denying approval of settlement that allocated $550,000 to attorneys; $2500 to each class representative, and only prospective labeling changes for the class members). This is an example of the latter scenario; the class receives solely injunctive relief while the agreement permits class counsel to seek, unopposed, an award of fees, costs and incentive awards of $575,000.

A proportionate attorney award is roughly 25% of the settlement value.[11] Conversely, an award that vastly exceeds this benchmark is disproportionate and renders the settlement unfair. *See,*

---

judicial fiduciary duty to ensure that proposed class action settlements are fair to absent class members").

[11] *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorneys Fees & Expenses in Class Action Litigation: 1993-2008*, 7 J. OF EMPIRICAL LEGAL STUD. 248, 262 (2010) (surveying cases and finding a mean fee in consumer cases of 25%); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 833 (2010) (analyzing 688 class action

e.g., Pampers, 724 F.3d 713 (vacating settlement where fees cannibalized $2.7 million of the $3.1 million constructive common fund value); *Bluetooth*, 654 F.3d at 945 (vacating approval where fees amounted to more than 83% of the constructive common fund); *Pearson*, 772 F.3d at 781 (69% fee is "outlandish"); *Brown v. Sega Amusements, U.S.A., Inc.*, 2015 WL 1062409 (S.D.N.Y. Mar. 9, 2015) (rejecting settlement where class counsel sought 56% of the proceeds); *In re Excess Value Ins. Coverage Litig.*, 598 F. Supp. 2d 380, 390 (S.D.N.Y. 2005) (it's "anomalous and unacceptable for counsel to fare better than the Class."). To reach the appropriate ratio here, the class benefit would have to be valued at more than $2 million. And the burden of proving that quantum of benefit lies with the proponents of the settlement, *Pampers*, 724 F.3d at 719.

But, as a matter of law, the injunctive relief that this settlement offers is not worth anywhere near $2 million. For a period of two years from the effective date, the defendant agrees to abide by labeling changes it already made and agrees to hire a consultant to review organic certifcations. Settlement ¶ 5.

First and foremost, voluntary pre-settlement changes, later duplicated in settlement, do not count as a compensable class benefit. *Subway*, 2017 WL 3666635, at *4 (comparing "state of affairs before and after the settlement" to find relief "utterly worthless"); *Pampers*, 724 F.3d at 719; *Staton v. Boeing Co.*, 327 F.3d 938, 961 (9th Cir. 2003). "[A] settlement agreement on paper that appears to be a dam holding back a flood is superfluous if there is nothing to hold back." *Grok Lines Inc., v. Paschall Truck Lines, Inc.*, 2015 WL 5544504, at *3 (N.D. Ill. Sept. 18, 2015). As in *Grok Lines*, the changes codified in this settlement are "nothing more than ordinary steps that any business might take on its own."[12] In fact, Harmless Harvest *did* take these steps months before plaintiffs served their first demand letter. Further codification of that relief in a settlement injunction is "of no real value" since

settlements in 2006 and 2007 and finding a mean of 25% and a median of 25.4% for the award of attorneys' fees "with almost no awards more than 35 percent").

[12] 2015 WL 5544504, at *5

it "does not obligate [the defendant] to do anything it was not already doing." *Koby v. ARS Nat'l Servs., Inc*, 846 F.3d 1071, 1080 (9th Cir. 2017); *see also Hofmann v. Dutch LLC*, 2017 WL 840646, at *7 (S.D. Cal. Mar. 2, 2017) (refusing to credit injunctive relief when defendant had voluntarily revised its labeling before the settlement).

But even if the settlement relief were not duplicative, class counsel do not meet their burden to quantify any degree of benefit. *See Koby*, 846 F.3d at 1079. Class action settlements are plagued by pie-in-the-sky valuations of inestimable injunctions, attempts which do nothing to serve the interest of the class and everything to serve the interest of class counsel. *See, e.g., Kaplan v. Rand*, 192 F.3d 60, 70-72 (2d Cir. 1999) ("Far from providing a remedy for clearly identified past misconduct, the settlement in this case strives to provide therapeutic 'benefits' that can only be characterized as illusory"); *Polar Int'l Brokerage Corp. v. Reeve,* 187 F.R.D. 108, 114 (S.D.N.Y. 1999) (discussing the "'politely' collusive settlement: one providing a nonpecuniary benefit of very little value to shareholders and a fairly substantial award of attorney's fees to plaintiff's counsel for a modest amount of work")."Precisely because the value of injunctive relief is difficult to quantify, its value is also easily manipulable by overreaching lawyers seeking to increase the value assigned to a common fund." *Staton*, 327 F.3d at 974.

Based on nothing more than the fact that Harmless Harvest has reduced their prices since the labeling changed, class counsel attests a "belief that …counsel's fees represent a percentage less than 1% of the total monetary benefit enjoyed by the class." Lee Decl. at ¶¶34-35. This is a pseudo-scientific valuation that "quite rightly" count for nothing. *Pearson*, 772 F.3d at 786. Mr. Lee has not been qualified as an expert, nor in any event, does his technical testimony display the rigor necessary under F.R.E. 702. Assertions of a "fanciful, contrived, and mutually inconsistent character" that cannot carry the day. *Schechtman v. Wolfson*, 244 F.2d 537, 540 (2d Cir. 1957).

However, even if the parties were to disambiguate which of the injunctive changes are non-duplicative and even if they were to provide a credible quantification of the value to the public at large of said changes, a $2 million *class* valuation still could not stand as a matter of law, simply

because "The fairness of the settlement must be evaluated primarily based on how it *compensates class members*—not on whether it provides relief to other people, much less on whether it interferes with the defendant's marketing plans." *Pampers*, 724 F.3d at 720 (internal quotation omitted; emphasis in original). "Future purchasers are not members of the class, defined as it is as consumers who have purchased [the product]." *Pearson*, 772 F.3d at 786. These are proper recognitions of the principle that the class is composed of people who interacted with defendants *in the past*; while the prospective injunctive relief can only benefit those who interact with defendants *in the future*. *See, e.g.*, *Koby*, 846 F.3d at 1079 (observing "an obvious mismatch between the injunctive relief provided and the definition of the proposed class"). "No changes to future advertising by [defendant] will benefit those who already were misled by [defendant's] representations regarding [the product's quality.]" *True v. Honda*, 749 F. Supp. 2d 1052, 1077 (C.D. Cal. 2010).[13]

Thus, the settlement, which includes a plenary waiver of class members' monetary claims, should not be approved, as it would provide class members *qua* class members with no marginal value above members of the general public. *E.g., Koby*, 846 F.3d at 1080 ("Because the settlement gave the absent class members nothing of value, they could not fairly be required to give up anything in return."); *Allen*, 318 F.R.D. at 428 (repudiating settlement where class members "would be better off opting out, since they would receive the same benefits of the injunctive relief in the Settlement Agreement but would not be giving up their right to sue.").

It may be true that "every square centimeter" of a Harmless Harvest bottle is "extremely valuable" to defendant, but it is "egocentrism" to presume that that the same space is equally

[13] Commentators have also recognized the problem of fictive injunctive relief settlements that remit no benefit to class members. *See e.g.*, Erin L. Sheley & Theodore H. Frank, *Prospective Injunctive Relief and Class Settlements*, 39 HARV. J. L. & PUB. POL'Y 769, 832 (2016) ("[T]here should be a presumption against approval of such settlements or awarding fees for such relief outside of the actions against public institutions originally contemplated by Rule 23(b)(2)."); Howard Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. 859, 872-78 (2016) (discussing the warning sign of "spurious injunctive relief").

valuable to class members. *Pampers*, 724 F.3d at 720. Illusory non-class injunctive relief simply does not justify a $575,000 award to class counsel and the named representatives. The first warning sign of a lawyer-driven deal is apparent.

B. Clear-sailing

A second telltale indication of preferential treatment is the presence of a "clear-sailing" clause (whereby defendant consents not to challenge the award of fees to plaintiffs' counsel). *Bluetooth*, 654 F.3d at 948. This is also present here. Settlement ¶ 10.1. "Provisions for clear sailing clauses 'decouple class counsel's financial incentives from those of the class, increasing the risk that the actual distribution will be misallocated between attorney's fees and the plaintiffs' recovery.'" *Vought v. Bank of Am.*, 901 F. Supp. 2d 1071, 1100 (C.D. Ill. 2012) (quoting *Int'l Precious Metals Corp. v. Waters*, 530 U.S. 1223, 1224 (2000) (O'Connor, J., respecting the denial of certiorari)). It indicates that the class attorneys have negotiated "red-carpet treatment" to protect their fee award while urging class settlement "at a low figure or less than optimal basis." *Pampers*, 724 F.3d at 718 (quoting *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991)).[14] As such, a clear-sailing clause must be considered a "questionable feature" that "at least in a case…involving a non-cash settlement award to the class…should be subjected to intense critical scrutiny." *Redman*, 768 F.3d at 637; *see also Weinberger*, 925 F.2d at 525; *accord Bluetooth*, 654 F.3d at 949; William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 TUL. L. REV. 813, 816 (2003) (courts should "adopt a per se rule that rejects all settlements that include clear sailing provisions.").

[14] Even if class benefits and fees were negotiated separately (and class counsel's declaration conspicuously omits whether fee negotiations were separate here) that does nothing to allay the inherent conflict when representatives negotiate for their own compensation unless "fee negotiations [are] postponed until the settlement was judicially approved." *In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortg. Litig.*, 418 F.3d 277, 308 (3d Cir. 2005). Even if separate negotiation could protect the class, it has not occurred here. *See Pearson*, 772 F.3d at 786-87 (finding implausible that separate negotiation could benefit the class); *Richardson*, 991 F. Supp. 2d at 204 (separate negotiation cannot cure unfair allocation between class and counsel).

C. Fee segregation

A third telltale indication of preferential treatment is the presence of a "kicker" clause (whereby class counsel's fee fund is segregated from the class benefit such that any unawarded fees revert to the defendant rather than going to benefit the class). *Bluetooth*, 654 F.3d at 948-49. This too is present here. Settlement ¶10.3.4. A reversionary fee structure is an inferior settlement structure for one principal reason: the segregation of parts means that the Court cannot remedy any allocation issues by reducing fee awards and/or named representative payments. *See Pearson*, 772 F.3d at 786; *Bluetooth*, 654 F.3d at 949 ("clear sailing… reveals the defendant's willingness to pay, but the kicker deprives the class of that full potential benefit if class counsel negotiates too much for its fees.").

Fee segregation thus has the self-serving effect of protecting class counsel by deterring scrutiny of the fee request. *See Pearson*, 772 F.3d at 786 (calling it a "gimmick for defeating objectors"). A court and potential objectors have less incentive to scrutinize a request because the kicker combined with the clear-sailing agreement means that any reversion benefits only the defendant that had already agreed to pay that initial amount. Charles Silver, *Due Process and the Lodestar Method*, 74 TUL. L. REV. 1809, 1839 (2000) (such a fee arrangement is "a strategic effort to insulate a fee award from attack"); Lester Brickman, LAWYER BARONS 522-25 (2011) (arguing that reversionary kicker is *per se* unethical).

* * *

Given the disproportionate, segregated, and unopposed fees that have been negotiated, this settlement must fall. When injunctive relief "may be largely or even entirely worthless" "even a modest award of attorneys' fees...is excessive." *Walgreen*, 832 F.3d at 721. Even were the fees reduced by 80%, the settlement would still be too lopsided to approve. *See Koby*, 846 F.3d 1071 ($67,500 - $0 ratio untenable); *Crawford v. Equifax Payment Info*, 201 F.3d 877, 882 (7th Cir. 2000) ($78,000 - $0 ratio unsupportable).

VI. If the Court approves the certification and settlement and finds that it has jurisdiction, it should decline to grant the $555,000 attorneys' award requested.

Class counsel seek a fee award of $555,000, a multiplier of 2.08 on their proclaimed lodestar, the details of their billing records sealed, inaccessible to members of the public or the class.

"The court's review of the attorneys' fees component of a settlement agreement is… an essential part of its role as guardian of the interests of class members. To properly fulfill its Rule 23(e) duty, the district court must not cursorily approve the attorney's fees provision of a class settlement or delegate that duty to the parties." *Strong v. BellSouth Telecomms., Inc.*, 137 F.3d 844, 850 (5th Cir. 1998)[15]; *GM Trucks*, 55 F.3d at 819-20 (3d Cir. 1995) (requiring "a thorough judicial review of fee applications...in all class action settlements").

As described above, the constructive common fund / segregated fee structure does not remedy any inherent conflicts of interest between class counsel and the class. Rather, the plaintiffs' argument (Dkt. 15 at 23) against scrutiny of their fees goes to show why *Bluetooth* was correctly decided and why the class is worse off when fees are entirely segregated from class relief. In line with plaintiffs' urging, a court generally has less motivation to scrutinize a fee award when the kicker combined with the clear sailing agreement means that any reversion will only go to the defendant that had already agreed to pay that amount. A segregated fee fund discourages thorough review, but the Court should discharge its responsibilities nevertheless, as district courts in this Circuit have done previously. *Excess Value*, 598 F. Supp. 2d 380, 391 (awarding $2.4 million rather than the $19.3 million requested to be commensurate with the class's settlement value); *In re Magazine Antitrust Litig.*, 00 Civ. 4889 (RCC), 2004 WL 253325 (S.D.N.Y. Feb. 5, 2004) (denying fee entirely based on lack of value of non-monetary class relief); *see also Padro v. Astrue*, 11-CV-1788 (CBA) (RLM), 2013 WL 5719076, at *9 (E.D.N.Y. Oct. 18, 2013) ("The Court does not agree with plaintiffs that the lack of a [pure] common fund necessarily vitiates conflict of interest concerns.").

Vindicating the Court's "overarching concern for moderation" is made difficult by the fact that the plaintiffs have not publicly revealed detailed lodestar records to allow objecting class members to vet those properly. *Goldberger v. Integrated Res.*, 209 F.3d 43, 53 (2d Cir. 2000); *see* Dkt. 16-1. This *in camera* submission of billing records improperly "paralyze[s] objectors" and frustrates

[15] Added in 2003, there is now also a duty under Rule 23(h).

absent class members' Rule 23(h) right of objection. *Reynolds,* 288 F.3d at 286; *Redman*, 768 F.3d at 637-38; *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994-95 (9th Cir. 2010); *see generally Shane Group Inc.*, *v. BCBS of Mich.*, 825 F.3d 299 (6th Cir. 2016) (discussing sealing records in class action).

"If plaintiffs and their attorneys are acting like they have something to hide from the absent class members, perhaps it's because they do." *Felix v. Northstar Location Servs.*, 290 F.R.D. 397, 408 (W.D.N.Y. 2013). It seems difficult to believe that nearly 600 hours were reasonably expended on a litigation where so little occurred. Even if the expenditures were reasonable though, it does not mean an award in that amount is reasonable. "An attorney who works incredibly hard, but obtains nothing for the class, is not entitled to fees calculated by any method…Plaintiffs attorneys don't get paid simply for working; they get paid for obtaining results." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1182 (9th Cir. 2013). Indeed, appropriate use of the lodestar calibrates the award downward, not upward, where the degree of success achieved is disproportionately small. *See Bluetooth*, 654 F.3d at 942-44 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 434-36 (1983)). The 2.08 multiplier sought is excessive. *See Flores v. Mamma Lombardi's of Holbrook, Inc.*, 104 F. Supp. 3d 290, 315 (E.D.N.Y. 2015) ("In the wake of [*Perdue v. Kenny A*, 559 U.S. 554 (2010)], it is difficult to reconcile the cases…suggested that multipliers are "regularly" awarded.").

No matter whether a percentage or lodestar basis is used, a court must assiduously discharge its duty to class members. But more than that, it should be cognizant of its duty to the public at large. It has been long recognized that "[f]or the sake of their own integrity, the integrity of the legal profession, and the integrity of Rule 23, it is important that courts should avoid awarding 'windfall fess' and that they should likewise avoid every appearance of having done so." *Grinnell I*, 495 F.2d 448, 469. Otherwise, courts risk reifying the lamentable proverb that "[a] lawsuit is a fruit tree planted in a lawyer's garden." *Id.* (quotation omitted).

CONCLUSION

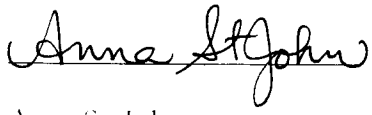
For the foregoing reasons, St. John respectfully requests that the Court dismiss the case for want of Article III standing. Barring that, the Court should deny class certification, deny settlement approval and deny attorneys' fees.

Dated: September 29, 2017.

Adam E. Schulman (*pro hac vice*)
DC Bar No. 1001606
COMPETITIVE ENTERPRISE INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1310 L Street, NW, 7th Floor
Washington, DC 20005
Phone: (610) 457-0856
Email: adam.schulman@cei.org

Attorney for Anna St. John

I, Anna St. John, am the objector. I sign my foregoing written objection pursuant to paragraph 12 of the Court's Preliminary Approval Order (Dkt. 11 at 5).



Anna St. John

Certificate of Service

The undersigned certifies he electronically filed the foregoing Objection and associated Declaration and Notice of Intent to Appear via the ECF system for the Eastern District of New York, thus sending the Objection in writing to the Clerk of the Court and also effecting service on all attorneys registered for electronic filing.

Dated: September 29, 2017.

Adam E. Schulman