No. 19-56297

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT BRISENO, ET AL.,
Plaintiffs–Appellees,

v.

M. TODD HENDERSON,
Objector–Appellant,

v.

CONAGRA FOODS, INC.
Defendant–Appellee.

Appeal from the United States District Court
for the Central District of California, No. 2:11-cv-05379

BRIEF OF THIRTEEN ATTORNEYS GENERAL AS *AMICI CURIAE* IN SUPPORT OF OBJECTOR-APPELLANT AND REVERSAL

Mark Brnovich
Attorney General
Oramel H. (O.H.) Skinner
Solicitor General
Counsel of Record
Kate B. Sawyer
Assistant Solicitor General
Keena Patel
Assistant Attorney General
OFFICE OF THE ARIZONA
ATTORNEY GENERAL
2005 N. Central Avenue
Phoenix, Arizona 85004
(602) 542-5025
o.h.skinner@azag.gov

Counsel for Amicus Arizona Attorney General's Office
(Additional counsel listed after signature block)

April 10, 2020

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STATEMENT OF AMICI CURIAE[1]

The Attorneys General of Arizona, Alabama, Alaska, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Missouri, Ohio, Oklahoma, South Carolina, and Texas are their respective States' chief law enforcement or legal officers. Their interest here arises from two responsibilities. *First*, the Attorneys General have an overarching responsibility to protect their States' consumers. *Second*, the undersigned have a responsibility to protect consumer class members under CAFA, which envisions a role for state Attorneys General in the class action settlement approval process. *See* 28 U.S.C. § 1715; *see also* S. Rep. No. 109-14, 2005 U.S.C.C.A.N. 3, 5 (requirement "that notice of class action settlements be sent to appropriate state and federal officials" exists "so that they may voice concerns if they believe that the class action settlement is not in the best interest of their citizens"); *id.* at 35 ("notifying appropriate state and federal officials ... will provide a check against inequitable settlements";

[1] The Attorneys General certify that no parties' counsel authored this brief, and no person or party other than named *amici* or their offices made a monetary contribution to the brief's preparation or submission. The Attorneys General submit this brief as *amici curiae* only, taking no position on the merits of the underlying claims, and without prejudice to any State's ability to enforce or otherwise investigate claims related to this dispute.

"Notice will also deter collusion between class counsel and defendants to craft settlements that do not benefit the injured parties.").

The Attorneys General submit this brief to further these interests. This brief is a continuation of the ongoing efforts by state Attorneys General to protect consumers from class action settlement abuse, which have produced meaningful settlement improvements for class members. *See, e.g.*, *Cowen v. Lenny & Larry's, Inc.*, No. 17-cv-01530, Dkts. 94, 110, 117 (N.D. Ill.) (involvement of government officials, including state attorneys general, produced revised settlement that increased class' cash recovery from $350,000 to ~$900,000); *Allen v. Similasan Corp.*, No. 12-cv-376, Dkts. 219, 223, 257, 261 (S.D. Cal.) (after state attorney general coalition filed amicus and district court rejected initial settlement, revised deal was reached, increasing class' cash recovery from $0 to ~$700,000); *Unknown Plaintiff Identified as Jane V., et al., v. Motel 6 Operating LP*, No. 18-cv-0242, Dkts. 50, 52, 58 (D. Ariz.) (after Arizona Attorney General raised concerns regarding distribution of settlement funds to class members, parties amended settlement agreement to increase minimum class member recovery from $50 to $75 and to remove class-wide caps).

SUMMARY OF ARGUMENT

The overall view here is troubling: class members take home less than a million dollars, along with injunctive relief that has no meaningful value to the class, while class counsel walks away with ~$6.85 million.

The district court abused its discretion by attributing more than, at best, minimal value to the purported injunctive relief, which only requires Conagra to conform its labeling and marketing practices in the event it ever buys back the Wesson Oil brand (a brand it sold in February 2019). The injunctive relief is only triggered if Conagra buys back the Wesson Oil brand (and there was no evidence that this was likely to occur). Conagra already made the required labeling changes prior to the divestment of the Wesson Oil brand and the settlement here. And the injunctive provisions are forward-looking, without a connection to the class members claims for past harm.

This Court should vacate the settlement approval and make clear that it was an abuse of discretion to assign meaningful value to the speculative, conditional, future, forward-looking injunctive provision here. Doing so is critical to protecting consumers in this and other cases that turn on injunctive terms that have only minimal value.

ARGUMENT

I. It Was An Abuse Of Discretion To Assign Any Meaningful Value To The Settlement's Injunctive Relief

The injunctive relief here provides no meaningful value to class members because it only requires Conagra to conform its labeling and marketing practices to the settlement terms in the event that Conagra ever buys back the Wesson Oil brand—Conagra divested the brand in February 2019—and there was no evidence before the trial court that Conagra was likely to reacquire it. For multiple reasons, the injunctive relief here provides minimal—if any—benefit to the class members who are releasing their claims as part of the settlement agreement.

First, and most strikingly, the limit that Conagra will not advertise, market, or sell Wesson Oil products labeled as "natural" or "non-GMO" unless the products meet specified conditions only goes into effect "*should* Conagra reacquire the Wesson Oil brand." Dkt. 652-1 at 16–17 (emphasis added). Conagra "divested all interest in the Wesson Oil brand to a third party purchaser, with the sale being final prior to the signing of [the settlement] agreement." *Id.* at 16. Conagra is thus agreeing to not do something with a product that *they do not own*. And Conagra provides no indication that it may soon, or ever, reacquire the

Wesson Oil brand. Giving any meaningful value to this injunctive term was an abuse of discretion on this basis alone.

Second, Conagra removed "natural" from its labeling in 2017, long before selling Wesson Oil or reaching this 2019 settlement. Dkt. 661 at 19. And Conagra has denied that "its decision to drop the 'Natural' claim from Wesson Oils" had anything to do with this litigation. *Id.* at 16–17. This Court recognized in *Koby v. ARS National Services, Inc.* that a settlement's "injunctive relief [was] of no real value" where it did "not obligate [defendant] to do anything it was not already doing." 846 F.3d 1071, 1080 (9th Cir. 2017). The Court emphasized that the defendant "took that step for its own business reasons … not because of any court- or settlement-imposed obligation." *Id.* Defendant here did the same thing—it removed the "natural" claim from Wesson Oil labels two years prior to reaching this settlement, and has expressly confirmed that the change had nothing to do with this litigation. Even if Conagra had not divested itself of Wesson Oil, this Court has recognized that a defendant that has already implemented a change under these circumstances may be "unlikely to revert back to its old ways regardless of whether the

settlement" included provisions to the contrary and that a promise to continue with actions already taken does not provide value. *Id.*

Lastly, even in the event that Conagra reacquires Wesson Oil, the proffered injunctive relief is forward-looking, while the class members are alleging past harm. Courts have repeatedly recognized the "obvious mismatch" between injunctive relief consisting of only future disclosures and a class comprised of those alleging *past* harm. *See id.* at 1079; *see also Pearson v. NBTY, Inc.*, 772 F.3d 778, 786 (7th Cir. 2014) ("future purchasers are not members of the class, defined as it is as consumers who have purchased [defendant's product]."); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 720 (6th Cir. 2013) (""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[.]"). Accordingly, even if Conagra controlled the labeling of Wesson Oil products now, and even if Conagra had not already made the relevant changes, Conagra's promise here would be "worthless to most members of the class" because it is not designed to specifically benefit "those who had suffered a past wrong." *Koby*, 846 F.3d at 1079. "In other words, [Defendant] and the named plaintiffs provide[] no evidence to suggest

that many, if any, members of the [] class would derive a benefit from obtaining the injunctive relief afforded by the settlement." *Id.* at 1080.

And yet, the district court assigned meaningful value to the purported injunctive relief here. *See* Dkt. 695 at 9 ("[T]he Court finds the injunction adds at least some value to the amount offered in settlement."); *id.* at 15 ("[T]he benefits achieved here—both injunctive and monetary—were substantial."); *see also id.* at 13 (evaluating attorney's fees and noting that "Plaintiffs' counsel … managed to negotiate a settlement of significant monetary and injunctive relief."). While the district court did not go so far as to accept the parties agreed-upon valuation of the injunctive relief ($27 million), the court erred by giving the injunctive relief "significant" value. *See id.* at 9, 15; *see also* Dkt. 661 at 6.

* * *

Injunctive provisions that provide entirely speculative relief (of little to no benefit even if materialized) cannot be used to rationalize a settlement that sends close to $7 million to class counsel and less than a million dollars to class members while releasing both monetary and injunctive class claims. When considering whether a settlement is fair,

reasonable, and adequate under Rule 23(e)(2), a district court must consider whether "the relief provided for the class is adequate, taking into account … the terms of any proposed award of attorney's fees[.]" This consideration is one of "the core concerns of … substance that should guide [a court's] decision whether to approve" a proposed settlement. Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment.

While the relief considered as part of a Rule 23(e)(2) analysis can be monetary or injunctive, courts should not ascribe meaningful value to empty injunctive relief, nor allow illusory injunctive terms to play a major role in a settlement's approval. But that is precisely what happened here, where the paltry amount of monetary compensation to class members means that the settlement rises or falls based on the injunctive relief. Any of the individual weaknesses of the injunctive relief standing alone would seem to be fatal. But when stacked together, it was clearly an abuse of discretion for the district court to provide any meaningful value to the injunctive relief.

II. It Is Critical That The Court Confirm That Empty Injunctive Relief Like That Provided Here Does Not Provide Meaningful Benefit To Class Members For Purposes of Rule 23

While injunctive relief may be hard to value, courts should not allow an empty promise of injunctive relief to be used as a means to gain settlement approval or as a means to increase fees. *See Campbell v. St. John*, No. 17-16873, Dkt. 76-1 at 35 (9th Cir. Mar. 3, 2020) ("To be sure, in a case where the class primarily receives non-monetary relief, but class counsel obtain millions of dollars, it may be an abuse of discretion not to at least attempt to approximate the value of injunctive relief and use that valuation in an assessment of disproportionality.").

Class members are already at a disadvantage in the class action settlement context. "Courts have long recognized that 'settlement class actions present unique due process concerns for absent class members.'" *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)). There is an ever-present risk of conflict between class counsel and the class because counsel has an incentive to obtain a large fee, which invariably comes from class members' pockets. *See, e.g.*, *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013) ("interests of class

members and class counsel nearly always diverge"); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 175 (3d Cir. 2013) ("'class actions are rife with potential conflicts of interest between class counsel and class members'"); *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 720 (E.D.N.Y. 1989) (noting need to protect the "[c]lass from whose pockets the attorney's fees will come[.]").

And defendants are no help—to a defendant, the fee award and the class award "represent a package deal," *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996), with the defendant "'interested only in the bottom line: how much the settlement will cost him,'" *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 712 (7th Cir. 2015). "Although under the terms of each settlement agreement[] attorney[s'] fees technically derive from the defendant rather than out of the class' recovery, in essence the entire settlement amount comes from the same source." *Johnston*, 83 F.3d at 246.

With this in mind, the Attorneys General regularly voice concerns with federal courts as part of their ongoing effort to protect consumers

from class action settlement abuse.[2] The Attorneys General actively monitor class action settlements (through notices provided under CAFA), watching for settlement terms that undermine consumers.

As repeat players in the class action settlement process, the Attorneys General often see settlements where the parties present injunctive relief that provides little or no meaningful value to class members. With the increased attention to coupon settlements in recent years from this Court and others, there is a growing sense that empty injunctive relief has become one of the more concerning parts of the class action settlement landscape. To be sure, injunctive relief can be of great value to harmed consumers. *See, e.g.*, *In re Google Street View Elec. Comm. Litig.*, No. 3:10-md-02184, Dkt. 189-1 (N.D. Cal) (brief led by Arizona Attorney General Brnovich noting that state attorneys general obtained tangible injunctive benefits in settling with Google, including

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[2] Attorney General Brnovich, through the undersigned, has led coalitions of state attorneys general in filing briefs in district courts and courts of appeals across the country, as well as in the Supreme Court. *See, e.g.*, *Frank v. Gaos*, No. 17-961 (U.S. July 16, 2018); *In re Google Inc. Cookie Placement*, No. 17-1480 (3d. Cir. July 10, 2017); *In re Easysaver Rewards Litig.*, No. 16-56307, Dkt. 21 (9th Cir. May 8, 2017); *In re Google Street View Elec. Comm. Litig.*, No. 3:10-md-02184, Dkt. 189-1 (N.D. Cal. Jan. 20, 2020).

destruction of improperly collected data). But when injunctive relief is nothing more than a filler to rationalize the value of the settlement, and in turn to validate attorneys' fees, consumers are the ones who suffer.[3]

Courts should step in to police these types of settlements as they "have a duty to protect the interests of absent class members." *Silber v. Mabon*, 957 F.2d 697, 701 (9th Cir. 1992); *see also Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 623 (1997) (Rule 23 inquiry "protects unnamed class members 'from unjust or unfair settlements affecting their rights when the representatives become fainthearted … or are able to secure satisfaction of their individual claims by a compromise.'").

[3] The core concerns with overvaluing empty injunctive relief in the settlement approval context are pertinent in considering attorneys' fees and indicia of collusion. *See Roes 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1055 (9th Cir. 2019) ("because of the danger that parties will overestimate the value of injunctive relief in order to inflate fees, courts must be particularly careful when ascribing value to injunctive relief for purposes of determining attorneys' fees, and avoid doing so altogether if the value of the injunctive relief is not easily measurable.").

CONCLUSION

For the foregoing reasons, this Court should reverse the settlement approval, sending parties back to ensure consumers properly benefit from meaningful relief here.

April 10, 2020

Respectfully Submitted.

/s/ Oramel H. Skinner

Mark Brnovich
Attorney General
Oramel H. (O.H.) Skinner
Solicitor General
Counsel of Record
Kate B. Sawyer
Assistant Solicitor General
Keena Patel
Assistant Attorney General
OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Avenue
Phoenix, Arizona 85004
(602) 542-5025
o.h.skinner@azag.gov
Counsel for Amicus Arizona Attorney General's Office
(Additional counsel listed after signature block)

ADDITIONAL COUNSEL

STEVE MARSHALL
Attorney General
State of Alabama

KEVIN G. CLARKSON
Attorney General
State of Alaska

LESLIE RUTLEDGE
Attorney General
State of Arkansas

LAWRENCE G. WASDEN
Attorney General
State of Idaho

CURTIS T. HILL, JR.
Attorney General
State of Indiana

DANIEL CAMERON
Attorney General
Commonwealth of Kentucky

JEFF LANDRY
Attorney General
State of Louisiana

ERIC SCHMITT
Attorney General
State of Missouri

DAVE YOST
Attorney General
State of Ohio

MIKE HUNTER
Attorney General
State of Oklahoma

ALAN WILSON
Attorney General
State of South Carolina

KEN PAXTON
Attorney General
State of Texas

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and Fed. R. App. P. 29(a)(5).

1. This brief is 3,332 words excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century type, which complies with Fed. R. App. P. 32 (a)(5) and (6).

/s/ Oramel H. Skinner

Oramel H. Skinner
OFFICE OF THE ARIZONA
ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, Arizona 85004
(602) 542-5025

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of April, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Oramel H. Skinner

Oramel H. Skinner
OFFICE OF THE ARIZONA
ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, Arizona 85004
(602) 542-5025