

No. 16-1652

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN RE: SUBWAY FOOTLONG SANDWICH MARKETING
AND SALES PRACTICES LITIGATION

APPEAL OF: THEODORE H. FRANK,
Objector-Appellant.

On Appeal from the United States District Court
for the Eastern District of Wisconsin, No. 2:13-md-2439,
Judge Lynn Adelman

Opening Brief and Short Appendix of
Appellant Theodore H. Frank

COMPETITIVE ENTERPRISE INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
Theodore H. Frank
1899 L Street, NW, 12th floor
Washington, D.C. 20036
(202) 331-2263
In pro per

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 16-1652

Short Caption: In re Subway Footlong Sandwich Marketing and Sales Practices Litigation

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Theodore Harold Frank

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Competitive Enterprise Institute, Center for Class Action Fairness

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: /s/ Theodore H. Frank Date: 5/03/2016

Attorney's Printed Name: Theodore H. Frank

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes No

Address: Competitive Enterprise Institute, Center for Class Action Fairness, 1899 L Street NW, 12th Floor
Washington, DC 20036

Phone Number: (703) 203-3848 Fax Number: _____

E-Mail Address: ted.frank@cei.org

Table of Contents

Rule 26.1 Disclosures	i
Table of Contents	ii
Table of Authorities	iii
Statutes and Rules.....	vii
Jurisdictional Statement	1
Statement of the Issues	2
Statement of the Case	2
A. A customer photographs a short Subway sandwich, and Subway responds to the public-relations problem.	2
B. Lawsuits follow publicity.	3
C. Subway settles.	5
D. Frank objects.	6
E. The Gordon Report.	9
F. The district court approves the settlement and fee award.	11
Summary of the Argument.....	11
Standard of Review.....	13
Argument	13
I. Once the court found that distribution to the class was impossible, <i>Aqua Dots</i> precluded certification where the defendant had already voluntarily acted to cease any wrongdoing.....	13
II. The Gordon declaration cannot support settlement approval.....	20
Conclusion	25
Statement Regarding Oral Argument.....	26
Certificate of Compliance with Fed. R. App. 32(a)(7)(C) and Circuit Rule 30(d).....	27
Proof of Service.....	28

Table of Authorities

Cases

<i>In re Aqua Dots Products Liability Litigation</i> , 270 F.R.D. 377 (N.D. Ill. 2010).....	14, 24
<i>In re Aqua Dots Products Liability Litigation</i> , 654 F.3d 748 (7th Cir. 2011)	2, 7, 9, 11-20
<i>In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.</i> , 789 F. Supp. 2d 935 (N.D. Ill. 2011)	16
<i>Bielskis v. Louisville Ladder, Inc.</i> , 663 F.3d 887 (7th Cir. 2011)	23
<i>In re Bluetooth Headset Prod. Liab. Litig.</i> , 654 F.3d 935 (9th Cir. 2011)	17
<i>Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.</i> , 532 U.S. 598 (2001).....	18
<i>Buscaglia v. United States</i> , 25 F.3d 530 (7th Cir. 1994)	23
<i>Crawford v. Equifax Payment Servs., Inc.</i> , 201 F. 3d 877 (7th Cir. 2000)	12
<i>Devlin v. Scardeletti</i> , 536 U.S. 1 (2002).....	1
<i>Dewey v. Volkswagen of Amer.</i> , 909 F. Supp. 373 (D.N.J. 2012).....	7
<i>In re Dry Max Pampers Litig.</i> , 724 F.3d 713 (6th Cir. 2013)	14, 18
<i>Gallego v. Northland Group Inc.</i> , 814 F.3d 123 (2d Cir. 2016)	14-15

In re GMC Engine Interchange Litig.,
594 F.2d 1106 (7th Cir. 1979)18

Grok Lines, Inc. v. Paschall Truck Lines,
2015 U.S. Dist. LEXIS 124812 (N.D. Ill. Sept. 18, 2015).....16

Johnston v. Comerica Mortgage Corp.,
83 F.3d 241 (8th Cir. 1996)17

Lake v. Neal,
585 F.3d 1059 (7th Cir. 2009)24

Lang v. Kohl’s Food Stores, Inc.,
217 F.3d 919 (7th Cir. 2000)23

Lonardo v. Travelers Indem. Co.,
706 F. Supp. 2d 766 (N.D. Ohio 2010)..... 7-8

McMahon v. Bunn-O-Matic Corp.,
150 F.3d 651 (7th Cir. 1998)23

Murray v. GMAC Mortg. Corp.,
434 F.3d 948 (7th Cir. 2006)12

Naeem v. McKesson Drug Co.,
444 F.3d 593 (7th Cir. 2006)23

Pearson v. NBTY, Inc.,
772 F.3d 778 (7th Cir. 2014) 6, 12, 14, 16-17

Poertner v. The Gillette Co.,
2015 WL 4310896 (11th Cir. July 16, 2015)20

Redman v. RadioShack Corp.,
768 F.3d 622 (7th Cir. 2014)6, 14, 17, 20

Reliable Money Order, Inc. v. McKnight Sales Co.,
704 F.3d 489 (7th Cir. 2013)13

Reynolds v. Beneficial Nat’l Bank,
288 F.3d 277 (7th Cir. 2002) 15-16

Robert F. Booth Trust v. Crowley,
687 F.3d 314 (7th Cir. 2012)6, 12, 14

Synfuel Technologies v. DHL Express (USA),
463 F.3d 646 (7th Cir. 2006)13

Thorogood v. Sears, Roebuck & Co.,
627 F.3d 289 (7th Cir. 2010) (denying rehearing *en banc*),
underlying opinion vacated on other grounds,
131 S.Ct. 3060 (2011)..... 12

Vought v. Bank of Am.,
901 F. Supp. 2d 1071 (C.D. Ill. 2012)16

Rules and Statutes

28 U.S.C. § 12911

28 U.S.C. § 1332(d)(2).....1

Fed. R. App. Proc. 4(a)(1)1

Fed. R. Civ. Proc. 23(a)(4).....7, 14

Fed. R. Civ. Proc. 23(b)(2)5, 15

Fed. R. Civ. Proc. 23(b)(3)3, 14

Fed. R. Civ. Proc. 23.112

Fed. R. Evid. 702.....2, 23

Fed. R. Evid. 702(d).....23

Other Authorities

AMERICAN LAW INSTITUTE,
PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.05(c) (2010)18

BRICKMAN, LESTER,
LAWYER BARONS (2011)17

Erichson, Howard M.,
Aggregation as Disempowerment: Red Flags in Class Action Settlements,
92 NOTRE DAME L. REV. -- (2016),
available at <http://ssrn.com/abstract=2761912>.....20

Liptak, Adam, *When Lawyers Cut Their Clients Out of the Deal*,
N.Y. TIMES, Aug. 13, 2013, at A12.....6

Manker, Rob, *Subway footlong lawsuits: Sandwich chain responds*,
CHICAGO TRIBUNE (Jan. 24, 2013).....4

Morrison, Maureen,
Footlong-Gate: Subway Apologizes for Sandwiches Not Measuring Up,
ADVERTISINGAGE (Jan. 25, 2013).....3

Statutes and Rules

Federal Rule of Civil Procedure 23. Class Actions.

(a) Prerequisites.

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

...

(4) the representative parties will fairly and adequately protect the interests of the class.

...

(e) Settlement, Voluntary Dismissal, or Compromise.

The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

...

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

...

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

...

(g) Class Counsel.

...

(4) *Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.

...

Federal Rule of Evidence 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Jurisdictional Statement

Though the parties in the district court below did not adequately allege jurisdiction (Dkt. 18),¹ the district court had jurisdiction under 28 U.S.C. § 1332(d)(2) because this is a class action where the amount in controversy exceeds \$5,000,000 exclusive of interest and costs; many of the millions of class members in the nationwide class are citizens of states other than a defendant's state of citizenship; and no exception to the Class Action Fairness Act applies. For example, named plaintiff Nguyen Buren is a citizen of Illinois while defendant Doctor's Associates, Inc., is a Florida corporation headquartered in Connecticut, and thus a citizen of Florida and Connecticut.

This Court has appellate jurisdiction under 28 U.S.C. § 1291. The district court issued a Decision and Order approving a class settlement on February 25, 2016 and a Final Judgment that same day. A1; A30. Theodore H. Frank is a class member who formally objected to the settlement and class certification before the lower court. A127. Frank appeared at the fairness hearing through counsel, and filed a notice of appeal on March 24, 2016. Dkt. 68. This notice of appeal is timely under Fed. R. App. P. 4(a)(1). As a class member who objected to settlement approval below, Frank has standing to appeal a final approval of a class action settlement without the need to intervene formally in the case. *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

¹ "Axyz" refers to page xyz of Frank's Appendix. "Dkt." refers to docket entries in Case No. 2:13-md-2439 (E.D. Wisc.) below.

Statement of the Issues

1. *In re Aqua Dots Products Liability Litig.*, 654 F.3d 748, 752-53 (7th Cir. 2011) held class certification inappropriate where plaintiffs sought “relief that duplicates a remedy that most buyers already have received, and that remains available to all members of the putative class” and “the principal effect” of certification would be “to pay the class’s lawyers.” Did the district court err in certifying a class and approving a \$0 settlement paying the attorneys and class representatives \$525,000 where the only relief was an injunction duplicating voluntary steps taken by the defendant years earlier?

2. Relating to plaintiffs’ alternative ground for affirmance: Fed. R. Evid. 702 requires expert testimony to be “based on sufficient facts or data” and to “reliably apply the principles and methods to the facts of the case.” Did the district court err in refusing to rely upon a putative expert declaration submitted by class counsel putting a monetary value on the injunctive relief where the expert assumed the conclusion and/or committed basic arithmetic errors?

Statement of the Case

A. A customer photographs a short Subway sandwich, and Subway responds to the public-relations problem.

Defendant Doctor’s Associates, Inc., is the franchisor of Subway restaurants in the United States and a hundred other countries; we will refer to the defendant interchangeably as “DAI” or “Subway” for simplicity’s sake. The restaurants, owned by

independent franchisees, sell fast-food submarine sandwiches in two sizes, advertised by DAI as “footlong” or “six-inch” sandwiches, including in countries with the metric system like Australia.

In January 2013, an Australian teenager, Matt Corby, posted a picture on Facebook of a Subway Footlong sandwich he purchased that was only 11 inches long. The picture went viral, assisted by a clumsy response from Subway’s Australian social media affiliate, and much media attention ensued, with other outlets such as the *New York Post* finding that some sandwiches they purchased were “short.” Within a week, Subway responded to the adverse publicity:

For 47 years, customer satisfaction has been our top priority. We regret any instance where we did not fully deliver on our promise to our customers. We freshly bake our bread throughout the day in more than 38,000 restaurants in 100 countries worldwide, and we have redoubled our efforts to ensure consistency and correct length in every sandwich we serve. Our commitment remains steadfast to ensure that every SUBWAY Footlong sandwich is 12 inches at each location worldwide.

Maureen Morrison, *Footlong-Gate: Subway Apologizes for Sandwiches Not Measuring Up*, ADVERTISINGAGE (Jan. 25, 2013); A172-73. There is no evidence in the record that the steps Subway immediately took in January 2013 did not generally substantially resolve problems of consistency of sandwich length.

B. Lawsuits follow publicity.

Lawyers responded to the public foofaraw, and between January and June filed several class actions under Rule 23(b)(3) seeking damages for buying sandwiches that

were shorter than advertised. Lead counsel in this suit, Thomas Zimmerman, told the *Chicago Tribune* that the Australian photo inspired his suit. Rob Manker, *Subway footlong lawsuits: Sandwich chain responds*, CHICAGO TRIBUNE (Jan. 24, 2013). Nine suits were consolidated into MDL No. 2439 in the Eastern District of Wisconsin.

In their rush to get to court, however, plaintiffs apparently failed to investigate whether they had a meritorious class action. According to the settling parties' own account, adopted by the district court, they quickly learned that the case for damages, much less a damages class action, was nonexistent, because differently-shaped bread did not affect the amount of food consumers received.

[T]he vast majority of bread sold in Subway restaurants was at least 12 inches long, and ... most of the bread that happened to be shorter than 12 inches was less than 1/4-inch shorter. Second, the plaintiffs learned that all of the raw dough sticks used to bake Subway bread weigh exactly the same. The dough sticks arrive at the restaurants frozen, and are then thawed, stretched, allowed to rise, and baked. Due to natural variability in this process, the final loaves may have slightly different shapes. Some loaves will be slightly shorter and wider than others. But because all loaves are baked from the same quantity of dough, each loaf contains the same quantity of ingredients. Thus, a customer who received a baked loaf that was shorter than 12 inches did not receive any less bread than he or she would have if the loaf had measured exactly 12 inches. Third, the plaintiffs learned that the amount of meat and cheese included with each sandwich is standardized. Thus, a sandwich that is slightly shorter than 12 inches contains the same amount of meat and cheese as it would have had it measured exactly 12 inches. It is theoretically possible that a sandwich made on a slightly shorter loaf would contain a slightly diminished quantity of toppings—a sandwich that was 1/4-inch shorter than

advertised might be missing a few shreds of lettuce or a gram or two of mayonnaise. However, Subway sandwiches are made to order in front of the customer, and if the customer asks for more of any particular topping, the employee making the sandwich will add more of that topping to the sandwich. Thus, the plaintiffs learned that, as a practical matter, the length of the bread does not affect the quantity of food the customer receives.

A3-4; Dkt. 55 at 4-6; *see also* Dkt. 55 at 6-8 (class certification motion would fail).

Moreover, even the named plaintiffs conceded that the length of the sandwiches didn't affect their purchases or change their plans to continue to eat at Subway. Dkt. 55 at 6; Dkt. 18 at 11-12. But learning that their suits were meritless did not cause plaintiffs to end their litigation. Instead, they filed a new complaint in December 2013 seeking an injunctive-relief class action under Rule 23(b)(2). A5; Dkt. 18.

C. Subway settles.

The suit was not burdened by contested litigation over the next 21 months; Subway never even filed a response to the complaint. Dkt. 28. In September 2015, Subway agreed to a settlement that would pay only the lawyers. A48 ("Settlement"). (The substance of the settlement was reached in March 2014, but the parties haggled over fees for over a year before the district court performed its own mediation on the fee question. A5-7.)

Under the Settlement, the class of purchasers of Footlong or Six-Inch Subway sandwiches in the United States between January 1, 2003 and the preliminary approval would receive no compensation. Settlement ¶ 21 (A57). (Judges assigned to hear this case, and their immediate families, are excluded from the class. A48.) Subway would

agree to an injunction requiring it to engage in a variety of standardization and quality-control measures for four years to ensure the length of its sandwiches. *Id.* ¶¶ 22-24 (A58-61). Plaintiffs conceded that DAI could not guarantee that a loaf of bread would be 12 inches after baking. *Id.* ¶ 23 (A60-61). The Settlement contains a self-serving recital that the changes were made as a result of the litigation (*Id.* ¶ 22 (A58)), but Subway announced changes before many of the consolidated suits, and nothing in the Settlement or in the record indicates which of the quality-control steps, if any, were unique to the settlement and which merely codified that which Subway had been doing since January 2013, if not earlier. The class did not waive damages claims, but waived claims relating to injunctive relief. *Id.* ¶¶ 47-49 (A69-A71).

Subway provided clear sailing for \$525,000 in fees to ten law firms and class-representative incentive awards; any reduction in that amount would revert to Subway. *Id.* ¶¶ 39-42 (A67-68).

D. Frank objects.

Appellant Theodore H. Frank is a class member in this case. A166. Frank is an attorney who, in this Circuit and others, has previously successfully challenged settlements that have favored class attorneys over their putative clients, including one involving the lead class counsel in this case.² A168-69. He was represented below by the

² *E.g.*, *Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014) (striking down Zimmerman settlement); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (praising Frank's work); *Robert F. Booth Trust v. Crowley*, 687 F.3d 314 (7th Cir. 2012). See also Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 13, 2013, at A12 (calling Frank "[t]he leading critic of abusive class action settlements").

non-profit Center for Class Action Fairness, which he founded in 2009, and which merged with the non-profit Competitive Enterprise Institute in 2015. A167.

Frank objected that the injunctive relief in this case was worthless. Subway had already committed to fixing any problem with the lengths of its sandwiches in January 2013, and there was no evidence that the litigation and settlement added anything to that. A135-42. Thus, the only beneficiaries of the case were class counsel and the class representatives, who would receive 100% of the cash in the case, but because of the kicker and clear-sailing clauses, that excess ratio couldn't be redistributed to the class. A153-60. And if the class couldn't benefit from the litigation or settlement, then, under *In re Aqua Dots Products Liability Litigation*, the class could not be certified under Rule 23(a)(4). A138-43.

Class counsel responded with extraordinary personal attacks on Frank. Dkt. 54 at 8-11. Though Frank declared his support for the class-action mechanism (A169), class counsel asserted (without any evidence) that the district court should discount Frank's objection because he opposed "all" class actions. Dkt. 54 at 9. Class counsel's *ad hominem* attacks were so baseless (including relying on and quoting a vacated decision that had been red-flagged on LEXIS as no longer good law) that class counsel had to file multiple withdrawals of multiple false allegations to avoid motions for Rule 11 sanctions. Dkt. 57; Dkt. 64. And of the two other decisions cited by class counsel for the proposition that courts were critical of Frank for filing "meritless objections", both actually awarded Frank attorneys' fees for winning money for class members. Compare Dkt. 54 at 9 with *Dewey v. Volkswagen of Amer.*, 909 F. Supp. 373, 396 (D.N.J. 2012); *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 813 (N.D. Ohio 2010). Plaintiffs

misquoted *Lonardo* in their brief even though Frank addressed that precise quote in his initial declaration as an example of a false boilerplate attack class counsel in previous cases frequently made. A171.

Plaintiffs presented no evidence that any element of the injunction added anything to what Subway had voluntarily done in January 2013. Dkt. 54. They presented a one-page declaration from David A. Cousins, the “managing attorney for dispute resolution” for “a company that provides services to” DAI; he stated the tautology that DAI agreed to perform the steps required by the Settlement “substantially as a result of the litigation” and that the Settlement required DAI to keep all of the listed changes in place for four years. A174. Cousins did not explain how he had personal knowledge of anything he testified about or identify which practice changes were made in January 2013 in response to market demand and which were not made until after the settlement agreement in 2014 or 2015. *Id.* He noted that “even if DAI would have made some of the practice changes on its own, it would not have been required to keep those changes in place,” but did not assert or claim that DAI had any intention of permitting franchisees to fail to meet sandwich-length standardization procedures.

Subway defended the settlement, but did not contend the injunction had any value beyond the fact that plaintiffs wanted it. Dkt. 55. No DAI employee gave evidence supporting or clarifying Cousins’s ambiguous characterization. Subway further argued that cash or coupon distribution to the class of part of the \$525,000 was impractical. Dkt. 55 at 10.

Though plaintiffs spent several pages attacking Frank, they did not mention *Aqua Dots* once. Dkt. 54. Subway did not contest Frank's argument that *Aqua Dots* precluded certification; it did cite *Aqua Dots* twice for the proposition that class certification would have been difficult. Dkt. 55 at 6-7.

E. The Gordon Report.

Plaintiffs' sole evidence for the value of the injunction was a putative expert report, filed January 6, 2016, three weeks after the objection deadline and nine days before the fairness hearing, by John Gordon, asserting the value of the injunction was over \$5 million a year. Dkt. 56-2; A177 (redacted version).

Frank objected and moved to strike the declaration. A186. Gordon's calculation assumed that 100% of pre-settlement Subway sandwiches were short and that 100% of post-settlement Subway sandwiches would be of the proper length, and neither assumption was supported by the record. A187; A192; A3 (vast majority of Subway sandwiches of proper length even before voluntary changes to quality assurance); A60-61 (plaintiffs acknowledge that injunction will not be 100% effective). In other words, Gordon effectively assumed the conclusion that the injunction had a marginal effect, though that assertion was precisely what Frank was challenging. The other part of Gordon's calculation assumed that consumers valued shorter sandwiches less than of-length sandwiches by a certain percentage (redacted, because leaving it unredacted would permit the use of algebra to determine the trade secret of Subway's sales figures; we will refer to the number as "Y"). Frank protested that this assignation of value was arbitrary and also unsupported by the record. A188; A193; A3-5. To top it all off,

Gordon's ultimate calculation was inconsistent with his stated methodology: he multiplied 100% of estimated sales figures of Footlong and Six-Inch subs by two entirely different percentages than the redacted Y%, and gave no explanation for the mathematical discrepancy. A193-94.

Plaintiffs defended Gordon's methodology on the ground that it was merely "multiplication," and asserted that "Gordon lays out his math simply and clearly and it cannot reasonably be contested." Dkt. 61 at 3-4. They did not defend the accuracy of Gordon's assumptions or the fact that the assumptions were entirely unsupported by the record; they denied that Gordon assumed that 100% of sandwiches would be short (Dkt. 61 at 3) but did not explain why Gordon used 100% of the sales figures as a multiplicand rather than a smaller percentage reflecting sales from short sandwiches. (It is unclear if plaintiffs understood Gordon's methodology at all. They describe Gordon as "calculat[ing] the profits DAI received for its sale" of sandwiches, Dkt. 61 at 2, but Gordon never attempts to calculate (or mention) DAI's profits. A250-51. Gordon himself states that he was assuming that sandwiches would universally be short by a certain percentage "absent the injunctive relief." A251.) Nevertheless, plaintiffs acknowledged a "typographical error" in Gordon's math, and submitted a "corrected Declaration." Dkt. 61 at 4; A250; *compare* A251 *with* A178. The math in the "corrected declaration" was still arithmetically incorrect and inconsistent with the putative methodology. A251 at ¶ 11. Even if Gordon's unsupported speculative assumptions were correct, multiplying 100% of sales by the redacted Y% would be less than \$600,000/year, not over \$5 million.

Ultimately, the district court chose not to rely on the Gordon declaration, but it denied Frank's motion to strike. A12; A28. Despite being warned of Gordon's basic

math errors, plaintiffs have announced that they will rely upon that declaration as an alternative ground of affirmance in this Court, multiplying proceedings in this Court over the sealing of sales figures and requiring Frank to brief the issue.

F. The district court approves the settlement and fee award.

On February 25, the district court approved the settlement and entered final judgment. A1; A30. The court found that it was acceptable for class counsel to receive 100% of the monetary relief with a kicker and clear-sailing, because any distribution to the class would be impracticable. A13-16; A19-20. The court found the injunction valuable notwithstanding Subway's voluntary actions to ensure quality control of its bread length, because Subway might choose to return to shorter sandwiches in the absence of a contempt enforcement mechanism. A16-17. It rejected the application of *Aqua Dots* because "The defendant, rather than the class, has paid for the injunction, notice, and attorneys' fees." A17-18.

The ten named plaintiffs ultimately sought \$500 incentive payments each, and the court awarded that \$5,000 amount. A7. The court awarded \$520,000 in fees to eleven law firms, noting that it was less than 50% of the lodestar, and finding it reasonable under the lodestar method and because the defendant agreed to pay it. A25-26.

Frank filed a timely appeal from the final judgment. Dkt. 68.

Summary of the Argument

Plaintiffs' narrower and final December 2013 complaint asked for "relief that duplicates a remedy that most buyers already have received, and that remains available

to all members of the putative class.” *Aqua Dots*, 654 F.3d at 752. The settling parties contended, and the district court agreed, that no cash remedy was available to the class. There is no evidence that the injunction that is the sole “benefit” to the class in this case added any marginal benefit to class members beyond a facially bogus declaration that assumes the conclusion. Because of that, the only real beneficiaries are the attorneys and class representatives who collect \$525,000.

For over a decade, this Court has criticized class-action attorneys who use the mechanism of the class action to benefit themselves without providing any, or even proportional benefits to their putative class clients. *E.g.*, *Pearson*, 772 F.3d 778; *Redman*, 768 F.3d 622; *Crowley*, 687 F.3d 314 (Rule 23.1); *Thorogood v. Sears, Roebuck, & Co.*, 627 F.3d 289, 293 & 293-94 (7th Cir. 2010) (citing authorities) (denying rehearing *en banc*), *underlying opinion rev'd on other grounds*, 131 S.Ct. 3060 (2011); *Aqua Dots*, 654 F.3d 748 (affirming rejection of class certification); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006) (calling less egregious statutory-damages cash settlement “untenable”); *Crawford v. Equifax Payment Servs., Inc.*, 201 F. 3d 877, 882 (7th Cir. 2000).

Settlement approval and class certification here cannot be reconciled with this Court’s binding *Aqua Dots* precedent holding that a class cannot be certified when “the principal effect” would be “to pay the class’s lawyers.” 654 F.3d at 752. The distinctions the district court raised are distinctions without a difference, because the unsuccessful putative *Aqua Dots* class counsel sought injunctive relief and could have negotiated a hypothetical settlement legally identical to the one in this case. But *Aqua Dots* rejected a world where courts could “induce the defendants to pay the class’s lawyers enough to make them go away” without “effectual relief for consumers.” 654 F.3d at 753. Either

(a) *Aqua Dots* was wrongly decided and it is permissible to certify self-dealing class actions punctuating voluntary steps taken by defendants; or (b) the district court erred as a matter of law.

Standard of Review

Although the Seventh Circuit's "review of a district court's approval of a class action settlement is limited to whether there was an abuse of discretion, we insist that district courts exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions." *Synfuel Techs. v. DHL Express (USA)*, 463 F.3d 646, 652 (7th Cir. 2006) (internal quotation and citations omitted). "We review class certification orders for abuse of discretion." *Reliable Money Order, Inc. v. McKnight Sales Co.*, 704 F.3d 489, 498 (7th Cir. 2013). "Abuse of discretion results when a district court commits legal error or makes clearly erroneous factual findings." *Id.*

Argument

I. Once the court found that distribution to the class was impossible, *Aqua Dots* precluded certification where the defendant had already voluntarily acted to cease any wrongdoing.

Aqua Dots were "a toy consisting of small, brightly colored beads that can be fused together into designs when sprayed with water." *Aqua Dots*, 654 F.3d at 749. Spin Master distributed *Aqua Dots* manufactured by a Chinese subcontractor, JSSY. The latter substituted for the specified safe adhesive a chemical that, when ingested,

metabolized into the date-rape drug GHB, gamma-hydroxybutyric acid. *Id.* Children who swallowed a large enough quantity of beads became sick. *Id.* at 750.

Upon learning of the problem, Spin Master recalled all Aqua Dots products, provided replacement products or toys, and honored more than 500,000 refund requests. *Id.* at 750-51. There was no evidence that Spin Master was declining refunds. *Id.* at 751. The plaintiffs in *Aqua Dots* challenged the recall program, and sought additional refunds and injunctive relief on behalf of class members who had not received them. *Id.*; *In re Aqua Dots Products Liability Litigation*, 270 F.R.D. 377, 381, 384 (N.D. Ill. 2010). The district court denied certification on Rule 23(b)(3) “superiority” grounds. On appeal, *Aqua Dots* disagreed with the district court’s reasoning, but nevertheless affirmed on the grounds that Rule 23(a)(4) could not be satisfied:

Plaintiffs want relief that duplicates a remedy that most buyers already have received, and that remains available to all members of the putative class. A representative who proposes that high transaction costs (notice and attorneys’ fees) be incurred at the class members’ expense to obtain a refund that already is on offer is not adequately protecting the class members’ interests. ...

The principal effect of class certification, as the district court recognized, would be to induce the defendants to pay the class's lawyers enough to make them go away; effectual relief for consumers is unlikely.

654 F.3d at 752-53. Since *Aqua Dots*, this Court and others have repeatedly criticized settlements and collective actions where attorneys are the primary or only beneficiary, including one with the lead class counsel here. *Redman*, 768 F.3d 622; *Crowley*, 687 F.3d 314; *Pearson*, 772 F.3d 778; *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013); *cf.*

also *Gallego v. Northland Group Inc.*, 814 F.3d 123, 129 (2d Cir. 2016) (affirming denial of certification on superiority grounds where “the intended result of the settlement was ‘mass indifference, a few profiteers, and a quick fee to clever lawyers’” (quoting district court decision)).

Here, we have a class action where all the settling parties and the district court agree that it is impracticable to provide class members any cash or even coupon compensation. A19; A20; A13-16. The only relief—besides fees for the attorneys and \$500 incentive payments for ten class representatives—is an injunction to make the defendant do what it said it was going to do months before the case was even consolidated in an MDL and nearly a year before a consolidated Rule 23(b)(2) complaint was filed. This is exactly the sort of nonsense that *Aqua Dots* held impermissible.

The district court nevertheless approved the settlement here, distinguishing this case from *Aqua Dots* on grounds that no appellee raised. But every feature of this settlement that the district court highlighted as a reason to distinguish this case from *Aqua Dots* was present in *Aqua Dots*.

First, the district court thought it important that plaintiffs obtained an injunction that compelled Subway to do what it was already doing, because without the injunction one could speculate that Subway might stop and the enforcement mechanism prevents that. A16-A17. But the *Aqua Dots* plaintiffs were also seeking injunctive relief to enforce the refund policy in that case. (Indeed, the *Aqua Dots* plaintiffs complained that the recall failed to provide sufficient notice of the availability of a refund, so they were seeking *more* marginal relief than plaintiffs sought here.) Other courts correctly recognize that this sort of injunction plaintiffs achieved here is superfluous. It is “the

incremental benefits that matter,” “not the total benefits.” *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 282 (7th Cir. 2002); *see also Vought v. Bank of Am.*, 901 F. Supp. 2d 1071, 1090 (C.D. Ill. 2012) (voluntary remedial measures independent of the settlement “should not be considered part of the benefit”). “The Settlement’s value to consumers in requiring Defendant to cease [allegedly unlawful activity], however, depends on the probability that [Defendant] would have voluntarily ceased [that activity] independent of the Agreement.” *In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 960 (N.D. Ill. 2011). “[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*, 2015 U.S. Dist. LEXIS 124812, at *10 (N.D. Ill. Sept. 18, 2015); *cf. also Pearson*, 772 F.3d at 785 (bemoaning “substantively empty” prospective injunctive relief). As in *Grok Lines*, the changes codified in this settlement are “nothing more than ordinary steps that any business might take on its own” (2015 U.S. Dist. LEXIS 124812, at *16-*17), and in fact include (and, for all the record indicates to the contrary, might even entirely consist of) steps the defendant did take immediately in January 2013. There is no legal difference between the injunction obtained in this case and the one sought in *Aqua Dots* that the Seventh Circuit thought so little of that the opinion didn’t even consider it as a potential source of class relief; if there’s any difference, it’s that the injunction sought in *Aqua Dots* was more meaningful.

Second, the district court held it important that Subway was incurring the costs of notice and fees under this settlement. A17-A18. It apparently thought that *Aqua Dots*’ criticism of “high transactions costs” only came into play because it was “at the class members’ expense.” 654 F.3d at 752. But nothing stopped the *Aqua Dots* plaintiffs from

demanding (or receiving as compensation for a successful suit or settlement) “notice and fees” paid by defendant Spin Master. And as courts have repeatedly pointed out, it’s a category error to think that if a settling defendant is paying fees from a separate fund, those fees aren’t coming at class members’ expense. That separate fund with its reversion to defendant is still part of a constructive common fund and reflects money that a defendant would have been willing to pay class members to settle, whether it was negotiated separately or not. *Pearson*, 772 F.3d at 786-87; *Redman*, 768 F.3d at 637; *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 948-49 (9th Cir. 2011); *Johnston v. Comerica Mortgage Corp.*, 83 F.3d 241, 245-46 (8th Cir. 1996); *see also* LESTER BRICKMAN, *LAWYER BARONS* 522-25 (2011) (reversionary kicker should be considered *per se* unethical). And it’s legal error to consider the costs of notice a class benefit in judging settlement fairness. *Redman*, 768 F.3d at 630; *Pearson*, 772 F.3d at 781. The costs of litigation here are every bit as much class members’ expense as posited in *Aqua Dots*, as sandwich buyers will ultimately bear the increased costs imposed upon Subway. (It is perhaps more likely than not a coincidence that Subway’s famous “Five-Dollar-Footlongs” repeatedly mentioned in plaintiffs’ complaint are, since February 2016, the more expensive and less alliterative “Six-Dollar-Footlongs.”)

Third, the district court thought the Cousins declaration significant because he asserted that DAI agreed to perform the steps required by the Settlement “substantially as a result of the litigation.” A17 (quoting A174). But the Court’s interpretation reads far too much into the declaration. All Cousins testified is what we know from the face of the Settlement: Subway agreed to the injunction to settle litigation. But nothing in Cousins’s four-paragraph declaration demonstrates that Subway was not already taking

each and every one of these steps in January 2013, or that Subway had any plans or reason to cease corrective measures that had a material effect on standardization of bread length. (It is, of course, the settling parties' burden to demonstrate the factual predicates supporting settlement. *In re GMC Engine Interchange Litig.*, 594 F.2d 1106, 1126 n.30 (7th Cir. 1979); *Dry Max Pampers*, 724 F.3d at 719 (citing authorities); accord AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.05(c) (2010).) And even if Subway took steps in January 2013 because of lawsuits (some of which were filed several months later), (1) agreeing to continue to do so is not *consideration* supporting a settlement, and (2) surely the *Aqua Dots* plaintiffs could have plausibly argued (or induced a representation as part of settlement) that Spin Master's refund program was motivated by the risk of litigation. This sort of substanceless self-serving declaration cannot be the magic words that transmogrify an abusive class action into an acceptable one. *See also Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001) (repudiating theory that obtaining voluntary concessions makes plaintiff "prevailing party").

The policy this Court adopted in *Aqua Dots* encourages voluntary compliance and corrective measures by wrongdoing defendants by deterring lawyers from attempting costly litigation to self-servingly profit off of such voluntary measures. Allowing class counsel to evade the consequences of *Aqua Dots* by obtaining the sort of settlement approved in this case would eviscerate the salutary public policy of *Aqua Dots*. After all, corporations facing market pressure regularly confess and correct error when customers complain. And class counsel can always offer a settlement with spurious injunctive relief and attorneys' fees that are cheaper to the defendant than the

cost of litigating to the success the *Aqua Dots* defendants received, and thus obtain rents for bringing socially worthless litigation. The availability of such rents would have perverse public-policy consequences that would eliminate the deterrence achieved by *Aqua Dots*. Under the district court's narrowing of *Aqua Dots*, defendants face the expense of litigation and "pay[ing] the class's lawyers enough to make them go away" whether or not they voluntarily correct tortious conduct; lawyers will continue to have every incentive to sue for an injunction memorializing what the defendant was already doing. Encouraging the social cost of additional litigation that would reduce the incentive for defendants to do the right thing is exactly what courts should not be doing. And that goes even before considering the externality that rent-seeking in cases like this has an opportunity cost of diverting plaintiffs' lawyers from litigation that does meaningfully benefit consumers.

The district's court core error was its misguided belief that *Aqua Dots* permits class certification as long as the class isn't specifically being made "worse off." A18. But *Aqua Dots* recognizes that the fiduciary duty inherent in class representation means doing no harm is necessary, but not sufficient; rather, the action must be capable of affirmatively benefitting class members before imposing social costs on the courts and defendants.

But affirming this settlement approval won't just eviscerate *Aqua Dots*; it will also eviscerate the scrutiny that this Court has demanded of class-action settlements in recent years. An injunction to putatively make the defendant do what it was already

doing and had no plans to discontinue is the epitome of illusory relief.³ If all class counsel needs to do to earn a payday (and all defendants need to do to obtain a cheap end to litigation) is agree to a superfluous injunction, and obtain approval by speculating that the defendant might choose to alienate the marketplace by ceasing voluntary compliance, then virtually any settlement goes. Under the district court's approach, class counsel's mistake in *Redman v. RadioShack Corp.* was apparently trying to justify its \$1 million fee windfall with low-value coupons instead of with an entirely worthless injunction forbidding RadioShack from printing expiration dates on credit-card receipts in the future. That hypothetical settlement is unambiguously worse than the one *Redman* rejected, but legally identical to the one the district court approved here.

Precedent and public policy demand reversal of the settlement approval and decertification of the class.

II. The Gordon declaration cannot support settlement approval.

The Gordon declaration implausibly estimated that the settlement was worth over \$5 million/year to the class. Plaintiffs have indicated that they will rely upon that declaration to argue that the settlement was valuable and approval should be affirmed.

³ So too is an injunction forbidding a defendant from doing something it had no chance of doing: "Ford hereby agrees that it will not exaggerate the gas mileage of any new Edsel it sells between 2017 and 2021." Cf. Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. --, -- (2016) (criticizing unpublished *Poertner v. The Gillette Co.*, 2015 WL 4310896 (11th Cir. July 16, 2015), for crediting an injunction on the marketing of a discontinued product "no longer manufactured, marketed, or sold"), available at <http://ssrn.com/abstract=2761912>.

The district court did not rely on that declaration, but announced that it was “denying” Frank’s motion to strike without stating any reasons. A12; A28. It would have been error to rely on Gordon’s declaration; the declaration is so far beyond the pale that any arguments plaintiffs could make in this Court to rely upon it as an alternative ground of affirmance would be frivolous.

Perhaps one could construct a scenario where the injunction has value. Maybe the injunction improved upon Subway’s voluntary quality-control procedures (though the parties identified no part of the injunction that differed from what Subway voluntarily changed in 2013), and franchisees will have a (hypothetical) 99.9% sandwich-length success rate instead of a 99.8% success rate, or the (hypothetical) number of short sandwiches goes down from 3,000,000 a year to 2,000,000 a year. So, for example, if before the settlement, Subway sold 3,000,000 sandwiches that were an average of half of an inch short but slightly thicker, and after the settlement Subway sold 2,000,000 sandwiches that were slightly shorter but slightly thicker; and if a consumer survey showed that 2% of customers cared not about the amount of food they received, but whether the shape of the food was a foot long, rather than slightly shorter and slightly thicker; and that consumer survey further showed that those consumers thought a misshaped sandwich was worth \$0.05 less to them than what they paid because they felt deprived of a smidgen of mayonnaise; then the marginal value of the injunction would be worth $\$0.05 \times 2\% \times 1,000,000/\text{year}$, or \$1,000/year. (Of course, these are generous estimates: there is nothing in the record demonstrating that the injunction will affect 1,000,000 sandwiches/year, or even one sandwich; nothing in the record demonstrating that 2% of consumers *both* care more about the shape of their food than

about the amount of food that they receive and then do not take the option of requesting a replacement loaf if they see their sandwich being made with bread they view as substandard; and nothing in the record demonstrating that the difference is worth 5 cents to such customers. But tweaking the numbers to be even more unreasonably generous to the worthless injunction than the evidence permits—for example, ten million sandwiches a year affected, 4% of customers care and value the difference by \$0.20—only get you up to \$80,000.)

But that's not what Gordon did. He made no effort to calculate the number of sandwiches that would actually be affected by the injunction, or to determine how many consumers bread-shape was important to. He simply assumed that the value to the consumers collectively of a short sandwich was a certain percentage (A251 at ¶ 10), and then attempted to multiply that arbitrary percentage by the total number of sandwiches sold by the typical sales price.⁴ Gordon's report assumes away Frank's argument that the injunction was worthless because it did not have any effect on the number of short sandwiches. Instead, Gordon effectively assumed that the injunction affected *every* sandwich. (If he was not making that assumption, as plaintiffs implausibly asserted below, his calculation including every sandwich as a multiplicand makes no sense. A251. But Gordon *says* without limitation that he "assumed [that Subway's sandwiches] would be [redacted]% short, absent the injunctive relief." A251;

⁴ Oddly, Gordon implausibly assumes that sales price is 2.5 times larger for a Footlong than for a Six Inch (A251 at ¶ 9), rather than twice as large or less as one would expect (otherwise a rational customer would always prefer to purchase two Six-Inch subs instead of one Footlong), but why pile on?

A178.) This directly contradicts the record: the district court found that Subway sold most sandwiches at proper length even before the January 2013 quality-control campaign announcement (A3), and the settlement itself acknowledges that the standardization campaign will not have a 100% success rate. A61. Nothing in Gordon's calculation addresses Frank's objection. Gordon simply assumes (1) that 100% of sandwiches before the injunction were short; (2) 100% of sandwiches after the injunction are of the correct size; and (3) each short sandwich has a certain discounted value to consumers. But both of the first two assumptions are wrong, and the third is invented out of whole cloth.

Garbage in, garbage out: an expert opinion that assumes the conclusion without any basis for the assumption is a random and arbitrary guess, not an expert opinion. Fed. R. Evid. 702; *McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 657-58 (7th Cir. 1998) (holding that a "bare conclusion" offered without explanation or empirical support fails the reliability requirement of Rule 702); *Bielskis v. Louisville Ladder, Inc.*, 663 F.3d 887, 894 (7th Cir. 2011) ("An expert's opinion must be reasoned and founded on data."); *Buscaglia v. United States*, 25 F.3d 530, 533 (7th Cir. 1994) (testimony inadmissible "if based upon speculation, unsupported assumptions, or conclusory allegations"). "[E]xperts' work is admissible only to the extent that it is reasoned, uses the methods of the discipline, and is founded on data. Talking off the cuff—deploying neither data nor analysis—is not an acceptable methodology." *Naeem v. McKesson Drug Co.*, 444 F.3d 593, 608 (7th Cir. 2006) (quoting *Lang v. Kohl's Food Stores, Inc.*, 217 F.3d 919, 924 (7th Cir. 2000)). And this opinion's assumptions *contradict* the record, rather than are merely unsupported by it.

The reliance on conclusory allegations and unsupported assumptions is bad enough, and reason alone to exclude Gordon as an expert, but the Gordon report fails to accomplish even its arithmetic correctly, running afoul of Rule 702(d) separately. Gordon twice attempted to multiply 100% of sales numbers by his redacted percentage, and ultimately multiplied those numbers incorrectly in two separate attempts. Dkt. 56-2 (\$5.2M/year); A178 (same, redacted); A251 (“corrected” \$5.9M/year). The sales numbers reported in paragraph 11 multiplied by the percentage Gordon asserted he was using in paragraph 9 of his report produce a total value of under \$0.6M/year, about a tenth of what he incorrectly reported both times. A251. Quack, quack. *Cf. Lake v. Neal*, 585 F.3d 1059, 1059 (7th Cir. 2009) (describing “Duck Test”).

Ultimately, Gordon’s two-page putative expert report cannot be grounds for supporting the settlement. It makes assumptions that contradict the record, makes other assumptions that are entirely arbitrary and without support, and then tops all that off by making an error of an order of magnitude when performing basic arithmetic. There is no competent evidence that the settlement affects the length of a single sandwich (much less *every* Subway sandwich sold) relative to the world where the district court refuses class certification under *Aqua Dots*. There is no competent evidence that the injunction is worth a single penny, much less the fantasy of \$5M/year Gordon purports to calculate. Class counsel and the class representatives prosecuted a lawsuit and pursued a settlement that only benefits themselves, and the Gordon declaration does not refute that.

Conclusion

This Court should vacate and reverse the settlement approval and class certification.

Dated: May 3 , 2016

Respectfully submitted,

/s/ Theodore H. Frank _____

Theodore H. Frank

COMPETITIVE ENTERPRISE INSTITUTE

CENTER FOR CLASS ACTION FAIRNESS

1899 L Street, NW, 12th floor

Washington, DC 20036

Telephone: (202) 331-2263

Email: ted.frank@cei.org

In pro per

Statement Regarding Oral Argument

Pursuant to Cir. R. 34(f), Frank requests that the Court hear oral argument in his case because it presents significant issues concerning settlements in class action cases. Exploration at oral argument would aid this Court's decisional process and benefit the judicial system.

While many appeals of class-action settlement approvals are brought by so-called "professional objectors" in bad faith to extort payments from the settling parties, this is not the practice of the Center for Class Action Fairness, which has never settled an appeal for a *quid pro quo* payment, and brings this objection and appeal in good faith to overturn an unlawful settlement. A167. While Frank is proceeding *pro se*, he has previously argued and won landmark appellate rulings improving the fairness of class-action and derivative settlement procedure. *E.g.*, *Pearson*, 772 F.3d 778 (7th Cir. 2014) (*pro se*); *Crowley*, 687 F.3d 314 (7th Cir. 2012) (*pro se*); *In re Baby Products Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011). A favorable resolution in this case would improve the class action process by deterring other class-action litigation designed to benefit attorneys at the expense of their putative clients.

**Certificate of Compliance
with Fed. R. App. 32(a)(7)(C) and Circuit Rule 30(d)**

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, Type Style Requirements, and Appendix Requirements:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

This brief contains 6,774 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 12-point Palatino font.

3. All materials required by Cir. R. 30(a) & (b) are included in the appendix.
Executed on May 3, 2016.

/s/ Theodore H. Frank _____

Theodore H. Frank

Proof of Service

I hereby certify that on May 3, 2016, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Seventh Circuit using the CM/ECF system, thereby effecting service on counsel of record who are registered for electronic filing under Cir. R. 25(a).

/s/ Theodore H. Frank

Theodore H. Frank

Required Short Appendix

**Statement of Compliance
with Circuit Rule 30(d)**

All materials required by Cir. R. 30(a) & (b) are included in the Appendix of Appellant Theodore H. Frank.

/s/ Theodore H. Frank _____

Theodore H. Frank

Adam E. Schulman

COMPETITIVE ENTERPRISE INSTITUTE

CENTER FOR CLASS ACTION FAIRNESS

1899 L Street, N.W., 12th Floor

Washington, D.C. 20036

(202) 331-2263

Attorneys for Appellant Frank

APPENDIX
TABLE OF CONTENTS
Required Short Appendix

Appendix Page

Decision and Order of The Honorable Lynn Adelman filed February 25, 2016 (Docket No. 65)	A1
Final Judgment of The Honorable Lynn Adelman filed February 25, 2016 (Docket No. 66)	A30

APPENDIX
TABLE OF CONTENTS

Volume I of II

Appendix Page

Docket Entries.....A33

Exhibit to Plaintiffs' Unopposed Motion
filed September 29, 2015:

Exhibit:

A. Settlement Agreement and Release,
With Exhibits,
dated September 10, 2015 (Docket No. 46-1)A48

Theodore H. Frank's Objection to Proposed Settlement,
With Exhibits,
filed December 15, 2015 (Docket No. 51)A127

Exhibits:

Theodore H. Frank's Declaration in
Support of Objection to Proposed Settlement
sworn December 14, 2015 (Docket No. 51-1).....A165

A. "Subway Pledged to Ensure Every
'Footlong' is 12 Inches" Article
dated January 25, 2013 (Docket No. 51-2)A172

B. "Subway Pledges to Make All Its
Footlong Sandwiches 12 Inches" Article
dated January 25, 2013 (Docket No. 51-3)A173

Attachment to Plaintiffs' Brief in Support of
Final Approval of Proposed Class Action Settlement
filed January 5, 2016:

Attachment:

Declaration of David A. Cousins,
sworn January 4, 2016 (Docket No. 54-1).....A174

Exhibit to Defendant Doctor's Associates, Inc.'s Reply Brief
filed January 11, 2016:

Exhibit:

1. Declaration of John A. Gordon,
With Curriculum Vitae,
sworn January 5, 2016 (Docket No. 59-1)A176

Memorandum in Support of Theodore H. Frank's
Motion to Exclude Declaration of John A. Gordon
filed January 12, 2016 (Docket No. 60-1)A186

Transcript of Fairness Hearing before
The Honorable Lynn Adelman
on January 15, 2016 (Docket No. 67).....A197

APPENDIX
TABLE OF CONTENTS
Volume II of II – UNDER SEAL

Appendix Page

Attachment to Defendant Doctor's Associates Inc.'s Motion to Seal
filed January 6, 2016:

Attachment:

Corrected Declaration of John A. Gordon
sworn January 14, 2016 (Docket No. 56-4).....A250

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

**IN RE: SUBWAY FOOTLONG
SANDWICH MARKETING AND
SALES PRACTICES LITIGATION**

MDL No. 13-02439

This Document Relates to All Cases

DECISION AND ORDER

The present litigation consists of multiple class actions that the Judicial Panel on Multidistrict Litigation transferred to this district for consolidated pretrial purposes. See 28 U.S.C. § 1407. The plaintiffs allege that Doctor's Associates, Inc., the franchisor of Subway restaurants, engaged in deceptive marketing and sales practices by advertising Subway sandwiches as "Footlongs" and "6-inch" sandwiches when, in fact, some sandwiches were slightly shorter than their advertised lengths. The parties have reached a settlement. In a prior order, I certified a settlement class and preliminarily approved the settlement agreement. On January 15, 2016, I held a final fairness hearing. Before me now are motions relating to the final approval of the settlement: plaintiffs' motion for final approval of the settlement; class counsel's motion for attorneys' fees, costs, and incentive awards for the named plaintiffs; and several administrative motions.

I. BACKGROUND

Doctor's Associates is the franchisor of Subway restaurants in the United States. The restaurants, which sell fast-food submarine sandwiches, are owned by independent franchisees. Doctor's Associates enforces certain uniform standards that apply to the

restaurants and also conducts a nationwide marketing campaign. During the time period relevant to this suit, the marketing campaign advertised Subway sandwiches as “Footlongs” and included various references to the sandwiches being one foot, or 12 inches, in length. See Am. Compl. ¶¶ 28–31, ECF No. 18. The defendant also marketed “6-inch” sandwiches as being available for purchase at Subway restaurants. These sandwiches are created by cutting the bread used for Footlong sandwiches in half. Id. ¶ 32.

In January 2013, an Australian teenager posted a picture on Facebook of a Subway Footlong sandwich he purchased that was only 11 inches long. The picture became the subject of considerable media attention. Around this time, the lawyers who would eventually file the present case began investigating potential claims against Doctor’s Associates for violating state consumer-protection laws. Between January and June of 2013, the named plaintiffs and their respective counsel filed complaints in several courts around the country. The complaints alleged that Doctor’s Associates had engaged in unfair and deceptive marketing practices regarding the length of Footlong and 6-inch sandwiches, resulting in each plaintiff receiving less food than he or she had bargained for. Each case was pleaded as a class action and sought monetary damages, attorneys’ fees, and injunctive relief under the consumer-protection laws of all 50 states and the District of Columbia.

In February 2013, Doctor’s Associates requested that the Judicial Panel on Multidistrict Litigation transfer the seven actions that had been filed by that time to a single district for consolidated pretrial proceedings. While waiting for the panel to rule on the request, the parties in all cases agreed to mediate with a retired United States Magistrate

Judge. In preparation for the mediation, the parties exchanged informal discovery relating to the merits of the plaintiffs' claims. During this time, plaintiffs' counsel continued with their own investigation, which included interviewing former employees of the bakeries that manufactured the dough used in Subway sandwiches. The parties then participated in a mediation session that did not result in a resolution of the case.

By the time the initial mediation session was over, the plaintiffs realized that their claims were quite weak. First, the plaintiffs learned that Doctor's Associates' own testing showed that the vast majority of bread sold in Subway restaurants was at least 12 inches long, and that most of the bread that happened to be shorter than 12 inches was less than 1/4-inch shorter. Second, the plaintiffs learned that all of the raw dough sticks used to bake Subway bread weigh exactly the same. The dough sticks arrive at the restaurants frozen, and are then thawed, stretched, allowed to rise, and baked. Due to natural variability in this process, the final loaves may have slightly different shapes. Some loaves will be slightly shorter and wider than others. But because all loaves are baked from the same quantity of dough, each loaf contains the same quantity of ingredients. Thus, a customer who received a baked loaf that was shorter than 12 inches did not receive any less bread than he or she would have if the loaf had measured exactly 12 inches. Third, the plaintiffs learned that the amount of meat and cheese included with each sandwich is standardized. Thus, a sandwich that is slightly shorter than 12 inches contains the same amount of meat and cheese as it would have had it measured exactly 12 inches. It is theoretically possible that a sandwich made on a slightly shorter loaf would contain a slightly diminished quantity of toppings—a sandwich that was 1/4-inch shorter than advertised might be missing a few shreds of lettuce or a gram or two of mayonnaise.

However, Subway sandwiches are made to order in front of the customer, and if the customer asks for more of any particular topping, the employee making the sandwich will add more of that topping to the sandwich. Thus, the plaintiffs learned that, as a practical matter, the length of the bread does not affect the quantity of food the customer receives.

See generally Decl. of Nicholas Hauptfeld, ECF No. 55-1.

Also during this informal discovery period and initial mediation session, the plaintiffs began to evaluate their chances for obtaining class certification on their damages claims. They realized that one serious obstacle to class certification was the lack of proof as to which potential class members purchased sandwiches that were shorter than advertised. Because not every Subway sandwich sold during the class period was undersized, it is not the case that every person who purchased a Subway sandwich during the class period suffered an injury. Thus, individualized hearings would be needed to determine which potential class members purchased undersized sandwiches. Moreover, unless a customer happened to measure his or her sandwich before eating it (as the named plaintiffs did, see Am. Compl. ¶¶ 11–19), the customer was unlikely to even realize that the sandwich was shorter than advertised. This made proof of injury difficult. Another obstacle to class certification related to proof of materiality, which is an element of a claim for damages under most states' consumer-protection statutes. Many consumers likely would not be so concerned about the exact dimensions of a fast-food sandwich that they would feel cheated upon learning that the sandwich they purchased was 1/4-inch shorter than advertised. This is especially true when the length of the sandwich does not affect the quantity of food received. Thus, individualized inquiries would be needed in order to identify those few consumers who both received undersized sandwiches and deemed the

slight difference in length material to their purchasing decisions.

In light of these problems with obtaining class certification on claims for monetary damages, the plaintiffs decided to refocus their efforts on the class's claims for injunctive relief, which sought an injunction requiring Doctor's Associates to adopt measures designed to ensure that all sandwiches are at least 12 inches long. By the time the plaintiffs made this decision, the Panel on Multidistrict Litigation had granted Doctor's Associates' motion and transferred the original seven cases to this court.¹ I then appointed lead counsel and set a deadline for the plaintiffs to file an amended complaint governing all cases. The complaint that was eventually filed did not contain claims for monetary damages. Instead, the plaintiffs sought injunctive relief only and alleged that class certification was proper under Federal Rule of Civil Procedure 23(b)(2). The proposed class was defined as all persons in the United States who purchased a Subway 6-inch or Footlong sandwich during the class period.

Throughout the summer and fall of 2013, the parties continued to attend mediation sessions with the magistrate judge. By March 2014, the mediation had resulted in a settlement in principle on the claims for injunctive relief. Under the settlement, Doctor's Associates agreed to institute or keep in place, for a period of at least four years from the date the court finally approves the settlement, a number of practices that are designed to ensure that all bread sold at Subway restaurants is at least 12 inches long. See Settlement

¹The Panel would later transfer an eighth case to this court. Moreover, a ninth case that had been originally filed in this district was also made part of the proceeding.

Agreement ¶¶ 22.i–22.vi, 24, ECF No. 46-1 at pp. 30–33.² In addition, Doctor’s Associates agreed to require all Subway restaurants to post notices to customers indicating that, due to natural variability in the bread-baking process, the size and shape of bread may vary. Id. ¶ 22.vii. Doctor’s Associates agreed to post a similar notice on its own website. Id. ¶ 22.viii.

Under the consumer-protection laws of most states, a successful plaintiff is entitled to an award of reasonable attorneys’ fees. The parties’ initial settlement agreement did not result in a settlement of class counsel’s claim for attorneys’ fees under these statutes. Moreover, in class-action settlements, the named plaintiffs are often awarded compensation (known as “incentive awards”) for their services as class representatives. See, e.g., Eubank v. Pella Corp., 753 F.3d 718, 723 (7th Cir. 2014). The initial settlement did not address the named plaintiffs’ claims for incentive awards. But the parties engaged in further mediation with the magistrate judge in an attempt to settle the amount of attorneys’ fees and incentive awards. After several months of failed attempts at settling these matters, the parties informed the court that they had reached an impasse.

In December 2014, I offered to personally conduct mediation relating to the amount of attorneys’ fees and incentive awards, provided that all parties consented to my doing so.

²The practices include: requiring individual restaurants to use a tool for measuring the baked bread; requiring Doctor’s Associates to sample and measure the baked bread at each restaurant during its compliance inspections; requiring Doctor’s Associates to inspect bread ovens and proofers during its compliance inspections; increasing compliance penalties for restaurants found using bread that is not at least 12 inches long; and changing all Subway protocols, training manuals, franchisee communications, and operations manuals, which previously stated that the minimum acceptable size of a Footlong was 11.5 inches, so that all documents now state that the Footlong must be 12 inches long.

I informed the parties that, in the alternative, the plaintiffs could file a contested motion for attorneys' fees and incentive awards, to which Doctor's Associates would respond, and which I would ultimately resolve. The parties agreed to mediation with the court. The mediation was held in February 2015 and resulted in a resolution of the outstanding issues. Under the parties' agreement, the plaintiffs agreed to ask the court to award no more than \$525,000 in attorneys' fees (including costs and expenses) and incentive awards, and Doctor's Associates agreed that it would not oppose the plaintiffs' request. See Settlement Agreement ¶¶ 39–41. The agreement provides that the incentive awards shall be no more than \$1,000 per named plaintiff.³ The agreement further provides that the exact amount of attorneys' fees and incentive awards would be left to the sole discretion of the court, and that the court's deciding to award less than \$525,000 would not result in termination of the agreement to settle the claims for injunctive relief.

In September 2015, the parties submitted the final proposed settlement agreement to the court for preliminary approval. In this agreement, the proposed settlement class is defined all persons in the United States who purchased a 6-inch or Footlong sandwich at a Subway restaurant between January 1, 2003 and the date of preliminary approval (which was October 2, 2015). Importantly, the final settlement agreement provides that class members who are not named plaintiffs are releasing only claims for injunctive relief; the settlement agreement expressly reserves the right of class members to bring claims for monetary damages against Doctor's Associates, either individually or in a subsequent class

³There are ten named plaintiffs, so the maximum total incentive award would be \$10,000. However, as discussed below, the named plaintiffs ended up requesting incentive awards of only \$500 each, for a total of \$5,000.

action. See Settlement Agreement ¶¶ 47–48.

The final settlement agreement contemplates that the class will be certified for settlement purposes under Federal Rule of Civil Procedure 23(b)(2), i.e., as an “injunction only” class. Rule 23 does not allow members of a class certified under this provision to opt out. Nor does Rule 23 clearly require the court to direct notice to the members of an injunction-only class. See Fed. R. Civ. P. 23(c)(2); but see Rule 23(e)(1) (requiring court to direct notice of a settlement to class members). However, the settlement agreement provides for notice to class members. Specifically, the agreement provides that a settlement administrator will distribute a national press release announcing the settlement to thousands of newspapers, television stations, radio stations, magazines, and websites. Settlement Agreement ¶¶ 33–34. The press release will direct class members to a website containing information about the case, the settlement, and the procedures for class members to object to the settlement and/or the plaintiffs’ requests for attorneys’ fees and incentive awards. Id.

On October 2, 2015, I preliminarily approved the parties’ settlement. Following the settlement administrator’s distributing the press release, many news agencies ran stories on the settlement. See Decl. of Jason Rabe ¶ 3, ECF No. 54-3. On December 7, 2015, class counsel filed their motion for attorneys’ fees, in which they seek an award of \$520,000. The named plaintiffs seek incentive awards of \$500 each, for a total of \$5,000.

The court has received four objections from class members. Three of these objections are by unrepresented class members who object to the lack of monetary relief for the class. See ECF Nos. 48, 49, 53. The fourth objection was filed by an attorney on behalf of Theodore H. Frank, who is the director of an organization called the Center for

Class Action Fairness. Like the unrepresented objectors, Frank objects to the lack of monetary relief for the class, but he also raises other legal issues that I consider below.

II. DISCUSSION

A settlement-only class must satisfy the bulk of Rule 23's requirements in order to be certified. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997); Jamie S. v. Milwaukee Public Schools, 668 F.3d 481, 502 (7th Cir. 2012). This includes the four “prerequisites” to class certification listed in Rule 23(a), i.e., numerosity, commonality, typicality, and adequacy of representation. Moreover, where, as here, the parties seek certification of an “injunction only” settlement class, they must show that Rule 23(b)(2) has been satisfied, i.e., that “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2); Jamie S., 668 F.3d at 503.

In the present case, the objectors do not dispute that the first three prerequisites to class certification are satisfied. And I conclude that they are satisfied. First, the class is so numerous that joinder of all members is impractical, see Fed. R. Civ. P. 23(a)(1), as a sizable portion of the American population purchased sandwiches at Subway restaurants during the class period. Second, there is a question of law or fact common to the class, see Fed. R. Civ. P. 23(a)(2), namely, whether the defendant’s having marketed Subway sandwiches as “Footlongs” or “6-inch” sandwiches was deceptive given that some sandwiches were slightly shorter than those lengths. Third, the claims of the named plaintiffs are typical of the claims of the class, see Fed. R. Civ. P. 23(a)(3), in that there are no discernible differences between the named plaintiffs’ claims and the claims of the class

members.

Objector Frank contends that the fourth prerequisite to class certification, adequacy of representation, is not satisfied. See Fed. R. Civ. P. 23(a)(4).⁴ Frank contends that both the named plaintiffs and class counsel have agreed to a settlement that is not fair to the class, and that therefore they have not fairly and adequately protected the interests of the class. Frank also contends that the class may not be certified as an injunction-only class under Rule 23(b)(2) because injunctive relief is not appropriate respecting the class as a whole. Frank's position is that this case is really about monetary relief, and that therefore the class must be certified under Rule 23(b)(3), which is the provision under which claims for monetary damages are usually certified. Frank's objections to certification under Rule 26(a)(4) and (b)(2) touch upon the fairness of the settlement itself. Thus, I will incorporate my discussion of these objections into my general discussion of the fairness of the settlement, to which I now turn.

Under Federal Rule of Civil Procedure 23(e)(2), a court may approve a settlement in class action litigation only if it finds that the settlement is "fair, reasonable, and adequate." In order to evaluate the fairness of a settlement, the court must consider "(1) the strength of the case for plaintiffs on the merits, balanced against the extent of settlement offer; (2) the complexity, length, and expense of further litigation; (3) the amount of opposition to the settlement; (4) the reaction of members of the class to the settlement; (5) the opinion of competent counsel; and (6) stage of the proceedings and the amount of discovery completed." Wong v. Accretive Health, Inc., 773 F.3d 859, 863 (7th Cir. 2014)

⁴Relatedly, Frank contends that class counsel have not fairly and adequately represented the interests of the class, as required by Rule 23(g)(4).

(internal quotation marks omitted). The first factor—the strength of the plaintiffs’ case compared to the value of the settlement—is the most important. Id. at 863–64.

In recent years, the Seventh Circuit has emphasized that, given the realities of class-action litigation—especially consumer class-action litigation—courts must carefully scrutinize class settlements for fairness. As the court has explained,

class action settlements are often quite different from settlements of other types of cases, which indeed are bargained exchanges between the opposing litigants. Class counsel rarely have clients to whom they are responsive. The named plaintiffs in a class action, though supposed to be the representatives of the class, are typically chosen by class counsel; the other class members are not parties and have no control over class counsel. The result is an acute conflict of interest between class counsel, whose pecuniary interest is in their fees, and class members, whose pecuniary interest is in the award to the class. Defendants are interested only in the total costs of the settlement to them, and not in the division of the costs between attorneys’ fees and payment to class members. We thus have remarked the incentive of class counsel, in complicity with the defendant’s counsel, to sell out the class by agreeing with the defendant to recommend that the judges approve a settlement involving a meager recovery for the class but generous compensation for the lawyers—the deal that promotes the self-interest of both class counsel and the defendant and is therefore optimal from the standpoint of their private interests.

Pearson v. NBTY, Inc., 772 F.3d 778, 787 (7th Cir. 2014) (internal quotation marks omitted). For these reasons, courts must “exercise the highest degree of vigilance” in their review of class-action settlements. Reynolds v. Beneficial Nat’l Bank, 288 F.3d 277, 279–80 (7th Cir. 2002).

I begin my analysis of the settlement’s fairness by comparing the strength of the plaintiffs’ case to the value of the settlement, which, as noted, is the most important factor. On this point, the parties and Frank are in agreement: given the strength of the plaintiffs’ case, the total value of the settlement, i.e., \$525,000 plus the value of the injunction to the

class,⁵ is reasonable. See Frank Obj. at 1 (“Frank does not object to Subway settling this case for half a million dollars . . .”). I too agree that the plaintiffs would be unlikely to recover more than \$525,000 from Doctor’s Associates, even if they attempted to reinstate their claims for monetary damages. Primarily, this is because class counsel has found no evidence to suggest that serving slightly undersized bread resulted in customers receiving less food. As explained in the background section, the frozen dough sticks weigh the same, and the precise length of the finished loaves does not affect the amount of meat, cheese, and other ingredients included with a sandwich. Thus, the evidence indicates that all purchasers of Footlongs and 6-inch sandwiches received the full amount of food associated with their advertised lengths, regardless of the precise length of the bread. Given this, the only class members who could have suffered an injury are those who deemed the precise length of the sandwich important for reasons unrelated to the amount of food associated with that length. But no evidence suggests that consumers ascribe any value to the precise length of a fast-food sandwich. Further, even if a slightly shorter sandwich contained a diminished quantity of ingredients, the evidence indicates that most undersized sandwiches were only 1/4-inch shorter than the advertised length. See Hauptfeld Decl. ¶ 4. It is highly unlikely that this difference in length would be material to a consumer’s purchasing decision, as a difference that small is unlikely to affect the consumer’s enjoyment of the sandwich, satiety, or nutrition. Thus, there is no evidence to

⁵The plaintiffs have submitted a declaration from an economist, John Gordon, who opines that the value of the injunction to class members is more than \$5 million. See Decl. of John Gordon ¶ 11, ECF No. 56-4. However, I do not believe that it is possible to assign a precise monetary value to the injunction. Nor is it necessary to do so. For these reasons, I have not relied on Gordon’s opinion in evaluating either the reasonableness of the settlement or the reasonableness of class counsel’s fee request.

suggest that any consumer would have paid less for a sandwich had he or she known of the possibility of the bread's being up to 1/4-inch shorter than the advertised length. In light of these problems with the plaintiffs' claims—not to mention the problems the plaintiffs would have had in obtaining certification of a damages class under Rule 23(b)(3)—a total monetary settlement of \$525,000 is reasonable. It is even more reasonable given that class members have not released their claims for monetary damages and are free to bring their own claims, either individually or through a proposed class action, if they believe that the difference in bread size caused them compensable harm.⁶

Although Frank agrees that the total settlement amount is reasonable, he objects to the settlement's allocation of the entire monetary component to the named plaintiffs and class counsel, with no money being distributed to absent class members. Frank contends that the \$525,000 that Doctor's Associates is willing to pay to the named plaintiffs and their counsel should be administered as a common fund for the benefit of the class as a whole, as it would be in a Rule 23(b)(3) settlement. Class counsel would then be entitled to claim a reasonable percentage of the common fund, such as one-third, as attorneys' fees, and the named plaintiffs could claim reasonable incentive awards.

One major problem with certifying the settlement class under Rule 23(b)(3), which Frank has not meaningfully addressed, is the impracticality of distributing a settlement as small as \$525,000 to a class composed of many millions of consumers. The cost of

⁶I emphasize that the settlement agreement does not prohibit individual class members from bringing a subsequent class action, which distinguishes the present settlement from the settlement in Crawford v. Equifax Payment Services, 201 F.3d 877, 880 (7th Cir. 2000), in which the court deemed a class settlement improper, in part, because it purported to preserve the class members' individual damages claims but barred class members from bringing a subsequent class action for damages.

informing class members of the settlement and how to either submit claims or opt out, processing the submitted claims and opt-outs, and distributing payments to class members would likely exceed the entire value of the settlement. For example, between 2008 and 2010, I presided over a consumer class action involving a Rule 23(b)(3) settlement class composed of nearly every person in the United States who purchased a lawnmower during a 20-year period. See In re Lawnmower Engine Horsepower Mktg. & Sales Practices Litigation, No. 08-MD-1999 (E.D. Wis.). In that case, slightly more than \$22 million in cash was distributed to the approximately one million class members who submitted valid claims. The total cost of administering that settlement was more than \$2.7 million. See Decl. of Rebecca Blake ¶¶ 3–9, ECF No. 525 in E.D. Wis. Case No. 08-MD-1999. The cost of mailing checks to class members was itself more than \$400,000. Id. ¶ 5. Even if a cash settlement in the present case could be administered for less than \$2.7 million, almost certainly the administrative costs would still exceed \$525,000, making distribution of the settlement proceeds to the class members impossible.

At the fairness hearing, Frank’s counsel suggested that the cost of administering a Rule 23(b)(3) settlement in this case might be as little as \$100,000. Based on my experience with class settlements, I find this estimate extremely unrealistic. But even assuming that \$100,000 is an accurate estimate of the cost of administering a \$525,000 common fund for the benefit of a class of millions, the class members would still receive nothing of value. That is because the amount distributed to any single class member would be less than the value of the time the class member would spend learning about the settlement, submitting a claim, and cashing the settlement check. Here are some back-of-the-envelope calculations that illustrate this problem: Assuming that \$100,000 of the

settlement would go to administrative costs, \$425,000 would be available for class members and class counsel. Assume further that class counsel is entitled to a fee equal to one-third of this amount. See Pearson, 772 F.3d at 782 (suggesting that, in consumer class actions, attorneys' fees awarded to class counsel should not exceed a third or at most a half of the total amount of money going to class members and their counsel). That would be a fee of \$141,667, which leaves \$283,333 for class members.⁷ Assume that the 10 named plaintiffs each receive \$100 incentive awards, which reduces the amount available for distribution to the class to \$282,333. If we then assume that one million class members will file valid claims, each class member would ultimately receive a check for 28 cents. Next, assume (optimistically) that it takes only five minutes for a class member to do what it takes to submit a valid claim and to cash the settlement check. Also assume (pessimistically) that an hour of a class member's time is worth only \$7.25, which is the current federal minimum wage. Under these assumptions, five minutes of the class member's time would be worth about 60 cents, which is more than double the 28 cents he or she would receive under the settlement. Thus, if the settlement could be administered under Rule 23(b)(3) for only \$100,000, it would, at best, cost class members 32 cents each. Of course, if all class members took the value of their time into consideration, no one would bother to submit a claim for 28 cents. Thus, administering this settlement under Rule 23(b)(3) would result in class members receiving nothing of value.

Also at the fairness hearing, Frank's counsel suggested that the settlement fund

⁷Note that in this hypothetical, class counsel does not receive any additional amount from the common fund to cover expenses. In the present case, class counsel has incurred nearly \$40,000 in expenses.

could be administered as a coupon settlement, which might make administration less costly. When I asked Frank's counsel to explain how distributing coupons rather than cash would improve matters, he stated that coupons could be distributed at the point of sale: a class member could walk into a Subway restaurant, identify herself as a class member, and then fill out a form and receive a coupon for 30 cents (or some similar amount) off of her order. This approach would eliminate the cost of mailing checks to class members and reduce the hassle to the class members associated with submitting claims and receiving settlement proceeds. However, counsel for Doctor's Associates stated at the fairness hearing that the parties considered entering into a coupon settlement but abandoned that idea because it would be too costly to administer. Counsel stated that the estimated cost of providing notice to class members of a coupon settlement and allowing them to opt out of the settlement would exceed \$1 million dollars, which obviously is more than the reasonable settlement value of this case. Moreover, because Subway restaurants are owned by independent franchisees rather than Doctor's Associates, the franchisees (who are not defendants), rather than Doctor's Associates, would bear most of the cost of the coupon settlement. Settling matters between Doctor's Associates and its franchisees would lead to further administrative costs. For these reasons, a coupon settlement, like a cash settlement, is impractical.

Frank further contends that the settlement is unreasonable, and that the named plaintiffs and class counsel have proved to be inadequate representatives of the absent class members, because the agreed-to injunctive relief will not benefit the class members. Frank contends that this is so for two reasons: (1) the injunction does not require Doctor's Associates to do anything that it had not already agreed to do before this suit was filed,

and (2) the class members' alleged injuries were incurred in the past, yet the prospective injunctive relief does nothing to redress those injuries.

In support of his first reason, Frank points out that on January 25, 2013—almost immediately after the Footlong controversy gained media attention—Doctor's Associates pledged to ensure that all Subway Footlong sandwiches would be 12 inches long. Thus, argues Frank, the injunction in this case does not provide class members with any benefit that they do not already enjoy. However, Doctor's Associates has submitted a declaration in which it states that it agreed to the specific practice changes listed in the injunction “substantially as a result of [this] litigation.” Decl. of David Cousins ¶ 3, ECF No. 54-1. Moreover, the value of the injunction lies not only in the practice changes, but in the availability of an enforcement mechanism. That is, assuming that Doctor's Associates made the practice changes in response to the media attention and was not judicially bound to keep the changes in place, it could have abandoned the changes after the media attention subsided. But the injunction requires Doctor's Associates to keep the changes in place for four years from the date that this litigation concludes, and class members may enforce violations by filing motions for contempt sanctions. Thus, it is not accurate to say, as Frank does, that the settlement does nothing to change the status quo.

Frank cites In re Aqua Dots Products Liability Litigation for the proposition that a named plaintiff is not an adequate class representative if he proposes to incur notice and litigation costs to obtain a remedy that the defendant has already made available to class members. 654 F.3d 748, 752 (7th Cir. 2011). In Aqua Dots, the named plaintiffs sought refunds on behalf of all purchasers of a consumer product that the distributor had agreed to voluntarily recall. Under the voluntary recall, full refunds were already available to all

purchasers. However, to obtain refunds through a class action, the class would have to bear the cost of providing notice to the class members and pay attorneys' fees. This meant that no consumer would obtain a full refund through the class action—at least part of each consumer's refund would be used to pay for notice and attorneys' fees. Thus, the named plaintiffs were proposing to make each class member worse off: under the voluntary recall, the consumer would obtain a full refund; under the class action, the consumer's refund would be reduced to pay for notice and attorneys' fees. This is why the court deemed the named plaintiffs inadequate representatives of the class and refused to certify their claims under Rule 23. *Id.* at 750–52.

In contrast to the proposed class action in Aqua Dots, the settlement in the present case does not make any class member worse off. The defendant, rather than the class, has paid for the injunction, notice, and attorneys' fees. It is true that the class members will indirectly pay for these items by releasing their claims for injunctive relief. But that is a reasonable exchange: the plaintiffs are giving up no more than the value of the injunctive relief they will receive. Thus, even if it were the case that the injunctive relief does no more than formalize the practice changes that Doctor's Associates already agreed to make, it would not follow that the named plaintiffs or class counsel have failed to adequately represent the class, or that the settlement is unfair.

Frank's second reason for claiming that the injunctive relief does not benefit class members is that it benefits only future purchasers of Subway sandwiches, yet the class is defined as customers who purchased Subway sandwiches in the past. It is true that not every person who purchased a sandwich in the past will purchase one in the future, and that therefore not every class member will benefit from the injunction. However, because

many patrons of Subway restaurants are repeat customers, it is also true that very many class members will purchase a Subway sandwich in the future. And those class members who would not benefit from the injunction because they do not intend to purchase sandwiches in the future (or simply do not care about the precise length of the sandwiches they purchase) necessarily are not giving anything up by releasing their claims for injunctive relief. Further, as I have discussed, it is not possible, given the value of the plaintiffs' claims, to distribute any form of compensatory relief to the class members. Thus, the remedy is either injunctive relief or nothing. When the injunction is viewed in this light, it cannot be deemed inadequate on the ground that it does not benefit every class member.

Frank next points out that the proposed settlement contains “clear sailing” and “kicker” clauses, which are features that courts have identified as warning signs of an unfair settlement. Under a clear-sailing clause, a defendant agrees not to oppose class counsel's fee petition. See Redman v. RadioShack Corp., 768 F.3d 622, 637 (7th Cir. 2014). Such a clause is considered a sign of collusion: Because it is in the defendant's interest to contest class counsel's fee request in order to reduce the overall cost of the settlement, the defendant won't agree to a clear-sailing clause without compensation—namely a reduction in the part of the settlement that goes to the class members, as that is the only reduction class counsel are likely to consider. Id. Under a kicker clause, if the court reduces the amount of class counsel's fee, the difference reverts to the defendant and is not distributed to class members. See Pearson, 772 F.3d at 786. This has been described as a gimmick for defeating objectors: “If the class cannot benefit from the reduction in the award of attorneys' fees, then the objector, as a member of the class, would not have

standing to object, for he would have no stake in the outcome of the dispute.” Id.

In the present case, however, the clear-sailing and kicker clauses are not signs of an unfair settlement. First, the kicker clause is just a byproduct of the fact that it is impractical to distribute any part of the \$525,000 requested by class counsel to the class members. For example, if I concluded that a reasonable fee for class counsel is only \$300,000, it would be impossible to distribute the remaining \$225,000 to the class, as administrative costs alone would exceed that amount. Second, the clear-sailing clause is what class counsel bargained for when it agreed to settle the fee component of this case rather than ask the court to award a reasonable fee. That is, but for the settlement of the fee component, class counsel could have filed a fee petition requesting more than \$525,000, and the defendant could have opposed that petition. But in exchange for class counsel’s agreement to cap its fee request at \$525,000, defendant agreed not to oppose the request. More importantly, the parties’ agreement to settle the fee component cannot be viewed as an attempt to minimize the defendant’s overall liability and enrich class counsel at the expense of the class members. As discussed, the reasonable settlement value of this case is only \$525,000, and it is simply impractical to distribute any part of that amount to the class members. See In re Southwest Airlines Voucher Litig., 799 F.3d 701, 712–13 (7th Cir. 2015) (noting that clear-sailing and kicker clauses are not per se unreasonable and concluding that district court did not abuse its discretion in approving a settlement agreement that contained such clauses).

Next, Frank contends that the settlement is unfair, and that the named plaintiffs have proved to be inadequate class representatives, because the named plaintiffs will receive \$500 each while the absent class members will receive no monetary relief. Frank

cites several cases in which the Seventh Circuit has noted that a named plaintiff's receiving an incentive award that is disproportionate to the relief afforded to absent class members is a sign of an unfair settlement. See Espenscheid v. DirectSat USA, LLC, 688 F.3d 872, 875–76 (7th Cir. 2012); Murray v. GMAC Mortg. Corp., 434 F.3d 948, 952 (7th Cir. 2006); Crawford v. Equifax Payment Servs., 201 F.3d 877, 882 (7th Cir. 2000). However, these cases are distinguishable. First, in Espenscheid, the court stated that “[o]ne can imagine . . . a case in which the representative presses for an incentive award so large in relation to the judgment or settlement that if awarded it would significantly diminish the amount of damages received by the class.” 688 F.3d at 875–76. But in the present case, awarding \$5,000 to the named plaintiffs would not significantly diminish the amount of damages received by the class since, as discussed, it is not practical to distribute damages to the class in the first place. Second, in both Murray and Crawford, the court thought that awarding a large incentive award to a single named plaintiff while the rest of the class received no meaningful relief implied that the class's claims were worth more than what the plaintiff in each case had settled for, and that the named plaintiff had sold out the class. Murray, 434 F.3d at 952; Crawford, 201 F.3d at 882. But as discussed, the named plaintiffs in the present case have extracted from Doctor's Associates all that they reasonably could have given the weakness of their claims, and distributing \$525,000 in cash to the class is impractical. Thus, unlike in Crawford and Murray, the fact that the named plaintiffs will receive \$500 each for their efforts while the absent class members will receive only injunctive relief does not imply that the named plaintiffs sold out the class. To the contrary, \$500 per named plaintiff is reasonable compensation for the risks that they took (such as the risk that, should the suit fail, they would be personally liable for the

defendant's costs and attorneys' fees) and the services they performed. See Espenscheid, 688 F.3d at 876–77 (identifying risks taken and services performed by class action plaintiffs and noting that median service award of \$4,000 per class member represents “modest” compensation).

The next question is whether the settlement class may be certified under Rule 23(b)(2) as an “injunction only” class. As noted, Rule 23(b)(2) applies when “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole.” Here, the plaintiffs' complaint alleges that the defendant's marketing and sales practices are deceptive because Doctor's Associates markets its products as Footlongs and 6-inch sandwiches, even though some sandwiches are slightly shorter than those lengths. This conduct applies generally to the class, in that the marketing and sales practices are not tailored to individual customers. Moreover, Doctor's Associates cannot modify its marketing and sales practices on a per-customer basis. Rather, any changes to those practices will apply to all franchisees and to all customers. Thus, injunctive relief is appropriate respecting the class as a whole. See Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, ___, 131 S. Ct. 2541, 2557 (2011) (“The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.” (Internal quotation marks omitted)).

Frank contends that the settlement class may not be certified under Rule 23(b)(2) because “monetary claims predominate.” Frank Obj. at 13. He points out that the class comprises persons who purchased Subway sandwiches but who allegedly did not get what

they paid for. He contends that the usual remedy for this kind of harm is money—i.e., a refund or the difference in value between the sandwich as represented and the sandwich received. That may be true, but in the present case the parties have excised any claim for monetary relief from the settlement and left all class members free to pursue such claims if they choose to do so, either individually or through a subsequent class action. Thus, all that is at stake in this case is injunctive relief. It is true, as Frank points out, that courts are suspicious of requests to certify a class under Rule 23(b)(2) when monetary relief is available. However, the reason for this is the possibility that the named plaintiff is trying to circumvent the procedural requirements of Rule 23(b)(3)—such as that individualized issues not predominate over the common questions of law or fact and that class members receive notice of the suit and an opportunity to opt out—by combining individualized claims for monetary relief with a request for a broader injunction. See Dukes, 131 S. Ct. at 2558–60. Where, as here, the class members are not releasing any claims for monetary relief in the first place, and the only relief awarded to the class is an injunction, the reasons for suspicion are absent. See Berry v. Schulman, 807 F.3d 600, 609–13 (4th Cir. 2015) (affirming certification of a settlement class under Rule 23(b)(2) even though “individualized monetary damages claims” were “at issue” because those claims were retained by class members under the terms of the settlement).

Frank also contends that injunctive relief is unavailable under many of the state consumer-protection statutes at issue in this case, and that the named plaintiffs cannot satisfy the general requirements for obtaining injunctive relief, such as proving that they would suffer irreparable harm in the absence of an injunction. Again, Frank may be correct, but that is irrelevant where, as here, the defendant has agreed as part of the

settlement to the entry of injunctive relief. The Fourth Circuit recently made this very point when it approved a Rule 23(b)(2) settlement class in a case under the Fair Credit Reporting Act (“FCRA”). Berry, 807 F.3d at 610–11. In that case, the objectors argued that certification under Rule 23(b)(2) was improper because the FCRA does not permit consumers to seek injunctive relief. However, the court deemed the unavailability of injunctive relief under the FCRA “beside the point.” Id. at 610. It noted that, in the settlement context, it is the parties' agreement that serves as the source of the court's authority to enter any judgment at all, and that the defendant was “free to agree to a settlement enforcing a contractual obligation that could not be imposed without its consent.” Id. Likewise, because Doctor's Associates has consented to the entry of injunctive relief in the present case, this class may be certified under Rule 23(b)(2) even though the class might have been unable to obtain injunctive relief in a contested suit.⁸

The remaining question is whether class counsel's fee request is reasonable. When a class is certified under Rule 23(b)(2), the reasonableness of counsel's fee is usually determined by the “lodestar method.” See People Who Care v. Rockford Bd. of Educ., 90 F.3d 1307, 1310 (7th Cir. 1996). Under this method, a district court begins by computing a “lodestar”: the hours reasonably expended on the case multiplied by a reasonable hourly rate. See, e.g., Montanez v. Simon, 755 F.3d 547, 553 (7th Cir. 2014). Although the lodestar yields a presumptively reasonable fee, the court may adjust the fee up or down based on factors not included in the computation. Id.

⁸Notably, the defendant's consenting to the entry of injunctive relief does not circumvent any of the safeguards in Rule 23 that are meant to protect absent class members. See Amchem Prods., 521 U.S. at 620 (holding that, even in the settlement context, courts must enforce aspects of Rule 23 that are “designed to protect absentees”).

Before proceeding, I note that the lodestar method is of little utility in a case like this, where class counsel and the defendant have agreed that a certain fee is reasonable, and where any amount not awarded to class counsel cannot be distributed to the class members. Indeed, the objectors do not contend that class counsel's requested fee exceeds what is reasonable as measured by the lodestar method. Instead, they contend that class counsel has unreasonably appropriated the entire cash value of the settlement for themselves. However, as I have already explained, it is not practical, given the reasonable settlement value of this case, to distribute cash to the class members. Thus, the reasonableness of counsel's fee cannot be measured by the size of the fee in relation to the amount of money that the class members will receive. Instead, it should be measured by the value of the injunctive relief in relation to what the class members have given up in exchange for that relief. And measured this way, I conclude that the fee is reasonable. Class counsel obtained an injunction requiring Doctor's Associates to take steps designed to ensure that all sandwiches sold in Subway restaurants are either 6 or 12 inches long, and to disclose to customers that variation in the bread-baking process sometimes results in bread that is slightly shorter than the advertised length. This injunction will end the allegedly deceptive marketing and sales practices challenged in this case. Moreover, in obtaining the injunction, class counsel preserved each class member's right to bring a subsequent action for monetary damages, either individually or as part of a class action. The only right the class members have given up is the right to pursue additional injunctive relief, yet the objectors have not identified (and I cannot envision) any additional injunctive relief that a rational class member might want to pursue. When this result is compared to the strength of the plaintiff's claims, it can only be described as

excellent. Therefore, a fee of \$520,000, which is modest by class-action standards, is reasonable.

For the sake of completeness, I also find that the proposed fee is reasonable under the lodestar method. The total fee will be distributed to eleven law firms. A lawyer from each firm has submitted a declaration describing the firm's hourly rates, the number of hours each professional at the firm spent on the case, and the costs and expenses the firm incurred. See ECF Nos. 50-2 to 50-11. Multiplying the reasonable hourly rate of each professional by the reasonable number of hours spent on the case results in a total lodestar of more than \$1.125 million.⁹ Thus, an award of \$520,000 in fees (\$40,000 of which is reimbursement for expenses) is a fee that is less than 50% of the lodestar. I do not see any reason to make further reductions to the lodestar amount. Accordingly, when measured by the lodestar method, class counsel's fee request is reasonable.

Frank contends that even if class counsel's fee is reasonable in the aggregate, there is a separate problem, which is that the plaintiffs' attorneys have proposed to divide the aggregate fee award among themselves and have not sought court approval of their proposed allocation. However, in response to Frank's objection, class counsel disclosed to the court their proposed allocation and asked me to approve it. See ECF No. 54 at 39. No plaintiffs' attorney has objected to the proposed allocation. At the fairness hearing, Frank did not contend that class counsel's proposed allocation was improper, and I conclude that it is fair. Thus, perhaps this part of Frank's objection is moot.

⁹This figure represents work performed through May 2014 and does not include the time counsel spent finalizing the settlement agreement, preparing and filing motions for approval of the settlement and the fee award, and responding to class members' inquiries and objections.

However, I also note that the authority on which Frank relies to support the proposition that class counsel may not privately divide a fee is inapposite. His primary case is In re High Sulfur Content Gasoline Products Liability Litigation, 517 F.3d 220 (5th Cir. 2008). But in that case, the court did not hold that district courts cannot allow plaintiffs' lawyers to divide a fee that is reasonable in the aggregate among themselves. Rather, the court held that when some of the plaintiffs' attorneys object to a proposed allocation—as they had in High Sulfur—the court has a duty to rule on the objection and allocate fees in a fair manner. Id. at 233–34 (stating that a district court has a duty to scrutinize the allocation of a fee award “when an attorney objects to his co-counsel’s fee award recommendations”). The court acknowledged circuit precedent allowing a district court to award an aggregate sum to plaintiffs' attorneys and then leave apportionment up to the attorneys themselves, and it did not disapprove of this precedent. Id. (discussing Longden v. Sunderman, 979 F.2d 1095, 1101 (5th Cir. 1992)).

Frank also cites In re Agent Orange Product Liability Litigation in support of his argument that a court may not allow plaintiffs' counsel to allocate fees among themselves. 818 F.2d 216 (2d Cir. 1987). But again, that case does not hold that district courts cannot allow counsel to privately divide a fee that is reasonable in the aggregate. Rather, the problem in Agent Orange was that plaintiffs' counsel had entered into a fee agreement in which fees would be allocated to certain firms based on how much the firm had advanced towards the expenses incurred during the litigation, rather than on the basis of the services the firm had performed for the class. Id. at 217. The court found that this arrangement created a potential conflict of interest between class members and their counsel because the investors had an incentive to settle early, regardless of the benefit to the class. Id. at

223–24. In the present case, the plaintiffs’ proposed allocation is not based on each firm’s contribution towards expenses but is based on the firms’ actual services. Under the proposed allocation, the two law firms that performed the majority of the work in this case will each receive 35% of the total fee, while the remaining eight firms will split the remainder. See ECF No. 54 at 39. Thus, the proposed allocation does not create a conflict of interest between class members and their attorneys.

III. CONCLUSION

For the reasons stated, I conclude that the settlement is fair and that the named plaintiffs and class counsel have adequately represented the class. I also conclude that the named plaintiffs’ request for \$5,000 in incentive awards is reasonable and that class counsel’s request for \$520,000 in costs, expenses, and attorneys’ fees is reasonable.

Accordingly, **IT IS ORDERED** that the plaintiffs’ motion for final approval of the settlement (ECF No. 54) is **GRANTED**. The court will enter the parties’ proposed final judgment.

IT IS FURTHER ORDERED that class counsel’s petition for service awards, attorneys’ fees, and costs (ECF No. 50) is **GRANTED**.

IT IS FURTHER ORDERED that Doctor’s Associates’ motions to seal certain parts of the record relating to the Declaration of John Gordon (ECF Nos. 56 & 62) are **GRANTED**.

IT IS FURTHER ORDERED that Frank’s motion to exclude the Declaration of John Gordon (ECF No. 60) is **DENIED**.

FINALLY, IT IS ORDERED that the plaintiffs’ motion to supplement their brief (ECF

No. 57) is **GRANTED**.

Dated at Milwaukee, Wisconsin this 25th day of February, 2016.

s/ Lynn Adelman

LYNN ADELMAN
District Judge

all persons in the United States who purchased a Six inch or Footlong sandwich at a Subway® restaurant any time between January 1, 2003 and October 2, 2015. Excluded from this class are Defendant, the Related Parties, governmental entities, and all judges assigned to hear any aspect of this case, as well as their immediate families.

The Court further finds that this Class satisfies the requirements of Fed. R. Civ. P. 23(a)-(b).

4. The notice provided to the Class was in accord with the Preliminary Approval Order and satisfies the requirements of Fed. R. Civ. P. 23(e)(1), and the due process requirements of the United States Constitution.

5. The Settlement is fair, reasonable, and adequate pursuant to Fed. R. Civ. P. 23(e)(2) and is approved in its entirety.

6. Within 10 business days of the Effective Date, DAI will pay Class Counsel \$520,000 for their reasonable attorney's fees and expenses and will pay \$5,000 to Lead Class Counsel for the Class Representative Service Awards. Lead Class Counsel will be responsible for distributing the \$500 service awards to each Plaintiff and for distributing the attorney's fees and expenses award among the various Class Counsel in the amounts specified in the order finally approving the Settlement.

7. To the extent not already done, DAI will implement all of the practices changes included in Paragraphs 22-24 of the Settlement Agreement in the manner and within the time periods described in the Settlement Agreement.

8. All Released Claims, as described in Paragraph 47 of the Settlement Agreement, are hereby dismissed with prejudice and without costs. Each member of the Class is barred from instituting, prosecuting, maintaining, or continuing with, in any capacity, any action or proceeding that asserts a Released Claim against any of the Released Parties. This Final

Judgment has no effect on the rights of any person, party, or entity to bring any claim other than the claims released by the Settlement Agreement.

9. Neither the Settlement Agreement, nor any act performed or document executed pursuant to the Settlement Agreement, may be deemed or used as an admission of wrongdoing in any criminal, civil, or administrative proceeding.

10. Without affecting the finality of this Final Judgment, the Court retains jurisdiction over (i) enforcing this Agreement, (ii) addressing settlement administration matters, and (iii) addressing such post-Judgment matters as may be appropriate under court rules or applicable law.

Dated: February 25, 2016

s/ Lynn Adelman

Honorable Lynn Adelman
United States District Judge
Eastern District of Wisconsin