Case No. 22-11232-AA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DAVID WILLIAMS, *et al.*,
Plaintiffs-Appellees,
v.
RECKITT BENCKISER LLC and RB HEALTH (US) LLC,
Defendants-Appellees,

THEODORE H. FRANK,
Objector-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

No. 1:20-cv-23564-MGC

PETITION FOR REHEARING EN BANC ON BEHALF OF PLAINTIFFS-APPELLEES

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No. 22-11232-AA
Theodore H. Frank v. David Williams, *et al.*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellees, under Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, certify that the following persons and entities may have an interest in the outcome of this case or appeal:

1. Andren, John M., Hamilton Lincoln Law Institute, Attorney for Objector-Appellant

2. Angeles, Martiza, Plaintiff-Appellee

3. Anglade, Caroll, Plaintiff-Appellee

4. Barbat Mansour & Suciu, PLLC, Attorneys for Plaintiffs-Appellees

5. Becker & Poliakoff, PA, Attorneys for Amicus TINA

6. Bednarz, M. Frank, Hamilton Lincoln Law Institute, Attorney for Objector-Appellant

7. Biderman, David T., Perkins Coie LLP, Attorney for Defendants-Appellees

8. Bilzin Sumberg Baena Price & Axelrod, LLP, Attorneys for Defendants-Appellees

9. Bursor & Fisher, PA, Attorneys for Plaintiffs-Appellees

10. Bryson, Daniel K., Whitfield Bryson LLP, Attorney for Plaintiffs-Appellees

11. Clark, Howard, Plaintiff-Appellee

12. Cohen, Jonathan Betten, Milberg Coleman Bryson Phillips Grossman, PLLC, Attorney for Plaintiffs-Appellees

13. Coleman, Gregory, Milberg Coleman Bryson Phillips Grossman, PLLC, Attorney for Plaintiffs-Appellees

14. Cooke, The Honorable Marcia G., United States District Judge

15. Dhillon Law Group, Inc., Attorneys for Objector-Appellant

16. Drescher, IIana Arnowitz, Bilzin Sumberg Baena Price & Axelrod, LLP, Attorney for Defendants-Appellees

17. Drozd, Dale A., United States District Court Judge

18. Fisher, L. Timothy, Bursor & Fisher, PA, Attorney for Plaintiffs-Appellees

19. Frank, Theodore H., Objector-Appellant and Attorney for Objector-Appellant

20. Geer, Martha, Milberg Coleman Bryson Phillips Grossman, PLLC, Attorney for Plaintiffs-Appellees

21. Grosjean, The Honorable Erin, United States Magistrate Judge

22. Goodman, The Honorable Jonathan, United States Magistrate Judge

23. Greg Coleman Law PC, Attorneys for Plaintiffs-Appellees

24. Hamilton Lincoln Law Institute, Attorneys for Objector-Appellant

25. Levin Papantonio Rafferty, Attorneys for Plaintiffs-Appellees

26. Lustrin, Lori P., Bilzin Sumberg Baena Price & Axelrod, LLP, Attorney for Defendants-Appellees

27. Matthews, Thomas, Plaintiff-Appellee

28. Milberg Coleman Bryson Phillips Grossman, PLLC, Attorneys for Plaintiffs-Appellees

29. Pallett-Vasquez, Melissa, Bilzin Sumberg Baena Price & Axelrod, LLP, Attorney for Defendants-Appellees

30. Perkins Coie LLP, Attorneys for Defendants-Appellees

31. Polenberg, Jon, Becker & Poliakoff, PA, Attorney for Amicus TINA

32. RB Health (US) LLC, Defendant

33. Reckitt Benckiser, LLC, Defendant, (Stock ticker: "RBGLY")

34. Sarelson, Matthew Seth, Dhillon Law Group, Inc., Attorney for Objector-Appellant

35. Schultz, Matthew D., Levin Papantonio Rafferty, Attorney for Plaintiffs-Appellees

36. Shub, Jonathan, Shub Law Firm LLC, Attorney for Plaintiffs-Appellees

37. Shub Law Firm LLC, Attorneys for Plaintiffs-Appellees

38. Sigmon, Mark R., Milberg Coleman Bryson Phillips Grossman, PLLC, Attorney for Plaintiffs-Appellees

39. Sipos, Charles C., Perkins Coie, LLP, Attorney for Defendants-Appellees

40. Smith, Laura, Attorney for Amicus TINA

41. Soffin, Rachel, Milberg Coleman Bryson Phillips Grossman, PLLC, Attorney for Plaintiffs-Appellees

42. Suciu III, Nick, Milberg Coleman Bryson Phillips Grossman, PLLC, Attorney for Plaintiffs-Appellees

43. Truth in Advertising, Inc., Amicus

44. Wallace, Patrick M., Milberg Coleman Bryson Phillips Grossman, PLLC, Attorney for Plaintiffs-Appellees

45. Whitfield Bryson LLP, Attorneys for Plaintiffs-Appellees

46. Williams, David, Plaintiff-Appellee

Except as stated above, there is no publicly-held corporation that owns 10% or more of the stock of the entities listed above.

ELEVENTH CIRCUIT RULE 35-5(c) STATEMENT

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following precedent of the United States Supreme Court and of this Circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

1. *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986).

2. *Pottinger v. City of Miami*, 805 F.3d 1293, 1295–96 (11th Cir. 2015).

3. *TransUnion LLC v. Ramirez*, 210 L. Ed. 2d 568, 141 S. Ct. 2190, 2207 (2021).

I further express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance. The Supreme Court has specifically observed that when a District Court refuses to approve a negotiated consent decree, denying the parties "the opportunity to compromise their claims and to obtain the injunctive benefits of the settlement agreement they negotiated," that decision has "serious, perhaps irreparable

consequences" for the parties, which can in fact justify an immediate appeal. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 89 (1981).

/s/ Martha A. Geer
Martha A. Geer

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ISSUES WARRANTING EN BANC CONSIDERATION

1. Did the Panel err in holding, contrary to *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986) and *Pottinger v. City of Miami*, 805 F.3d 1293, 1295–96 (11th Cir. 2015), that the District Court could not approve a settlement agreement vigorously negotiated by the Parties when it included a voluntary agreement by Defendants to alter the labeling and marketing at issue in this case and Plaintiffs could not, because of a lack of Article III standing, have obtained a court-ordered injunction mandating that advertising change?

2. Did the Panel err in concluding that Appellant Theodore Frank had standing to invoke this Court's jurisdiction simply because he was within the defined class or does *TransUnion LLC v. Ramirez*, 210 L. Ed. 2d 568, 141 S. Ct. 2190, 2207 (2021), mandate that any class member who demonstrates he or she was not injured-in-fact necessarily loses Article III standing to object to a class settlement?

PRIOR PROCEEDINGS AND DISPOSITION OF THE CASE

Appellant Theodore H. Frank appealed from the District Court's decision finally approving the settlement entered into between Plaintiffs and Defendants Reckitt Benckiser LLC and RB Health (US) LLC.

Defendants have been selling a line of brain supplements called "Neuriva" since April 2019. The central theme in all of Defendants' marketing and product labelling of the Neuriva Products has been that they contain ingredients that have been clinically and scientifically "proven" to improve brain performance. D.E. 69-1 ¶ 5.

Named Plaintiffs Thomas Matthews, David Williams, Caroll Anglade, Martiza Angeles, and Howard Clark have all alleged in the Consolidated Amended Complaint that Defendants deceptively marketed and sold Neuriva as having ingredients that were "clinically proven" and "proven" by science to improve brain performance with respect to focus, memory, learning, accuracy, concentration, or reasoning. Plaintiffs alleged, among other things, based on consultation with retained experts, that Neuriva's ingredients were not clinically or scientifically proven to improve brain performance and that Defendants' claims overall were false or misleading. D.E. 69-1 ¶11.

In the fall of 2020, the Parties agreed to mediate. D.E. 69-1 ¶¶ 18-19. The October 2 mediation ended in the evening without a settlement. D.E. 69-1 ¶ 21. The mediator persuaded the Parties to re-engage, and in a lengthy mediation on November 30, the Parties made significant progress

towards a resolution regarding both monetary and non-monetary benefits, including labelling and marketing changes. D.E. 69-1 ¶ 22.

On January 7, 2021, the Parties filed notice with the District Court that they had settled. D.E. 47. On February 2, 2021, Mr. Frank purchased a bottle of Neuriva Original for $21.95. D.E. 75-1 p. 2 ¶ 4.

Magistrate Judge Goodman granted preliminary approval of the settlement on April 23, 2021. D.E. 57. The Settlement Agreement provided that class members with proof of purchase could receive up to $32.50 per claim with a maximum of two claims totaling $65.00. Mr. Frank, who had proof of purchase, would be entitled to a full refund under the Settlement. Those class members without proof of purchase could submit up to four claims at $5.00 per claim for a maximum of $20.00. D.E. 116-1 ¶¶ IV.B.1-5. The Defendants agreed to pay up to $8,000,000.00 in monetary relief to the class members, *exclusive of* administrative costs, attorneys' fees and expenses. D.E. 116-1 ¶ V.A-B.

In addition to monetary relief, the Settlement Agreement as modified by an Amended Settlement Agreement, D.E. 116, addressed the deceptive advertising alleged in Plaintiffs' complaint for a period of two years by (1) barring Defendants from stating that the Neuriva Products or their ingredients are clinically or scientifically proven to improve brain

performance, and (2) barring Defendants from using the terms "Clinically Tested and Shown," "clinical studies have shown," or similar "shown" claims. D.E. 116-1 ¶¶ IV.A.1(a)-(d). If Defendants ultimately returned to their former marketing approach after two years, they could again be sued. D.E. 116-1 ¶ IV.A.3.

The Settlement Agreement provided that Class Counsel could apply for an award of attorneys' fees and expenses in an amount not to exceed $2,900,000.00. The fees and expenses would be paid separately and have no impact on the Settlement Class's recovery. D.E. 116-1 ¶ V.A-B. The Parties negotiated and agreed upon attorneys' fees and costs only after agreeing on all material terms of the Settlement. D.E. 69-1 ¶¶ 47-48.

After almost six months of additional briefing and a three-hour final approval hearing, on December 15, 2021, the Magistrate Judge entered a 108-page R&R recommending that the District Court grant final approval of the parties' settlement. D.E. 133. Mr. Frank had filed an objection to the settlement and subsequently objected to the R&R. On March 17, 2022, District Court Judge Marcia Cooke found Magistrate Judge Goodman's R&R "thorough and well-reasoned" and adopted it as the court's Order. D.E. 140. Mr. Frank appealed.

After the briefing in this Court was complete, the appeal was set for argument on March 2, 2023. On February 13, 2023, the Panel entered an order asking Counsel to be prepared to discuss two questions at the oral argument:

> 1. In a class action, at least one class representative must have Article III standing to represent each subclass for each claim. *See Prado-Steiman v. Bush*, 221 F.3d 1266, 1277 (11th Cir. 2000). When the district court in this case reviewed the class settlement, it determined that class representatives lack Article III standing to complain about products they did not purchase and weighed that "risk factor[]" "in favor of final approval." **[**See **R133:45–46]** No class representative has alleged that he or she purchased Neuriva De-Stress. **[**See **R51 ¶¶ 134–158]** Be prepared to discuss whether any of the class representatives has standing to assert claims about Neuriva De-Stress. *See, e.g.*, *Dapeer v. Neutrogena Corp.*, 95 F. Supp. 3d 1366, 1372–73 (S.D. Fla. 2015); *Toback v. GNC Holdings, Inc.*, No. 13-80526-CIV, 2013 WL 5206103, at *4–5 (S.D. Fla. Sept. 13, 2013).
>
> 2. Plaintiffs who seek injunctive relief must allege an injury that is concrete, certainly impending, fairly traceable to the challenged action of the defendant, and likely to be redressed by a favorable decision. *See Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1328–29 (11th Cir. 2013); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Some of the class representatives in this case allege that they "would like to purchase Defendants' products if they truly improved brain performance" but that they are "unable to rely on Defendants' representations regarding the effectiveness of Defendants' products in deciding whether to purchase Defendants' products in the future." **[**See, e.g.**, R51 ¶ 139]** The class representatives allege that the existing Neuriva products are

> "worthless," **[**see id. ¶ **128]**, so the allegations about possible future purchases of effective products must pertain to future products.
>
> Be prepared to discuss (1) whether the allegation that class representatives "would like to purchase Defendants' products if they truly improved brain performance" supports a finding of a certainly impending future injury and (2) whether injunctive relief directed toward existing products is likely to redress the class representatives' stated concerns about any future, effective products.

D.E. 52.

Plaintiffs filed a Citation of Supplemental Authority on March 1, 2023 addressing the questions. D.E. 55. Mr. Frank filed a response on March 5, 2023. D.E. 57. Although Plaintiffs' counsel requested at oral argument that the Parties be allowed to file supplemental briefs addressing the questions, the Panel did not allow briefing.

On April 12, 2023, the Panel reversed the District Court's Order on the ground that the Named Plaintiffs "lack standing to pursue the injunctive relief *awarded* by the Settlement, and the district court lacked power *to grant that relief*." App. D.E. 60 p. 17 (emphasis added).

ARGUMENT

I. THE PANEL'S DECISION CONFLICTS WITH LONGSTANDING SUPREME COURT AUTHORITY AND IS UNSUPPORTED BY DECISIONS OF THIS COURT OR ANY OTHER CIRCUIT.

The Panel's holding conflicts with the District Court's role in approving a class action settlement. The plaintiff and the defendant—and not the court—decide what the terms of the settlement will be, and the court reviews the settlement to determine if it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The parties to the settlement can, and often do, agree to terms unavailable through litigation as a means of compromise. In approving a class settlement, a court does not "award relief" on a party's claims; instead, the court reviews the parties' compromise under Rule 23 regardless whether the court could award the agreed-upon relief if the claims were fully litigated.

As this Court explained in *American Disability Ass'n, Inc. v. Chmielarz*, 289 F.3d 1315, 1317 (11th Cir. 2002), when parties to litigation agree on a settlement, "the district court's approval of the terms of the settlement coupled with its explicit retention of jurisdiction are the functional equivalent of a consent decree[.]" More recently, this Court confirmed in *Pottinger v. City of Miami*, 805 F.3d 1293, 1295–96 (11th

Cir. 2015), that a "district court's approval of the parties' agreement functioned as the equivalent of the entry of a consent decree."

The district court's role thus is to first review and, if approved, enforce the terms of the parties' agreement. When the parties voluntarily agree to abide by prescribed conduct, it ceases to matter whether the district court—in the absence of the settlement agreement—would independently have the power to order the parties to take certain action. *See In re Consolidated Non-Filing Ins. Fee Litig.*, 431 Fed. Appx. 835, 844-45 (11th Cir. 2011) (holding that even though the Truth in Lending Act barred the district court from entering an injunction, the court could "enter a negotiated injunction" that was part of a consent decree the parties agreed to following "extensive negotiations").

The panel in *In re Consolidated* based its decision on the Supreme Court's decision in *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986), which the court explained "explicitly held that *a court has the power to enter a consent decree that grants a form of relief that a court could not have granted had it entered a judgment on the merits*." 431 F. App'x at 843 (emphasis added). In contrast to *In re Consolidated*, the Panel in this case dismissed *Local No. 93* as irrelevant,

stating "[c]rucially for our purposes, [*Local No. 93*'s] holding was limited to an interpretation of the statutory language of Title VII, [478 U.S. at] 513-14 n.5[.]" App. D.E. 60-1 at 29. Because the Panel misread the Supreme Court's decision in *Local No. 93*, the opinion in this case cannot be reconciled with the Supreme Court decision.

As *In re Consolidated* recognized, 431 F. App'x at 843-44, the Supreme Court first "examined the nature of consent decrees and contrast[ed] them with judgments entered by a court after a decision on the merits." *Id.* The Supreme Court then applied the consent decree "principles" in the Title VII context. *Id.* at 844. The *In re Consolidated* panel in turn applied the principles in the Truth in Lending Act context. *See also Pottinger*, 805 F.3d at 1300 (applying *Local No. 93* and holding that agreement of the parties rather than the force of the law creates the obligations embodied in a consent decree).

The Supreme Court in *Local No. 93*, 478 U.S. at 522, started by pointing to the Court's ruling in *United States v. Armour & Co.*, 402 U.S. 673, 681–82 (1971) (emphasis added), which held:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time,

> expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. *Thus the decree itself cannot be said to have a purpose; rather the parties have purposes*, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, *and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.*

The Supreme Court in *Local No. 93* further emphasized: "Indeed, it is the parties' agreement that serves as the source of the court's authority to enter any judgment at all. . . . More importantly, it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree." 478 U.S. at 522. "Consequently," the Court held, Congress' limitations on the power of federal courts to remedy Title VII violations by placing obligations on employers "simply do not apply when the obligations are created by a consent decree." *Id.* at 522-23.

The Supreme Court then summarized the principles that apply in all cases involving a consent decree regardless of subject matter:

> Accordingly, *a consent decree must spring from and serve to resolve a dispute within the court's subject-matter jurisdiction*. Furthermore, consistent with this requirement, the consent decree *must come within the general scope of the case made by the pleadings* and must further the objectives of the law upon which the complaint was based. However, in addition to the law which forms the basis of the claim, the parties' consent animates the legal force of a consent decree. *Therefore, a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial.*

Id. at 525-26 (cleaned up; emphasis added). While the Panel in this case acknowledged this language, it read it restrictively rather than with the breadth emphasized by the Court.

In this case, the Settlement Agreement, which amounted to a consent decree, resolved a "dispute" over the truthfulness of the Neuriva advertising. The Panel acknowledged that Plaintiffs had Article III standing to pursue the false advertising claims and monetary relief. The consent decree, therefore, sprang from and served to resolve a dispute within the District Court's subject matter jurisdiction. As for *Local No. 93*'s third element, the consent decree—addressing the monetary loss of

Neuriva purchasers and the false advertising—falls squarely within the scope of the case set out in Plaintiffs' complaint.

Circuits across the country have, under similar circumstances, applied the controlling *Local No. 93* analysis when enforcing settlements in class actions. *See, e.g., Pelzer v. Vassalle*, 655 F. App'x 352, 361–62 (6th Cir. 2016) (affirming approval of class action settlement despite objectors' arguments against "stipulated injunction"); *Durrett v. Housing Auth. of the City of Providence*, 896 F.2d 600, 604 (1st Cir. 1990) (reversing refusal to approve class action settlement as abuse of discretion); *Kozlowski v. Coughlin*, 871 F.2d 241, 244–45 (2d Cir. 1989) (enforcing consent judgment in class action); *Duran v. Carruthers*, 885 F.2d 1485, 1491 (10th Cir. 1989) (holding Eleventh Amendment did not bar consent decree settling class action); *see also Hyland v. Navient Corp.*, 48 F.4th 110, 119 (2d Cir. 2022) (rejecting objection to class action settlement provision creating a *cy pres* fund in a Rule 23(b)(2) case, noting "[t]he award in this case was not a court-fashioned remedy aimed at repurposing funds that would otherwise have been distributed to the class as money damages. It was instead a provision of a settlement reached by private parties."), *cert. denied sub nom. Yeatman v. Hyland*, No. 22-566, 2023 WL 2959374 (U.S.

Apr. 17, 2023); *Smith v. Sch. Bd. of Concordia Par.*, 906 F.3d 327, 334–35 (5th Cir. 2018) (enforcing consent decree entered in desegregation case observing "[c]onsequently, a consent decree can sweep more broadly than can other forms of court-ordered relief").

In contrast, the only case cited by the Panel discussing Article III standing in the context of class action settlement approval is *Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019). The Panel's reliance on *Frank* misconstrues what actually happened in that case. The question before the Supreme Court was whether *any* class representative had standing with respect to *any* claim at all in light of *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016). The Court held that "[a] court is powerless to approve a proposed class settlement if it lacks jurisdiction over the dispute, and federal courts lack jurisdiction if no named plaintiff has standing." *Id.*

The Supreme Court's analysis in *Frank*, remanding for the lower courts to decide that issue, matches that of *Local No. 93*, which required that a case exist within the subject matter jurisdiction of the court. In *Frank*, that decision had not yet been made by any court, while here the Panel acknowledges that all four Plaintiffs have Article III standing at least as to the monetary relief.

None of the other cases cited by the Panel as mandating Article III standing as a prerequisite for approval of a Settlement Agreement's injunction-like provisions involved the approval of settlements or consent decrees. In the closest case factually, *Berni v. Barilla S.p.A.*, 964 F.3d 141, 143 (2d Cir. 2020), a false advertising case, the Second Circuit, without mentioning Article III standing or ever reviewing the settlement agreement, simply ruled that the district court erred in certifying a Rule 23(b)(2) class. Plaintiffs' counsel have not found another Circuit Court decision applying analysis similar to that relied upon in this case.[1]

Review by the entire Court is needed to resolve the conflict between the Panel's decision and *Local No. 93*, especially given the lack of authority supporting the Panel's decision. This issue—addressing whether a district court can (or based on the Panel's decision "must")—refuse to approve a settlement including prospective injunctive benefits is of exceptional importance, as the Supreme Court pointed out in *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 86-90 (1981).

[1] Counsel has focused on Circuit Court cases and cannot speak as to District Court decisions.

The Supreme Court held in *Carson* that an order denying a motion to enter a consent decree that included injunctive relief "plainly has a 'serious, perhaps irreparable, consequence'" because it denies the party injunctive relief, the opportunity to settle their case on the negotiated terms, and the ability to save themselves the time, expense, and inevitable risk of litigation. *Id.* at 86-87.

In the context of false advertising cases, frequently, the only way that individuals can obtain meaningful change to a defendant's advertising is through settlement. The Panel decision blocks that avenue while also establishing a standard for obtaining injunctive relief through court proceedings that will be difficult if not impossible to meet. Issues of this magnitude should not be decided based on 15 minutes of argument and no briefing.

II. THE PANEL'S DECISION THAT APPELLANT-OBJECTOR HAD ARTICLE III STANDING TO APPEAL CONFLICTS WITH *TRANSUNION*.

Plaintiffs argued before the Panel that Mr. Frank had not established at the district court level that he suffered an injury-in-fact within the meaning of Article III standing and, therefore, did not have standing to invoke the jurisdiction in this Court. The Panel answered

succinctly: "Frank has established that he is a member of the Class who would be bound by the judgment, so he has standing." App. D.E. 60 at 13-14. As support, it cited *Devlin v. Scardelletti*, 536 U.S. 1, 6-7 (1992) and *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1260-61 n.7 (11th Cir. 2021) (relying on *Devlin*). *Id.* at 15.

Since *Equifax* likewise concluded that *Devlin* establishes that any member of a class has standing to appeal without needing to meet the Article III standards, only this Court sitting en banc can revisit whether subsequent Supreme Court decisions call into question reliance on *Devlin*.

Almost 30 years after *Devlin* was decided, the Supreme Court altered the Article III standing landscape in *TransUnion LLC v. Ramirez*, 210 L. Ed. 2d 568, 141 S. Ct. 2190, 2207 (2021). Among other holdings, the Supreme Court stated: "Every class member must have Article III standing in order to recover individual damages. 'Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.' *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466, 136 S.Ct. 1036, 194 L.Ed.2d 124 (2016) (Roberts, C. J., concurring)." *Id.* at 2208.

While the Supreme Court has not yet determined how or when absent class members will be required to establish their standing, Mr. Frank, by appealing the District Court's decision overruling his objection, is seeking relief from this Court and, as *TransUnion* states, "federal courts" do not have the power to order relief to an uninjured plaintiff even if he is a member of a class action.

Mr. Frank has made no attempt to show at the trial level or on appeal that he suffered an actual injury-in-fact as a result of his purchase of Neuriva. Although the Panel opinion points to a purported injury that Mr. Frank suffered as a result of the District Court's approval of the Settlement, that showing does not establish that Mr. Frank was injured by Defendants, the true Article III requirement.

To hold that Mr. Frank may affirmatively seek relief from a federal court without showing that he suffered any injury from Defendants' advertising would place him at an advantage over named plaintiffs. In *Trichell v. Midland Credit Management, Inc.*, 964 F.3d 990, 996 (11th Cir. 2020), another panel of this Court held that "[t]he party invoking the jurisdiction of a federal court bears the burden of establishing [the *Lujan*] elements to the extent required at each stage of the litigation." While this

holding is broad enough to encompass an objector invoking the jurisdiction of this Court, *Trichell* addressed only named plaintiffs in a class action, concluding that they lacked standing when they sought "to recover for representations that they contend were misleading or unfair, but without proving even that they relied on the representations, much less that the reliance caused them any damages." *Id.* at 998.

It is difficult to identify any meaningful distinction between the *Trichell* plaintiffs and Mr. Frank other than that the *Trichell* plaintiffs sought relief in the District Court while Mr. Frank seeks relief in the 11th Circuit—a classic distinction without a difference.

In light of *TransUnion*, it is appropriate for the full Court to decide whether to revisit the standing requirements applicable to objectors when invoking this Court's jurisdiction. Notably, in *In Re Flint Water Cases*, 63 F.4th 486, 503 (6th Cir. 2023), the Sixth Circuit recently held that in order for the court to exercise jurisdiction over appeals by three sets of objectors, the objectors were required to demonstrate they possessed Article III standing.

CONCLUSION

For the above reasons, the Court should grant rehearing en banc.

Dated: May 3, 2023.

Respectfully submitted,

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