Nos. 16-1124 & 16-3019

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE: FLONASE ANTITRUST LITIGATION

SMITHKLINE BEECHAM CORPORATION
N/K/A GLAXOSMITHKLINE LLC D/B/A GLAXOSMITHKLINE,

Defendant-Appellant,

v.

STATE OF LOUISIANA,

Respondent-Appellee.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
No. 2:08-cv-3301 (Hon. Anita B. Brody)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Appellant SmithKlineBeecham Corporation n/k/a GlaxoSmithKline LLC d/b/a GlaxoSmithKline makes the following disclosure:

1. For non-governmental corporate parties please list all parent corporations:

GlaxoSmithKline LLC (f/k/a SmithKline Beecham Corporation) is owned, through several levels of wholly-owned subsidiaries, by GlaxoSmithKline plc, a publicly-traded public limited company organized under the laws of England. GlaxoSmithKline plc has no parent company.

2. For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

To the knowledge of GlaxoSmithKline LLC and GlaxoSmithKline plc, none of the shareholders of GlaxoSmithKline plc beneficially owns ten percent or more of its outstanding shares. However, Bank of New York Mellon ("BNYM") acts as Depositary in respect to Ordinary Share American Depositary Receipts ("ADRs") representing shares in GlaxoSmithKline plc. In that capacity, BNYM is the holder, but not the beneficial owner, of more than ten percent of the outstanding shares in GlaxoSmithKline plc on behalf of the ADR owners who are the beneficial owners

of these shares, none of whom to GlaxoSmithKline plc's knowledge own ten percent or more of its outstanding shares.

3. If there is a publicly held corporation which is not party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

Not applicable.

4. In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not applicable.

Dated: October 26, 2016

/s/ Lisa S. Blatt
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JURISDICTIONAL STATEMENT

This case arises from an antitrust class action certified under Federal Rule of Civil Procedure 23(b)(3) that indirect purchaser plaintiffs brought against Defendant-Appellant SmithKline Beecham Corporation n/k/a GlaxoSmithKline LLC d/b/a GlaxoSmithKline ("GSK"). JA355. The district court had jurisdiction over that Rule 23(b)(3) class action under 28 U.S.C. §§ 1331 and 1337(a). The court approved a class settlement resolving all class members' claims. GSK then sought to enforce the class settlement against Appellee the State of Louisiana, an absent class member. The court had jurisdiction over GSK's motion because, in its Final Order and Judgment approving the class settlement, the court retained exclusive jurisdiction over disputes related to the settlement, and all class members submitted to the court's exclusive jurisdiction. JA30–31. And for the reasons stated below, the Eleventh Amendment of the U.S. Constitution did not divest the district court of jurisdiction over Louisiana. This Court has jurisdiction under 28 U.S.C. § 1291 to review the district court's decisions denying GSK's motion to enforce the class settlement and GSK's motion for reconsideration. JA5; JA18.

STATEMENT OF THE ISSUES

1. Whether the Eleventh Amendment bars a district court from binding a State as an absent member of a plaintiff class in a class settlement, when the class

certification and settlement complied with all Rule 23 safeguards for absent class members and no one asserts or threatens any claim against the State. JA11–13.

2. Alternatively, whether a State waives its sovereign immunity through its voluntary litigation conduct when the State receives written notice of a class settlement and declines to opt out. JA14–17.

3. Whether the district court abused its discretion under Rule 60(b) by refusing to consider newly discovered evidence that Louisiana waived its sovereign immunity by indirectly submitting claims to recover from the class settlement as a class member. JA22.

STATEMENT OF RELATED PROCEEDINGS

Louisiana's related lawsuit against GSK, *State of Louisiana v. SmithKline Beecham Corp.*, No. 636032, is currently pending in the Nineteenth Judicial District Court for the Parish of East Baton Rouge, Louisiana.

GSK is not aware of any proceedings related to this case previously or currently before this Court.

INTRODUCTION

Over three years ago, the district court approved a class settlement between GSK and a class of indirect purchasers of the drug Flonase. The settlement ended years of protracted litigation over allegations that GSK had wrongfully hampered a competitor's ability to bring generic Flonase to market. In exchange for GSK's

payment of tens of millions of dollars, class members relinquished their claims against GSK and authorized the district court to enjoin any future suits asserting those claims.

Louisiana was a member of the settlement class. The district court certified a settlement class that expressly included States, to the extent they purchased Flonase or its generic equivalent for their employees and others covered by any state government employee health plan. There was nothing unusual about this. District courts have repeatedly certified similar classes that include States in their capacity as purchasers of a given product or service. Moreover, any class members who wanted to avoid being bound by this settlement could simply opt out. Under Rule 23 and Supreme Court precedent, those class members who declined to avail themselves of the easy opt-out process affirmatively consented to the district court's inclusion of their claims in the settlement.

In keeping with the district court's duty to review all aspects of class actions to protect absent class members' rights, the court below carefully scrutinized the settlement and confirmed that all class members had received adequate notice of its terms, their right to opt out, and the consequences of not doing so. Pursuant to the 2005 Class Action Fairness Act, GSK also sent detailed written notice of the settlement, the class definition, and the opt-out requirement to all 50 States' Attorneys General, including the Louisiana Attorney General. Louisiana thus had

a wealth of documents notifying it that the settlement would resolve States' claims relating to their purchases of Flonase for state employees and health plan beneficiaries. And Louisiana had six months to act before the district court approved the settlement. But Louisiana declined to opt out. That should have been the end of this story.

Instead, two years later, Louisiana sued GSK in Louisiana state court, asserting the very same antitrust claims that the class settlement had conclusively resolved. In fact, Louisiana copied its state-court complaint almost entirely from the earlier indirect-purchaser class-action complaint. GSK moved the district court below to enforce the class settlement by enjoining the Louisiana Attorney General from further prosecution of the state-court suit, to the extent that Louisiana's claims had been released in the indirect-purchaser class action. The district court recognized that Louisiana fell within the class definition and that Louisiana's new state suit asserted claims covered by the settlement release. But the court refused to enforce the settlement against Louisiana based on a radical new theory of sovereign immunity under which the Eleventh Amendment is an escape hatch for States to avoid being bound by a class-wide settlement that covered them as absent class members. Under the decision below, States can receive all the notice they are owed under Federal Rule of Civil Procedure 23 (and then some), decline to opt out

of the class, wait for the class action to end—and then invoke the Eleventh Amendment to free them from the class-wide settlement.

Neither the Supreme Court nor any other court of appeals has ever accepted that dangerous theory, and this Court should not blaze a new path. Centuries of history and Supreme Court precedent confirm that state sovereign immunity provides immunity from claims that private parties bring *against* a nonconsenting State defendant. Sovereign immunity does not apply when, as here, the State is aligned solely as a *plaintiff*, i.e., no one asserts any claim against the State.

Accepting the district court and Louisiana's contrary theory would also invite destabilizing gamesmanship. In class actions that include States as class members, States could decline to opt out, and thereby get counted as part of the settlement class and get assigned an expected share of the settlement proceeds. Then, States could surprise defendants by filing new suits repeating the same claims, as Louisiana did here—presumably hoping to drive up recovery in a state-specific judgment or settlement. Parties to class actions, unsure whether States will be bound as absent class members, would face crippling uncertainty over what a class settlement would cover and how final it would be. Even after settling a class that clearly includes States, defendants could face the prospect that 50 different States might re-litigate these claims anew. Settlements to date that have included States as absent class members would suddenly be up in the air. And

going forward, the time and expense required to persuade all 50 States to expressly and comprehensively agree that the settlement will bind them would chill class settlements by effectively requiring the negotiation of 50 side agreements.

In any event, even if Louisiana could somehow assert sovereign immunity in this context, Louisiana waived that immunity. Louisiana decided not to opt out of the plaintiff class despite receiving copious notice of the class action and settlement. That conduct reflects a quintessential, voluntary litigation choice to have the State's claims resolved in a federal forum. The district court's contrary conclusion misconstrues Supreme Court precedent governing voluntary waivers of sovereign immunity. The court's analysis also rests on sheer speculation that Louisiana might not have known it was a class member because it might not have fully understood documents that expressly declared that the class included State indirect purchasers.

Finally, the court below erred yet further by refusing to reconsider its decision, ignoring newly discovered evidence that—contrary to Louisiana's prior representations—Louisiana had indirectly submitted a claim seeking proceeds from the very settlement that Louisiana later disclaimed.

The decision below leaves Louisiana free to pursue its state-court lawsuit against GSK—and potentially seek a windfall double recovery—for claims that GSK paid to settle more than three years ago. This Court should stop Louisiana

from abusing principles of sovereign immunity to get two bites at the litigation apple.

STATEMENT OF THE CASE

A. The Class Settlement

On July 14, 2008, an Alabama welfare benefit plan filed a class complaint in the U.S. District Court for the Eastern District of Pennsylvania, alleging that GSK—the manufacturer of prescription drug Flonase—violated antitrust laws by impermissibly seeking to delay FDA approval of a competitor's generic equivalent to Flonase. JA355. The plan sought money damages on behalf of itself and a class of indirect purchasers of Flonase or its generic equivalent, and sought class certification under Federal Rule of Civil Procedure 23(b)(3). Putative class members included anyone who "purchased and/or paid for Flonase nasal spray indirectly from GSK (or any of its predecessors or affiliates) for purposes other than for resale." JA378. In other words, the class included all third-party payors—health insurers, employee welfare benefit plans, government plans, or union plans that paid some portion of the cost of Flonase or its generic equivalent for anyone insured under the plans—as well as any States functioning as third-party payors.

After years of litigation, the parties conclusively settled all class members' claims against GSK. Federal law expressly authorizes such class settlements. So long as courts rigorously ensure that Rule 23(b)(3)'s stringent prerequisites are

satisfied, courts may certify a class action that will fully adjudicate all class members' claims and bar even absent class members from re-litigating them in another forum. *Reyes v. Netdeposit, LLC*, 801 F.3d 469, 482–84 (3d Cir. 2015); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985). In a Rule 23(b)(3) class action, moreover, federal law deems all class members within the class definition to have consented to the court's jurisdiction and to its adjudication of class members' claims unless class members affirmatively opt out. *See* Fed. R. Civ. Proc. 23(c)(2)(v)–(vii); *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 431 F.3d 141, 146 (3d. Cir. 2005); *Carlough v. Amchem Prods. Inc.*, 10 F.3d 189, 199–200 (3d Cir. 1993).

Furthermore, under Federal Rule of Civil Procedure 23(e), certain conditions must be met before settlements are binding on all class members. The district court must approve the settlement, "direct[] notice in a reasonable manner to all class members who would be bound by the proposal," hold a hearing, and "find[] that [the settlement] is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(1)-(2). District courts apply these criteria with particular rigor when parties seek approval for settlement and certification simultaneously. *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 349–50 (3d Cir. 2010); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 534 (3d Cir. 2004).

The Class Action Fairness Act of 2005 ("CAFA"), Pub. L. 109-2, 119 Stat. 4 (codified as amended at 28 U.S.C. §§ 1332(d), 1453, 1711–1715 (2012)), adds yet another layer of safeguards to the class settlement process. Under CAFA, a class settlement agreement does not bind class members unless the defendant provides comprehensive notice of the proposed settlement to federal officials and to state officials in each State where even a single class member resides. 28 U.S.C. § 1715(b). Among other requirements, defendants must include a copy of the complaint; notice of any scheduled judicial hearing in the class action; proposed or final notifications to class members regarding their right to opt out of the class; any proposed or final class settlement; and any written judicial opinion relating to the class action complaint, class notice, or the settlement. *Id.*

To ensure that States have adequate time for review, CAFA forbids district courts from approving a class settlement until 90 days after the defendant provides States with the CAFA notice. *Id.* § 1715(d). States often respond to CAFA notices by objecting to proposed class settlements, whether to express disapproval of the settlement, to try to modify or prevent the settlement, or to protect States' own litigation interests. Catherine M. Sharkey, *CAFA Settlement Notice Provision: Optimal Regulatory Policy?*, 156 U. Penn. L. Rev. 1971, 1982–85 (2008).

Thus, the parties' December 14, 2012 request that the district court approve their proposed class settlement and certify a proposed settlement class set a host of

procedures in motion. JA98. On December 21, 2012, GSK—pursuant to CAFA—notified the Attorneys General of every State, including Louisiana, of the proposed settlement. JA499–512. And after holding the required hearing, the court on June 19, 2013 issued its Final Order and Judgment certifying a Rule 23(b)(3) class for purposes of the settlement and approving the settlement as final and binding upon all class members.[1] JA24–37.

The court first determined that it "has jurisdiction . . . over all members of the Settlement Class." JA25. Critically, the court defined that class to comprise all indirect purchasers, expressly including "State governments and their agencies and departments . . . to the extent they purchased . . . [Flonase or its generic equivalents] for their employees or others covered by a government employee health plan." JA27. Louisiana was thus included in the class definition because it purchased Flonase or generic equivalents for state employees or others covered by a government employee health plan. *See id.* And, as detailed below, see *infra* pp. 20–21, Louisiana appears to have made at least $183,404.44 worth of Flonase purchases for beneficiaries of its government employee health plan.

[1] On January 13, 2013, the district court issued an order preliminarily approving the settlement, conditionally certifying a settlement class, and approving the parties' proposed notice plan. JA40. The court's Final Order and Judgment substantially reiterates the court's determinations under its earlier order.

The court also found that Rule 23's preliminary requirements of numerosity, commonality, typicality, and adequate representation were satisfied for purposes of certifying a settlement class. JA28. The court further held that the requirements for a Rule 23(b)(3) opt-out class were met, concluding that common questions of law and fact predominated over individual issues and that a class action was the superior method "for the fair and efficient adjudication" of the claims. *Id*.

Additionally, the court determined that "due process and adequate notice have been provided pursuant to Rule 23 . . . to all members of the Settlement Class, notifying the Settlement Class of, among other things, the pendency of these Actions and the proposed Settlement." JA26. Class counsel had agreed to provide notice by mailing a postcard to all class members that it was able to identify. JA99; JA129; *see* JA96–97. Class counsel also published notice of the suit and settlement in multiple national publications (like *National Geographic*, *People*, and *USA Weekend*) and ran banner ads on websites. JA130–32. The publication notices directed viewers to a website and a toll-free number where they could obtain a detailed notice containing comprehensive information about the settlement's terms, the class definition, class counsel, the right to opt out, and procedures for opting out. JA80–81. These forms of notice supplemented the CAFA notice GSK provided to all state attorneys general. The court found that this notice "was the best notice practicable under the circumstances and included

individual notice to those members of the Settlement Class whom the parties were able to identify through reasonable efforts." JA26. The court concluded that "due and adequate notice of these proceedings was directed to all Settlement Class members of their right to object to the Settlement" and other aspects of the litigation. *Id.*

The court also carefully evaluated the settlement's terms, approving them as "in all respects, fair, reasonable and adequate, and in the best interests of the Settlement Class, including Plaintiffs." JA28. Under the settlement, GSK would pay $35,000,000 to settle all class members' claims against it. JA108. In exchange, GSK was "released and forever discharged from all manner of claims, demands, actions, suits, causes of action, damages whenever incurred, and liabilities of any nature whatsoever . . . that Plaintiffs or any member or members of the Settlement Class . . . ever had, now has, or hereafter can, shall or may have . . . relating to any conduct, events or transactions, prior to the date hereof, alleged or which could have been alleged in the Actions." JA114. Moreover, other than through an action to "enforc[e] this Settlement Agreement," the settlement precluded "each member of the Settlement Class" from ever "seek[ing] to establish liability against [GSK] based, in whole or in part, on any of the Released Claims." *Id.*

Having held that all members of the settlement class—including States that purchased Flonase for employees or health plan beneficiaries—had received adequate notice of the class settlement and their ability to opt out, the court concluded that "all members of the Settlement Class are bound by this Final Order and Judgment." JA28. Thus, "each Settlement Class member shall be permanently barred and enjoined from asserting any Released Claims." JA35; *accord* JA30. The court further provided that "[a]ny and all disputes arising out of or released to the [class settlement], must be brought . . . exclusively in this Court." The court "retain[ed] exclusive jurisdiction," on a continuing basis, over "any suit, action, proceeding or dispute arising out of or related to" the class settlement. JA30–31.

In a separate settlement agreement, GSK also resolved claims by certain health plans ("Settling Health Plans") that opted out of the class settlement. *See* JA297–312. The class definition in the class settlement thus expressly excluded the Settling Health Plans. *See* JA124–25. GSK agreed to make an initial settlement payment to the Settling Health Plans. JA299; JA301. Pursuant to an allocation agreement with the indirect purchaser class, the Settling Health Plans could also receive additional compensation from the class settlement fund by submitting claims under the same claims-submission process as indirect purchaser class members. Settling Health Plans could submit those claims on their own

behalf, or on behalf of indirect purchaser class members with which they had "administrative services only" arrangements. Those arrangements existed whenever an organization that funded its own employee benefit plans retained a Settling Health Plan to perform "administrative services only," instead of providing full insurance coverage for the organizations' employees. JA298; JA301; JA305. The claims administrator had to reject any claims that Settling Health Plans submitted on behalf of entities that were not part of the indirect-purchaser class. JA305.

The district court approved Rust Consulting, Inc. as the claims administrator. JA30. As in nearly all class settlements, GSK has no role in administering the settlement. JA108; JA111. Information on funds that Settling Health Plans received or claims they submitted is confidential. JA306; SA62.

B. Louisiana's Notice of the Class Action and Settlement

As noted, as part of the settlement process, GSK and the indirect purchaser plaintiffs agreed that class counsel for the plaintiff class would provide class members with notice through direct mailing, publication notice, and Internet banner ads. Although class counsel certified to the district court that it had implemented the notice plan, *see* JA26, GSK was not privy to that process and did not receive any reports or detail on the implementation of class notice, *see* JA45–46. Only when Louisiana filed a supplemental brief on the Eleventh Amendment

issue did GSK discover that Louisiana did not receive an individual postcard notifying it of its status as a class member and its need to opt out of the settlement if it did not want to forgo any covered claims against GSK. *See* JA 513; JA96–97.

Louisiana concedes, however, that it received a separate form of notice, namely the written CAFA notice of the opt-out class settlement that GSK sent to all States' Attorneys General on December 21, 2012. GSK's CAFA notice supplied Louisiana with extensive information about the litigation and settlement—indeed, far more information than the court-approved class notices provided. GSK gave Louisiana a copy of the settlement agreement, thereby informing Louisiana that that the settlement class included "State governments . . . to the extent they purchased [Flonase or its generic equivalents] for their employees or others covered by a government health plan." JA27; JA104. GSK also enclosed copies of the proposed individual postcard notices to all identifiable individual class members, which reiterated that "[i]f you do not want to be legally bound by the Settlement, you must exclude yourself from the Settlement. . . . If you stay in the Settlement you will not be able to sue GSK for any claims relating to the Settlement. You will be bound by all the Court's orders." JA96. GSK similarly enclosed the proposed publication notices including "all the substantive information required by Rule 23" as well as a toll-free number and website that provided access to the detailed notice. JA181; *see* JA500–01; JA8. GSK further

enclosed copies of the detailed notice. JA500–01; JA8. Louisiana's Attorney General received the CAFA notice and accompanying exhibits on December 27, 2012. JA499.

Because GSK sent the CAFA notice in anticipation of the district court's review of the settlement, Louisiana had extensive documentation of virtually every aspect of the indirect purchaser class action, including the class definition, the settlement's terms, and its binding effect on all class members who declined to opt out of the settlement. Louisiana received all of this information nearly six months before the district court's final approval of the settlement. Louisiana did not opt out of the class or file any objections to the settlement agreement.

C. Louisiana's Duplicative State-Court Suit and GSK's Motion to Enforce the Class Settlement

On December 29, 2014—over a year and a half after the district court approved the class settlement—Louisiana's Attorney General filed a state-law antitrust suit against GSK in Louisiana state court. JA331–55. Louisiana's complaint copied the indirect purchasers' original class complaint largely verbatim. *Compare, e.g.*, JA357–78 *with* JA333–49.

On April 2, 2015, GSK moved the U.S. District Court for the Eastern District of Pennsylvania to enforce the settlement by enjoining Louisiana's Attorney General from pursuing this second action to the extent the damages claims had been released in the class-action settlement. JA10. Because the

settlement class included States that purchased Flonase or its generic equivalents for its employees or others covered by its employee health plans, GSK argued, Louisiana was a class member bound by the settlement, and thus Louisiana's Attorney General was barred from re-litigating claims extinguished by the settlement. JA319.

Louisiana opposed GSK's motion, arguing that the court lacked jurisdiction to enforce the settlement against Louisiana because the Eleventh Amendment purportedly bars States from being bound by class settlements as absent class members unless States clearly consent. JA397–98. GSK countered that there was no Eleventh Amendment issue because "GSK has not sued Louisiana and is not seeking any money damages from it." JA473.

On December 21, 2015, the district court denied GSK's motion to enforce the class settlement and granted Louisiana's motion to dismiss. The court acknowledged that "Louisiana falls within the Settlement Class to the extent that it purchased [Flonase]" for its employees and beneficiaries of government employee health plans. JA13.[2] The court further recognized that "[o]n its face, Louisiana's complaint encompasses the types of claims covered by the Settlement Agreement,"

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[2] The court thus rejected Louisiana's contention that Louisiana was excluded from the class definition because GSK had failed to show that Louisiana had purchased Flonase for its employees. Louisiana's state-court complaint on its face included claims arising from purchases of Flonase for its employees and other beneficiaries of government employee health plans.

id., and that "some of Louisiana's claims fall within the Settlement Agreement," JA14. Moreover, the court observed that "[m]ost Eleventh Amendment cases involve suits *against* a State," and "[s]everal district courts have certified settlement classes that include state governments and agencies as absent class members." JA14 n.7.

Nevertheless—and notwithstanding the court's earlier conclusion that it had jurisdiction over all members of the settlement class, JA25—the court held that the Eleventh Amendment deprived it of jurisdiction to bind Louisiana to the settlement. JA17. State sovereign immunity, the court reasoned, does not just apply to States when they are haled into federal court as defendants; it allows a State more broadly "to decide where and when to have its claims adjudicated." JA12. Thus, the court concluded, state sovereign immunity applies even when a State is an absent member of a *plaintiff* class that seeks relief from a defendant. JA12–13.

In those circumstances, the court decided, a State is not bound by a class-wide settlement—even if that settlement fully complies with Rule 23 and binds all other absent class members—unless the State satisfies the "stringent" Eleventh Amendment "test for determining whether it 'voluntarily' and 'unequivocally' agreed to have its claims resolved through the [settlement]." JA15. And here, the court held, "Louisiana's receipt of the CAFA Notice is insufficient to

unequivocally demonstrate that the State was aware that it was a class member and voluntarily chose to have its claims resolved by the Settlement Agreement." JA17. The court reserved "the broader question of whether the Eleventh Amendment ever permits a State to be bound as an absent class member in a Rule 23(b)(3) opt-out class." JA14. GSK timely filed a notice of appeal from this ruling on January 19, 2016. JA3.

D. Louisiana's Claim for Settlement Funds and GSK's Rule 60(b) Motion for Reconsideration

Meanwhile, while litigating its motion to enforce the settlement, GSK attempted to determine whether Louisiana had ever submitted a claim for settlement proceeds from the indirect-purchaser settlement fund. But GSK was unable to obtain any information relating to claims made or payments received by the Settling Health Plans, because that information was confidential, even as to GSK. *See* SA62; JA306.

GSK thus initially accepted Louisiana's repeated representations, made in the course of litigating the Eleventh Amendment issue, that Louisiana had never submitted any claims or received any portion of the settlement funds. According to Louisiana, GSK had "paid nothing" to Louisiana in the previous indirect purchaser litigation, JA407, and "obviously" no "claim forms [were] submitted on behalf of the State of Louisiana for payment," JA482. *See also* JA487 (similar).

SA71. Louisiana never advised the court of any such payments. But Louisiana's newfound uncertainty as to whether it had, in fact, submitted or received claims from the settlement prompted GSK to renew its own efforts to obtain information.

GSK's efforts ultimately bore fruit. On December 10, 2015, Humana, one of the Settling Health Plans, allowed Rust Consulting to disclose to GSK that Humana had submitted claims on Louisiana's behalf. Humana, an insurance company, appears to have had an "administrative services only" arrangement with Louisiana—i.e., Louisiana itself funds its employees' benefits plans, but Humana provided Louisiana with administrative services like claims evaluation and processing. Accordingly, insofar as Humana was Louisiana's agent, Humana was entitled to submit claims on Louisiana's behalf through the procedure described in the allocation agreement between the Settling Health Plans and the indirect-purchaser plaintiffs. Humana could only submit claims on Louisiana's behalf if

Louisiana was a class member; the claims administrator was required to deny claims submitted by Settling Health Plans on behalf of entities that were not part of the indirect-purchaser class. JA305. [redacted] SA62 (emphasis added).

GSK then tried to determine whether Louisiana (as opposed to just Humana) had received payment for those claims, but Humana explained that it could not disclose that information without Louisiana's consent. [redacted] *See* SA74; SA67.

GSK promptly filed a motion for relief from the judgment under Federal Rule of Civil Procedure 60(b)(2) [redacted]. The district court denied relief on the theory that GSK had failed to exercise reasonable diligence in seeking evidence that any Settling Health Plan filed claims on Louisiana's behalf. The court faulted GSK for failing to "inform the Court of its ongoing discussions with Humana, Rust, and Louisiana, or alert the Court to the obstacles it faced in obtaining the relevant data." JA21. The court declined to

address whether the newly discovered evidence was material or would have affected its resolution of GSK's motion to enforce the class settlement. JA22. This appeal followed.

SUMMARY OF ARGUMENT

The district court incorrectly held that the Eleventh Amendment prevented the court from binding Louisiana to the class settlement as an absent member of the plaintiff class. The court's unprecedented conception of state sovereign immunity defies a mountain of Supreme Court precedent. If adopted, that novel theory would make this Court an extreme outlier among courts of appeals and would inject debilitating uncertainty into class action settlement negotiations.

Sovereign immunity shields a State from suit in federal court only when a private party tries to force the State to answer for a claim against it. That is how the Framers understood the scope of States' sovereign immunity, and that is how the Supreme Court has interpreted the Eleventh Amendment. For over two centuries, the Supreme Court has consistently rejected States' attempts to expand sovereign immunity beyond that understanding, and has cautioned that sovereign immunity does not apply just because the State is bound by a judicial action without its consent. Numerous courts of appeals have accordingly refused States' invocation of sovereign immunity in cases where the State is aligned solely as a plaintiff. No appellate decision holds to the contrary.

Louisiana's assertion of sovereign immunity in this case is thus doomed from the start. As an absent member of a plaintiff class, Louisiana faced no risk of a money judgment or equitable relief against it. Indeed, the Supreme Court has rejected the notion that absent class members are in any way equivalent to defendants. Being part of the settlement could only have added money to Louisiana's coffers. If Louisiana wanted to preserve its claims against GSK and litigate them itself, it easily could have opted out of the settlement by filing notice with the district court. For instance, 59 Settling Health Plans successfully exempted themselves from the settlement. JA124–25.

Nor did GSK's motion to enforce the settlement turn Louisiana into a defendant. That motion is a textbook application of *Ex parte Young*, 209 U.S. 123 (1908), since GSK seeks to enjoin Louisiana's Attorney General—not the State itself—from pursuing a duplicative state-court suit based on claims that the settlement fully resolved.

The district court's breathtakingly expansive concept of immunity transforms immunity into a shield for States against being bound by class-action settlements, with devastating practical consequences. States would have every reason to engage in pernicious gamesmanship, rolling the dice on the settlement and then deciding later, based on the settlement figure, whether to submit claims for payment or to sue again on their own. Settlements to date that have included

States as absent class members would be thrown into jeopardy. And going forward, parties would only be able to settle class-wide claims if all 50 States expressly consent to being class members. But persuading States to opt in could take months and would add to the already considerable uncertainty and expense of litigating and settling a nationwide class action. Those consequences are particularly unjustifiable because Federal Rule of Civil Procedure 23 already protects absent class members from being unfairly bound to a settlement.

II. Even if sovereign immunity allowed States to avoid being bound by class settlements as absent class members, Louisiana unambiguously waived any such immunity through its litigation conduct. States waive sovereign immunity through litigation conduct that is inconsistent with later objecting to adjudication by a federal court. And the Supreme Court has long held that absent class members consent to a court's jurisdiction when they decide not to opt out from a class action after receiving notice of the litigation and instructions on how to request exclusion. Louisiana received all that information in great detail. Louisiana consented to being treated as an absent class member by not opting out, and is accordingly bound by the settlement like any other class member.

III. In any event, the decision below should be reversed based on the district court's erroneous refusal to grant GSK relief under Federal Rule of Civil Procedure 60(b)(2). While GSK's motion to enforce the settlement was pending,

Louisiana repeatedly denied that it could possibly have waived its sovereign immunity, citing the lack of any settlement claims or recovery on its behalf as proof. But after the district court denied GSK's motion to enforce the settlement, GSK discovered new evidence that claims were, in fact, made on the settlement fund on Louisiana's behalf. When a State (or its agent) seeks to recover settlement proceeds that resulted from a federal-court judgment, the State waives its entitlement to contend that the federal court had no power to resolve the State's claims. The court's denial of relief on the ground that GSK purportedly failed to exercise reasonable diligence in pursuing that evidence was an abuse of discretion and warrants reversal.

STANDARD OF REVIEW

This Court exercises plenary review over a decision to grant a motion to dismiss. *Broselow v. Fisher*, 319 F.3d 605, 607 (3d Cir. 2003). This Court reviews the denial of Rule 60(b) relief for an abuse of discretion. *Coltec Indus., Inc. v. Hobgood*, 280 F.3d 262, 269 (3d Cir. 2002).

ARGUMENT

I. STATE SOVEREIGN IMMUNITY DOES NOT BAR THE DISTRICT COURT FROM BINDING LOUISIANA AS A MEMBER OF THE PLAINTIFF CLASS

Louisiana seeks to wield sovereign immunity to avoid the binding effect of a class settlement that would otherwise bar Louisiana and all other absent class members from suing GSK on the claims they released. It cannot. For the entirety

of this Nation's history, States' sovereign immunity has shielded States only from being forced to answer for federal claims against them. But Louisiana was a member of the *plaintiff* class, not a defendant, and faced no prospect of liability in the original class action. The district court's contrary theory contradicts a mass of precedent and would upend incentives to settle class actions.

A. State Sovereign Immunity Has No Application When a State Is Aligned as a Plaintiff

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. That Amendment "confirm[s] the structural understanding that States entered the Union with their sovereign immunity intact," and "retained their traditional immunity from suit, except as altered by the plan of the Convention or certain constitutional amendments." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253 (2011) (citations and internal quotation marks omitted). Eleventh Amendment immunity has always been understood as a right of States to avoid being forced to *defend* claims brought against them in federal court.

1. At the Founding, the Framers considered it self-evident that States' sovereign immunity meant only immunity *from* suits against the State. By then, centuries of English common-law practice had established that sovereign immunity

applied only when the Crown was sued for allegedly committing some injury. In those cases, British courts applied the fiction that "the king can do no wrong," and plaintiffs' only remedy was to ask the Crown for non-judicial relief. 3 William Blackstone, Commentaries *254. But when the Crown was instead a plaintiff, it pursued common-law actions in the courts in much the same way any other plaintiff would. *Id.* at *257. Thus, it was "widely understood at the time the Constitution was drafted" that "'[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without [the sovereign's] consent*.'" *Sossamon v. Texas*, 563 U.S. 277, 283 (2011) (quoting The Federalist No. 81, at 51 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961). Future Chief Justice John Marshall accordingly explained that Article III, § 2 of the Constitution—which gives the Supreme Court original jurisdiction over cases "in which a State shall be Party"—could only provide a federal forum for States if they, as plaintiffs, sued "to recover claims of individuals residing in other states." 3 Debates on the Federal Constitution 555 (Jonathan Elliot 2d ed., 1854) (Virginia ratifying convention). That construction was "necessary . . . and cannot be avoided," Marshall explained, because "I see a difficulty in making a state defendant, which does not prevent its being plaintiff." *Id.* at 556.

For two centuries, the Supreme Court has hewed to this understanding, uniformly describing state sovereign immunity as "the privilege of the sovereign

not to be sued without its consent." *Va. Office for Prot. & Advocacy*, 563 U.S. at 253; *accord Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 752 (2002) (States, in ratifying the Constitution, relinquished immunity to suits by the United States or sister States against them, but retained "immunity from private suits"); *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 616 ("The Eleventh Amendment grants a State immunity from suit" by private citizens); *Wis. Dept. of Corr. v. Schacht*, 524 U.S. 381, 389 (1998) (similar); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 408 (1821) (immunity is only against "a suit commenced by an individual against a State . . . for the purpose of establishing some claim against [the State]"); *United States v. Peters*, 9 U.S. (5 Cranch) 115, 139 (1809) ("The state cannot be made a defendant to a suit brought by an individual; but it remains the duty of [federal] courts . . . to decide all cases brought before them by citizens of one state against citizens of a different state, where a state is not necessarily a defendant."). This Court's precedents also reflect that understanding. Sovereign immunity, this Court has stated, "has meaning only where an individual seeks redress against the sovereign," *City of Newark v. United States*, 254 F.2d 93, 98 (3d Cir. 1958), and "should be treated as an affirmative defense," *Christy v. Pa. Tpk. Comm'n*, 54 F.3d 1140, 1144 (3d Cir. 1995) (citation omitted).

The Supreme Court has been equally adamant in rejecting the expansion of state sovereign immunity to circumstances in which the State is not a defendant

facing liability from an adverse judgment. In *Cohens v. Virginia*, for instance, the Court refused to accept that sovereign immunity barred federal courts from reviewing state supreme court decisions in which the State was nominally a defendant-in-error. 19 U.S. at 407. While the State had putatively become a defendant for purposes of defending the judgment, the Eleventh Amendment, held the Court, "was intended for those cases, and for those only, in which some demand against a State is made by an individual." *Id*.

Moreover, a long line of Supreme Court precedent refutes the notion that sovereign immunity stops States from being "bound by . . . judicial actions without their consent" when States are not being haled into court as a defendant. *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 446 (2004). In *Hood*, for instance, the State argued that sovereign immunity should shield it from being bound by bankruptcy proceedings, in which a federal bankruptcy court discharges all of a debtor's debts—including any owed to the State as a creditor. But "[u]nder our longstanding precedent," the Supreme Court explained, "States, whether or not they choose to participate in the proceeding, are bound by a bankruptcy court's discharge order no less than other creditors." *Id.* at 448. That is true even if the order renders "individualized determinations of States' interests." *Id.* at 450. Sovereign immunity is no bar because "[a] debtor does not seek monetary damages or any affirmative relief from a State by seeking to discharge a debt; nor does he

subject an unwilling State to a coercive judicial process. He seeks only a discharge of his debts." *Id.*

In sum, Supreme Court precedents could not be clearer in refusing to expand state sovereign immunity to contexts where States are not being forced to defend claims against them. As the Court recently put it: "Denial of sovereign immunity . . . offends the dignity of a State; but not every offense to the dignity of a State constitutes a denial of sovereign immunity. The specific indignity against which sovereign immunity protects is the insult to a State of being haled into court without its consent" to face the prospect of an adverse judgment. *Va. Office for Prot. & Advocacy*, 563 U.S. at 258.

2. Taking their cue from the above precedents, courts of appeals have steadfastly repudiated States' attempts to assert sovereign immunity when the State faces no adverse judgment against it. States that have sued defendants in state court have repeatedly tried to prevent those defendants from removing the case to federal court by asserting that sovereign immunity protects States against litigating their claims in a federal forum without their consent. But all courts of appeals to confront this issue have refused to allow States to invoke immunity as plaintiffs. As the Tenth Circuit explained, "the Supreme Court has never construed the Eleventh Amendment to apply to suits in which a state is solely a plaintiff," and "[a] legion of case law could be cited reflecting the general understanding that

'[t]he ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not *be sued* by private individuals in federal court.'" *Oklahoma ex rel. Edmondson v. Magnolia Marine Transp. Co.*, 359 F.3d 1237, 1239 (10th Cir. 2004) (citations and internal quotation marks omitted). The Second Circuit likewise rejected this expansion of state sovereign immunity because "[s]uits commenced by states stand on a different footing." *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 488 F.3d 112, 119 (2d Cir. 2007). And reviewing the history, the Ninth Circuit saw "little indication that sovereign immunity was ever intended to protect *plaintiff* states. Rather, it plainly understands sovereign immunity as protection from *being sued*." *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 847 (9th Cir. 2004). Similarly, when California, as a plaintiff, claimed that sovereign immunity should have blocked the transfer of its suit from a federal court in California to one in Indiana, the Federal Circuit flatly disagreed: "[T]he Eleventh Amendment applies to suits 'against' a state, not suits by a state." *Regents of Univ. of Cal. v. Eli Lilly & Co.*, 119 F.3d 1559, 1564 (Fed. Cir. 1997).

3. Finally, the bright-line rule that sovereign immunity bars federal courts from only "entertain[ing] a private person's suit against a State," *Va. Office for Prot. & Advocacy*, 563 U.S. at 254, reflects the doctrine's purposes. Sovereign immunity guards the State's treasury against forced exactions by private plaintiffs

and preserves the dignity of the States as independent sovereigns. *Alden v. Maine*, 527 U.S. 706, 749–51 (1999). But these concerns are implicated only when the State is a defendant in federal court. Only then is the State at risk of paying an unfavorable court judgment or being subjected to a federal court's direct control through an injunction. Likewise, the State's dignity as an independent sovereign is uniquely called into question when it is haled into court to face private parties' allegations that the State committed wrongdoing.

B. Louisiana Cannot Invoke Sovereign Immunity to Escape the Binding Effect of the Class Settlement on Absent Plaintiff Class Members

This unbroken understanding of state sovereign immunity forecloses Louisiana's novel attempt to wield state sovereign immunity to avoid the binding effect of a class settlement on absent plaintiff class members. Sovereign immunity bars only suits brought against States by private parties—but Louisiana was positioned on the plaintiffs' side in the indirect-purchaser class litigation. Since Louisiana was an absent class member, by definition, "[n]o claim against it of any description [was] asserted or prosecuted." *Cohens*, 19 U.S. at 410. Quite the contrary: Louisiana stood only to gain money from being part of the class. GSK never counterclaimed against the plaintiffs, let alone against absent class members, so there was no risk that Louisiana would face an adverse judgment. And the only allegations of wrongdoing were brought by the class plaintiffs against GSK.

Nor did Louisiana become a defendant by virtue of the class settlement. To be sure, in exchange for a portion of the settlement fund, the settlement extinguished all class members' claims and barred re-litigation. But the Supreme Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), squarely rejected the notion that absent class members—whose claims may be "extinguish[ed] . . . forever" through settlement or an adverse judgment against the plaintiffs—are functionally equivalent to defendants who are wrongfully haled into court. *Id.* at 807. In *Phillips Petroleum*, a class-action defendant argued that the same jurisdictional rule for defendants—that courts cannot exercise jurisdiction unless the defendant has meaningful contacts with the forum state or has affirmatively consented to jurisdiction—should apply to absent class members. *Id.* at 805. But the Supreme Court disagreed, concluding that absent class members' failure to opt out constituted sufficient consent to jurisdiction because absent class members fundamentally differ from defendants. *Id.* at 813–14. Absent class-action plaintiffs, explained the Court, face far lesser burdens than a defendant subjected to adjudication in a forum against its will. *Id.* at 808. Unlike unwilling defendants, absent class members are not "haled anywhere to defend themselves upon pain of a default judgment." *Id.* at 809. Nor do absent class members face "extended and often costly discovery," or the prospect of "damages or to comply with some other form of remedy imposed by the court should [they] lose the suit." *Id.* at 808.

Rather, "a class-action plaintiff is not required to fend for himself," not least because the rules governing class actions—including Rule 23—require "continuing solicitude for [absent class members'] rights." *Id.* at 810. "The court and named plaintiffs protect [absent class members'] interests" in a multitude of ways. *Id.* at 809. For all these reasons, the Supreme Court held, absent class members are "in quite a different posture" from defendants. *Id.* at 808.

Nor has Louisiana become a defendant because GSK seeks to enforce the settlement agreement. GSK moved to enjoin Louisiana's Attorney General from pursuing the state court action to the extent it encompassed claims released in the class settlement; GSK has never sued the State itself. JA313. That distinction makes all the difference for sovereign immunity purposes. "[W]hen the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101–02 (1984). But under *Ex parte Young*, 209 U.S. 123 (1908), when private plaintiffs sue state officers for prospective injunctive relief in federal court to enforce federal law, they are deemed not to be suing the State itself. *Id.* at 155–56. State attorneys general thus routinely are sued in federal court. *E.g.*, *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088 (9th Cir. 2003) (plaintiffs sued, *inter alia*, California Attorney General for declaratory and injunctive relief).

Nor does the posture of this case—i.e., GSK's enforcement of a settlement agreement—create sovereign immunity concerns. A federal court's power to enjoin state officers to enforce federal law extends to the enforcement of federal consent decrees that are binding on the State. So long as the State validly entered into the consent decree, federal courts may enforce it against state officials without creating any sovereign immunity issue. See *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 440 (2004). And the settlement agreement here—which reserved to the district court continuing jurisdiction over any disputes about the settlement—was functionally a consent decree. *See Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 281–282 (4th Cir. 2002). Under these circumstances, state sovereign immunity is no obstacle to the district court's ability to enforce the settlement by enjoining Louisiana's Attorney General from pursuing claims that the settlement conclusively resolved.

C. Creating a Special Sovereign-Immunity Rule for Class Actions Would Flout Centuries of Precedent and Destroy Incentives to Settle Class Actions

The district court's contrary conclusion—that sovereign immunity empowers States to avoid the otherwise binding effect of class settlements on absent class members—rests on an alarmingly expansive and unprecedented misconception of state sovereign immunity. According to the district court, the Eleventh Amendment embodies States' entitlement "to decide where and when to

have its claims adjudicated" irrespective of whether States are positioned as plaintiffs or defendants. JA12. Moreover, the district court reasoned, unless it is absolutely clear that States chose to have their claims adjudicated in federal court, the Eleventh Amendment bars federal courts from enforcing class settlements against States even if that settlement fully complies with Rule 23 and binds all other absent class members. JA15–17.

1. That sweeping conception of sovereign immunity is not only squarely contrary to the overwhelming authority going the other way. *See supra* pp. 25–35. Even on its own terms, the authority the district court cited to show that "the inclusion of States as absent class members falls in a gray area of Eleventh Amendment jurisprudence," JA14 n.7, does nothing of the kind. The court's sole appellate precedent, *Thomas v. FAG Bearings Corp.*, 50 F.3d 502, 505 (8th Cir. 1995), is inapposite, and in any event confirms that sovereign immunity protects States only as defendants. There, the plaintiffs sued FAG Bearings under federal law for allegedly contaminating groundwater and drinking water. 50 F.3d at 503–04. Afraid it might face multiple or inconsistent judgments, FAG Bearings tried to join a state agency under Federal Rule of Civil Procedure 19(a). *Id.* But the Eighth Circuit deemed this joinder impermissible, reasoning that because the State "d[id] not meet the stringent requirements for initial joinder as an involuntary plaintiff," the State (at least initially) would have been involuntarily joined *as a*

defendant. *Id.* at 504 n.5. State sovereign immunity thus barred federal courts from making the State an involuntary party because there was at least a risk that the State could be subject to an adverse judgment against it. *See id.* at 506–07; *accord Dynegy*, 375 F.3d at 848 n.14 (interpreting *FAG Bearings*). Here, however, Louisiana was never made an involuntary party, let alone an involuntary defendant. Rather, as an absent class member, Louisiana could have opted out at will at any time before May 3, 2013, one month prior to the final Rule 23 approval hearing. JA46.

The two district court opinions that the court below invoked likewise offer no reason to disregard the overwhelming body of Supreme Court precedents. *In re McKesson Governmental Entities Average Wholesale Price Litig.*, 767 F. Supp. 2d 263 (D. Mass 2011), is an outlier even within the District of Massachusetts, where judges have far more often certified classes containing States as absent class members. *See, e.g.*, *In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 76 n.3, 98 (D. Mass. 2005). Regardless, *McKesson* just floated the possibility that the Eleventh Amendment might bar federal courts from certifying classes containing States, without deciding the question. 767 F. Supp. 2d at 271. And *Walker v. Liggett Group, Inc.*, 982 F. Supp. 1208 (S.D. W. Va. 1997), acknowledged that "the application of the Eleventh Amendment is not readily apparent" in cases where the State is not a defendant, yet concluded without analysis that States, as

absent class members, were "cast as unwilling Plaintiffs" and their "status in this case is analogous to that of a defendant." *Id.* at 1210. But as noted, *supra* pp. 32–34, the Supreme Court rejected that precise analogy in *Phillips Petroleum*.

2. Accepting the district court's and Louisiana's theory of sovereign immunity would also upend parties' incentives to settle class actions. A rule that States alone can avoid the binding consequences of class-action settlements for absent class members—even if Rule 23 and CAFA notice requirements are all satisfied, and even if the State failed to opt out of the class—invites States to engage in destabilizing and unfair gamesmanship. States can ignore the usual consequences of failing to opt out, see how the class action and settlement terms develop, and decide whether the State's expected recovery from the settlement is more or less than what the State thinks it could now obtain in a new lawsuit against the defendant in the State's own court system.

That gamesmanship would have far-reaching effects, because States purchase a panoply of goods and services and are thus frequently absent class members in massive class actions. *See, e.g.*, Final Order and Judgment Granting Final Approval of the Class Settlement and Release and Approving Proposed Allocation of Settlement Funds, *In re Neurontin Mktg., Sales Practices & Prods. Liab. Litig.*, No. 04-cv-10981 (D. Mass. Nov. 7, 2014), ECF No. 4302 (certifying a class in which States, as indirect purchasers of an anticonvulsant drug, were absent

class members); *S. States Police Benevolent Ass'n v. First Choice Armor & Equip., Inc.*, 241 F.R.D. 85, 93 (D. Mass. 2007) (allowing "certif[ication of] state agencies as part of a class action" where law enforcement agencies purchased allegedly defective bullet-resistant body armor); *Lupron*, 228 F.R.D., at 76 n.3, 98 (certifying a class in which States, as indirect purchasers of a drug used to treat prostate cancer, were absent class members).

Parties that included States in the class definition could never be certain whether the State would ultimately decide to count itself as a class member and file claims, or strike out on its own after the class action ends. Class-action defendants, in turn, would never know whether a given settlement amount is a financially reasonable exchange or just the tip of the iceberg. That uncertainty would severely undermine their incentives to settle.

Nor would this problem disappear if parties simply stopped including States in class definitions going forward. States could still upend the many prior class-action settlements that already included States as class members by filing new suits of their own. Forcing class counsel to obtain States' explicit, affirmative consent to count as class members is no answer, either. Doing so would severely bog down settlements as the parties waited in limbo while 50 different States decided whether to consent to class membership and attempted to negotiate side agreements. And if

States simply declined to respond, the settlement's status would only be more uncertain, defeating finality and closure.

3. Endorsing an unprecedented enlargement of state sovereign immunity is also neither necessary nor appropriate to address any unfairness in subjecting States' claims to class-wide adjudication when States did not actively litigate the case or negotiate the settlement. That is the nature of a class action, and the State is not at risk of any adverse judgment. In any event, as the Supreme Court has repeatedly indicated, Rule 23's extensive safeguards for absent class members amply guard against subjecting absent class members to a court's jurisdiction against their will. *See Phillips Petroleum*, 472 U.S. at 809-12; *Taylor v. Sturgell*, 553 U.S. 880, 894-95 (2008) ("Representative suits with preclusive effect on nonparties include properly conducted class actions . . . ."); *see also Carlough*, 10 F.3d at 199 (similar). No federal court forced Louisiana to relinquish its claims and unwillingly submit to class-wide adjudication. If Louisiana wished to proceed separately, all it had to do was file a one-page opt-out notice with the district court.

II. ALTERNATIVELY, LOUISIANA WAIVED SOVEREIGN IMMUNITY BY FAILING TO OPT OUT

Louisiana's claim of immunity suffers another fatal flaw: Louisiana's litigation conduct waived any immunity it could have asserted by deciding not to opt out despite receiving actual notice of the class action and settlement.

A. Louisiana's Decision Not To Opt Out Constitutes Consent to Federal Jurisdiction

Even if Louisiana's sovereign immunity somehow protected Louisiana against becoming part of a Rule 23(b)(3) settlement class, Louisiana waived that immunity through its litigation conduct. Sovereign immunity is the State's "personal privilege which it may waive at pleasure." *Clark v. Barnard*, 108 U.S. 436, 447 (1883). A State voluntarily waives sovereign immunity by engaging in litigation conduct that "voluntarily invokes [federal] jurisdiction," or by "mak[ing] a clear declaration that it intends to submit itself to [federal] jurisdiction." *Coll. Sav. Bank. v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675–76 (1999) (citations and internal quotation marks omitted). In either case, the "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one," and requires that the "State's consent to suit must be unequivocally expressed." *Id.* at 676 (citations and internal quotation marks omitted).

For waiver through litigation conduct, however, the State's actions speak louder than its words. A State clearly and unequivocally expresses its consent to jurisdiction through its litigation conduct whenever it voluntarily engages in conduct that is inconsistent with its later claim of immunity. *Lapides*, 535 U.S. at 620; *Gunter v. Atl. Coast R.R.*, 200 U.S. 273, 284 (1906). Whether the State accompanied that conduct with an express declaration of its intent to relinquish

immunity is irrelevant. *Lapides*, 535 U.S. at 620. What matters instead is whether, in the specific litigation context, the State's behavior evinces a willingness to let federal courts resolve its claims. And for good reason: "a Constitution that permitted States to follow their litigation interests by freely asserting both" that they assented to federal jurisdiction and denied its existence "could generate seriously unfair results." *Id.* at 619.

Thus, a State sued in state court that removes the case to federal court waives sovereign immunity regardless of whether the State's removal papers expressly announce its intended waiver of immunity. The act of removal, in of itself, voluntary invokes federal-court jurisdiction. *Id.* at 620. Likewise, a State's voluntary intervention as a defendant in federal court waives the State's immunity by signaling the State's willingness to have claims resolved against it, irrespective of whether the State is demonstrably aware of the Eleventh Amendment consequences of its actions. *See Clark*, 108 U.S. at 447; *City of Newark*, 254 F.2d at 98.

Here, Louisiana's litigation conduct—namely, Louisiana's decision not to opt out of the plaintiff class despite receiving notice that Louisiana was included in the class and would be bound by the settlement if it failed to object—waived whatever sovereign immunity Louisiana had. GSK's CAFA Notice to Louisiana's Attorney General expressly, and in several places, informed Louisiana that the

indirect purchaser class action included any States (like Louisiana) that bought Flonase for their employees or other beneficiaries of government health plans. The settlement agreement GSK delivered to Louisiana's Attorney General informed Louisiana that States were class members "to the extent they purchased [Flonase or its generic equivalents] for their employees or others covered by a government employee health plan." JA104. That class definition was also front and center in GSK's enclosed copy of the detailed notice, where Louisiana's Attorney General would have seen two separate sections entitled "WHO IS IN THE CLASS AND THE SETTLEMENT," which explained that "State governments and their agencies and departments" were included in the settlement "to the extent they purchased branded Flonase or its generic equivalents for their employees or others covered by a government employee health plan." JA58; JA68.

Louisiana was equally on notice that, as an absent class member in an opt-out class, by failing to opt out of the class, it would affirmatively consent for the federal court to exercise jurisdiction and resolve Louisiana's claims. Louisiana is presumed to be familiar with Rule 23, under which an absent member of a Rule 23(b)(3) plaintiff class consents to a federal court's adjudication of its claims so long as the class received notice and the absent member did not opt out by requesting exclusion. Fed. R. Civ. P. 23(c)(2)(B). For at least three decades, Supreme Court precedent has put Louisiana on notice that an absent class

member's failure to opt out constitutes affirmative consent to state or federal adjudication even if the class member has no contact with the forum. *Phillips Petroleum*, 472 U.S. at 811–14. And were there any ambiguity, GSK's CAFA Notice gave Louisiana's Attorney General multiple sets of the instructions informing class members that they would be bound by the class settlement unless they opted out, and telling class members how to do so. JA60–61; JA71–72; JA77; JA81.

Nor is there anything anomalous in treating a State's inaction as sufficient to waive a constitutional right. The Supreme Court has suggested that Eleventh Amendment waiver rules should track waiver rules applicable to individuals' constitutional rights. *See Coll. Sav. Bank*, 527 U.S. at 681–82. And litigants relinquish many other constitutional rights in litigation through omission, not affirmative conduct. Parties waive the Seventh Amendment right to a jury trial in civil suits by failing to serve other parties with a timely written demand for jury trial. *See* Fed. R. Civ. P. 38(d); *BCCI Holdings (Luxembourg), S.A. v. Khalil*, 214 F.3d 168, 172 (D.C. Cir. 2000). Criminal defendants waive their Fifth Amendment right to testify on their own behalf by failing to take the stand or failing to notify the court of their desire to do so. *United States v. Joelson*, 7 F.3d 174, 177 (9th Cir. 1993). So too do criminal defendants waive their Sixth Amendment right to be tried in the district where their crime was committed when they fail to

affirmatively object to a defect in venue. *United States v. White*, 590 F.3d 1210, 1213–14 (11th Cir. 2009). If anything, States have far more notice that they will relinquish their Eleventh Amendment right to sovereign immunity if they fail to take steps to preserve that right.

In sum, Louisiana was on clear notice that the indirect purchaser settlement would bind Louisiana and any other absent class members who failed to opt out. Louisiana had received a wealth of documents from GSK repeatedly reiterating that States that purchased Flonase for employees or health-plan beneficiaries were class members. And Louisiana had over six months to review these documents, raise objections, or opt out before the district court approved the settlement. States that were included as absent class members in other class actions have apparently had little difficulty in timely expressing their intent to opt out. *See* JA612–18.

Yet Louisiana did nothing, and in this context, federal law treats that silence as affirmative consent to class-wide adjudication in federal court. And once Louisiana waived its sovereign immunity with respect to the class settlement, it also consented to ancillary proceedings to enforce that settlement. *See Gunter*, 200 U.S. at 292–93. Louisiana cannot now claim that the Eleventh Amendment bars that same federal court from enforcing the class-wide settlement against it.

B. The District Court's Contrary Conclusion Is Legally and Factually Untenable

Despite acknowledging that all other absent class members received sufficient notice to bind them to the settlement, the district court held that States must get additional notice before their failure to opt out of a class can constitute assent to federal jurisdiction. JA14–17. And, according to the district court, even the additional notice provided by GSK's CAFA Notice—which gave the States far more information about class membership and opt-out procedures than any other class members received—did not suffice. JA16–17. Louisiana may have read the class definition informing it that state purchasers of Flonase were class members who would be bound by the settlement if they did not opt out, the court conceded. JA16. But the court still deemed Louisiana's failure to opt out insufficiently clear to waive its immunity, speculating that it was "just as likely that Louisiana would have considered these documents with a view to protecting the interests of its citizens." *Id.*

That reasoning runs headlong into the Supreme Court's opinion in *Lapides*. There, the Court explained that when evaluating "waivers effectuated by litigation conduct," the question is not whether the State gave "a 'clear' indication of [its] intent to waive its immunity," but whether "the litigation act the State takes that creates the waiver" is a sufficiently "clear" invocation of federal jurisdiction. 535 U.S. at 620. Here, federal law already supplied an answer: so long as the class

action notice was adequate, absent class members' failure to opt out of the class is a litigation act that waives any objection to the federal court's jurisdiction over class members. *See Phillips Petroleum*, 472 U.S. at 811–14.

It would also be perverse to treat the same litigation act as sufficient to waive other absent class members' due-process objections to the court's exercise of jurisdiction, but not to waive absent State class members' sovereign immunity. States, after all, are more sophisticated, more aware of the ongoing litigation, and more able to assess the value of their claims than are other absent class members. Nor do States receive special, heightened protections against waiver in other litigation contexts. Anyone, State or not, who fails to assert a claim in district court cannot raise it anew on appeal. *See United States v. Dupree*, 617 F.3d 724, 728 (3d Cir. 2010) ("[T]he Government is subject to the ordinary rule that an argument not raised in the district court is waived on appeal . . . ." (citations and internal quotation marks omitted)). The meaning of a litigation act cannot turn upon whether the State or a private party is engaging in it.

The district court's reasoning is just as untenable on the facts. To believe the court's unsubstantiated conjecture that "it is just as likely that Louisiana would have considered [the CAFA notice documents] with a view to protecting the interests of its citizens," one must believe that States read CAFA notices with a one-track mind, and disregard even the plainest indications that their own claims

are also at stake. But as a sophisticated legal actor, the Louisiana Attorney General's Office can reasonably be expected to read and understand the contents of the legal notices it was provided—especially sections entitled "WHO IS IN THE CLASS AND THE SETTLEMENT" that expressly mention States that purchased Flonase or its generic equivalents "for their employees or others covered by a government employee health plan." JA58; JA68. And if that information failed to register with Louisiana as an attachment to the CAFA Notice, it is difficult to fathom why sending Louisiana a second copy of the notice in its capacity as an absent class member would matter so dramatically to the State's comprehension, as the district court and Louisiana suppose. *See* JA15–17; JA406; JA487.

III. THE DISTRICT COURT IMPROPERLY IGNORED MATERIAL EVIDENCE OF A CLAIM FOR SETTLEMENT PROCEEDS FILED ON LOUISIANA'S BEHALF

In all events, it is beyond dispute that if Louisiana actually submitted or received claims for settlement proceeds, that act was a voluntary invocation of federal jurisdiction that waived Louisiana's sovereign immunity. *See supra*, pp. 41–45. Indeed, in apparent recognition of this point, Louisiana repeatedly represented in the proceedings below that it never submitted any claims under the settlement agreement or received any proceeds from it. JA407; JA 482; JA 487; JA 585–86; JA603.

After the district court denied GSK's motion to enforce the settlement agreement, however, GSK uncovered evidence that Louisiana's agent, the insurance company Humana, had in fact submitted $183,404.44 in claims on Louisiana's behalf. SA62; JA20. GSK promptly filed a Rule 60(b) motion for reconsideration in light of this newly discovered evidence.

Under Rule 60(b), a party is entitled to relief if it presents material evidence that "could not have been discovered prior to trial through the exercise of reasonable diligence" and "would probably have changed the outcome of the [proceeding]." *Bohus v. Beloff*, 950 F.2d 919, 930 (3d Cir. 1991). The evidence GSK uncovered meets all these criteria and should have prompted the court to reconsider its previous ruling that the State had not waived its immunity and consented to membership in the settlement class. The court held otherwise on the sole ground that GSK had purportedly not exercised reasonable diligence in seeking this evidence. That conclusion is clearly wrong, and the district court abused its discretion in failing to grant GSK relief.

1. Contrary to the district court's conclusion, GSK exercised reasonable diligence in obtaining evidence of Louisiana's claim for settlement proceeds. "There are very few facts which diligence cannot discover, but there must be some reason to awaken inquiry and direct diligence in the channel in which it would be successful. This is what is meant by reasonable diligence." *Vernau v. Vic's*

Market, Inc., 896 F.2d 43, 46 (3d Cir. 1990) (citation omitted). "Reasonable diligence" does not demand that a litigant turn over every stone in an effort to unearth evidence that the opposing party has expressly represented does not exist. *Cf. Gantt v. Roe*, 389 F.3d 908, 912–13 (9th Cir. 2004) ("Though defense counsel could have conducted his own investigation, he was surely entitled to rely on the prosecution's representation that it was sharing the fruits of the police investigation.").

GSK took all the steps that it could reasonably have been expected to take to discover whether Louisiana had submitted claims for settlement proceeds or received any money from the fund. In preparing its motion to enforce the settlement, GSK sought information from the claims administrator (Rust Consulting) and Humana, the administrator of Louisiana's employee health plan, about claims that Louisiana may have submitted under the settlement.

Louisiana then adamantly represented that it had never sought or received payment under the settlement agreement. JA407; JA482; JA487; JA585–86; JA603. GSK took Louisiana at its word and reasonably concluded that no contrary evidence existed.

Supra pp. 19–20; SA71–72. Only then was it plain that Louisiana's previous representations were suspect and that evidence might exist that Louisiana had, in fact, submitted claims or received settlement funds.

. *Supra* pp. 20–21; SA62. GSK then tried to find out whether Louisiana had received any payments on those claims, but Humana refused to inform GSK without Louisiana's consent. One would have thought that Louisiana would have seized this opportunity to substantiate its longstanding representation that it never received a penny of settlement proceeds.

The district court's conclusion that GSK failed to exercise reasonable diligence, JA21–25, is thus unwarranted. The district court faulted GSK for failing to " inform the Court" of the steps GSK was taking to prove that Louisiana had actually availed itself of the settlement agreement that Louisiana claimed was unenforceable against it. JA21. But the court itself recognized that GSK had been

attempting to obtain the evidence and had faced "obstacles" in doing so. *Id.* And reasonable diligence has never required a party to keep the court apprised of every twist and turn in its search for evidence.

2. Furthermore, the evidence that the claims administrator received claims for settlement proceeds on Louisiana's behalf was material and would likely have prompted the district court to grant GSK's motion to enforce the settlement. That evidence called into question Louisiana's repeated assertions that it filed no claims, and cast serious doubt upon Louisiana's representation that it never received any settlement funds. And as noted, had Louisiana filed (or directed its agent, Humana, to file) claims on its behalf, or had Louisiana received settlement funds, this conduct would have waived Louisiana's sovereign immunity. It is hard to think of a clearer indication that a State wishes to avail itself of a federal court's jurisdiction over a class-action settlement than when the State voluntarily files claims for settlement money or voluntarily accepts that money. The court's denial of GSK's motion for reconsideration was an abuse of discretion and thus requires reversal.

CONCLUSION

For the foregoing reasons, the district court's decisions should be reversed.

Dated: October 26, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2016, I electronically filed the foregoing document with the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users.

I certify that I served a copy of the foregoing brief on the State of Louisiana by placing a paper copy in the mail on October 26, 2016. *See* Fed. R. App. P. 25(c)(1)(A)–(C). I have also provided a copy of the brief to the State of Louisiana via electronic mail. *See* Fed. R. App. P. 25(c)(1)(D).

Dated: October 26, 2016

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CERTIFICATE OF COMPLIANCE

1. The foregoing brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because the brief contains 12,195 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. The brief also 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 2007 in Times New Roman 14-point font.

3. Pursuant to Local Rule 31.1(c), I certify that the text of the electronic brief is identical to the text in the paper copies.

4. The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, System Center Endpoint Protection, Antimalware Client Version 4.6.305.0, last updated October 24, 2016, and according to that program, the submissions are free of viruses.

Dated: October 26, 2016

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