IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14-3798
Consolidated with No. 14-3761

Amber GASCHO, *et al.*,

Plaintiffs-Appellees,

v.

GLOBAL FITNESS HOLDINGS, LLC

Defendant-Appellee,

Appeal of Joshua BLACKMAN,

Objector-Appellant.

On Appeal from the United States District Court
For the Southern District of Ohio, No. 2:11-cv-00436-GCS-NMK

Principal Brief
of Appellant Joshua Blackman

CENTER FOR CLASS ACTION FAIRNESS
Theodore H. Frank
Adam E. Schulman
1718 M Street NW, No. 236
Washington, D.C. 20036
(703) 203-3848

Attorneys for Appellant Joshua Blackman

Corporate Disclosures

Pursuant to 6th Cir. R. 26.1, Joshua Blackman makes the following disclosures:

1. Blackman is not a subsidiary or affiliate of a publicly owned corporation.
2. There is no publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome.

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Statement in Support of Oral Argument

Pursuant to 6th Cir. R. 34, Appellant Joshua Blackman, a law professor, respectfully requests that the Court hear oral argument in his case because it presents significant issues concerning settlements in class action cases. These issues, regarding the requirements of Rule 23 and the scope of existing Sixth Circuit precedent, are meritorious, and pit the district court decision against those of this and other Circuits.

This appeal further raises complex but recurring questions of civil procedure; their exploration at oral argument would aid this Court's decisional process and benefit the judicial system. While many appeals of class-action settlement approvals are brought by so-called "professional objectors" in bad faith to extort payments from the settling parties, this is not the practice of Blackman's attorneys, who have never settled an appeal for a *quid pro quo* payment, and bring this objection and appeal in good faith to overturn an unfair settlement. *See generally, e.g.,* Ashby Jones, "A Litigator Fights Class-Action Suits," *Wall St. J.* (Oct. 31, 2011). Blackman's attorneys have previously argued and won landmark appellate rulings improving the fairness of class-action settlement procedure. *E.g.*, *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013); *Redman v. RadioShack Corp.*, No. 14-1470, -- F.3d --, 2014 U.S. App. LEXIS 18181, 2014 WL 4654477 (7th Cir. Sep. 19, 2014) *see also* Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 13, 2013 (calling Blackman's counsel "[t]he leading critic of abusive class action settlements"). A favorable resolution in this case would improve the class action process by deterring other class-action settlements designed to benefit attorneys at the expense of their putative clients.

Statement of Subject Matter and Appellate Jurisdiction

It is not clear from the record if the district court had jurisdiction. "This Court has an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Freeland v. Liberty Mutual Fire Ins. Co.*, 632 F.3d 250, 252 (6th Cir. 2011) (internal quotation and citation omitted).

The parties claimed diversity and removal jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2)(A) and 28 U.S.C. § 1453(c)(1). Third Amended Complaint ¶ 5, RE 100, PageID #1655; Removal Notice, RE 2. The case is a class action brought, *inter alia*, under state consumer fraud laws, involving a class of more than 100 class members who are citizens of, *inter alia*, Ohio, Kentucky, Georgia, Nebraska, North Carolina, Pennsylvania, and Tennessee, the amount in controversy exceeds the sum of $5,000,000, and no statutory exception to 28 U.S.C. § 1332(d)(2) applies. But the record does not contain any information relating to the citizenship of the defendant, Global Fitness Holdings, LLC, a Kentucky limited liability corporation. The citizenship of a LLC is the citizenship of its members, and there is nothing in the record relating to the identity of the defendant LLC's members. *Compare Delay v. Rosenthal Collins Group, Inc.,* 585 F.3d 1003, 1005 (6th Cir. 2009) *with* Removal Notice, RE 2, PageID #8 (citing irrelevant *Hertz Corp. v. Friend*, 130 S.Ct. 1181 (2010)). The lower court did not make findings relating to minimal diversity.[1] To the extent this is

[1] While plaintiffs challenged the timeliness of the removal in a motion to remand, they did not dispute Global's allegation of minimal diversity. RE 11. A magistrate recommended denying the motion to remand. RE 47. The district court never ruled on objections to the report and recommendation, which, again, failed to

merely a "defective allegation," the defect can be cured with a 28 U.S.C. § 1653 filing by the defendant in this court. *E.g., Homfeld II, L.L.C. v. Comair Holdings, Inc.,* 53 F. App'x 731, 733 (6th Cir. 2002). But if there is not minimal diversity, there is no federal jurisdiction.

Class member and objector Joshua Blackman (a citizen of Texas) filed a timely objection to a proposed class action settlement. RE 122; RE 122-1. The magistrate's report and recommendation issued April 4, 2014. RE 141. Blackman filed timely objections to the report and recommendation under Fed. R. Civ. Proc. 72 on April 17, 2014. RE 142. The court's final judgment issued on July 16, 2014. RE 148. Blackman filed a timely notice of appeal under Fed. R. App. Proc. 4(a)(1)(A) on August 14, 2014. RE 150.

To the extent the district court has jurisdiction, this court has appellate jurisdiction under 28 U.S.C. § 1291 because this is a timely-filed appeal from a final judgment. Blackman has standing to appeal a final approval of a class action settlement without the need to intervene formally in the case. *Devlin v. Scardelletti,* 536 U.S. 1 (2002).

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raise any question on the issue of minimal diversity. RE 48. A party seeking remand waives any defects (other than subject matter jurisdiction) if not "made within 30 days after filing the notice of removal," 28 U.S.C. § 1447(c), so if subject-matter jurisdiction exists, remand is inappropriate for the procedural defect in the removal papers. *McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 653 (7th Cir. 1998) (Easterbrook, J.); *see also Page v. City of Southfield,* 45 F.3d 128, 133 (6th Cir. 1995) (pre-1996 amendment § 1447(c)).

Statement of the Issues

1. *In re Dry Max Pampers Litigation* holds that class action settlements may not afford "preferential treatment" to class counsel at the expense of absent class members, and reversed a settlement approval despite there being only three objections. 724 F.3d 713, 718 (6th Cir. 2013) (Kethledge, J.). *Accord Redman v. RadioShack Corp.*, -- F.3d --, 2014 U.S. App. LEXIS 18181, 2014 WL 4654477 (7th Cir. Sept. 19, 2014) (Posner, J.) (55% recovery); *see also In re Bluetooth Prod. Liab. Litig.*, 654 F.3d 935, 947-49 (9th Cir. 2011).

(a) Is it error as a matter of law for a district court to approve a class action settlement (1) structured to pay class counsel $2.4 million, but the class only $1.6 million; (2) when class counsel has also self-dealt by shielding its fee request from the class through clauses (A) prohibiting the defendant from challenging the fee request; and also (B) reverting any court-ordered fee reduction to the defendant rather than the class?

(b) In the alternative, did the lower court apply the wrong standard of law when it held that *Pampers* and *Bluetooth*'s warnings of preferential treatment and disproportionate recovery did not apply to a settlement where there were few objections and where class relief was more than "perfunctory" or "negligible," but still less than what class counsel received?

Standard of Review: A district court decision to approve a class action settlement is reviewed for abuse of discretion. *Dry Max Pampers,* 724 F.3d at 717. A

failure to apply the correct law is an abuse of discretion. *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 644 (6th Cir. 2006).

2. When calculating a cross-check using the percentage of recovery method, did the district court err as a matter of law by giving class counsel half credit for the hypothetical maximum recovery of the class, even though the settlement was structured so that the actual claims rate would be a small fraction of that figure?

Standard of Review: An attorneys' fees award is reviewed for abuse of discretion. *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 779 (6th Cir. 1996). Questions of law about the interpretation of the Federal Rules of Civil Procedure are reviewed *de novo*. *Kalamazoo v. River Study Group v. Rockwell Intern. Corp.*, 355 F.3d 574, 583 (6th Cir. 2004).

Statement of the Case

A. The lawsuit.

Global Fitness Holdings, LLC, is a Kentucky LLC that operated fitness facilities under the "Urban Active" brand name in Ohio, Kentucky, Georgia, Nebraska, North Carolina, Pennsylvania, and Tennessee until October 2012, when it sold all of its assets to the entity that ran the LA Fitness chain. Report and Recommendation ("R&R"), RE 141, PageID #2799.

Amber Gascho and other plaintiffs brought a class action on behalf of a class of Ohio consumers against Global in Ohio state court in 2011, and Global timely removed to the Southern District of Ohio, asserting jurisdiction under the Class

Action Fairness Act. RE 2. That class action, and four other similar ones, alleged that Global engaged in a variety of unfair sales practices relating to disclosures to consumers, deductions from bank accounts, and honoring contract cancellations; and sought compensatory and equitable damages and costs and attorneys' fees under, *inter alia*, theories of breach of contract, unjust enrichment, fraud, and a variety of state consumer protection laws, including state laws relating to health clubs. R&R at PageID #2800-03. One such class action was dismissed. *Robins v. Global Fitness Holdings, LLC*, 838 F. Supp. 2d 631 (N.D. Ohio 2012), with an appeal, No. 12-3231, pending in the Sixth Circuit. The second amended complaint in *Gascho* was also dismissed in part. RE 69.

Global eventually attempted to settle one suit in Kentucky state court in 2012. Counsel for three competing class actions objected, and the Kentucky court rejected the settlement because of, among other reasons, the "lack of value": the cumbersome claims process meant that only 1,444 class members made approved claims, while the attorneys would collect $250,000 to $300,000. *Seeger* Order, RE 118-10, PageID #2000-02; R&R at PageID #2803-04.

B. The Settlement Agreement.

Instead, the parties reached a global settlement in this case in September 2013. Settlement, RE 97-1. The settlement provided for the filing of a Third Amended Complaint (RE 100) of broader scope than the earlier complaints to permit a global settlement. Settlement § 2.1, PageID #1489.

The settlement covered a class consisting of approximately 606,246 persons who signed a gym membership or personal training contract with Global during the Class Period of January 1, 2006 to October 26, 2012, and three subclasses of those class members who also paid biannual $15 fees; cancelled their gym membership; or cancelled a personal training contract. Settlement § 6.1, PageID #1496-97. (Class members could be in zero, one, two, or all three subclasses.)

Class members who filed "timely and valid claims" ("Allowed Claimants") would receive a cumulative $5, $20, $20, and $30 award for membership in the class or subclasses. *Id.*; Settlement Exh. 1, RE 97-2, PageID #1526-27. Class members who did not file claims would receive nothing. If total claims made were less than $1.3 million, Allowed Claimants would have their awards augmented *pro rata*. Settlement § 7.1, PageID #1497-98. Twelve class representatives would receive incentive awards totaling $40,000. *Id.* § 8, PageID #1498.

Class counsel was permitted under the settlement to apply for $2,390,000 in fees and costs. *Id.* § 9.1, PageID #1499. Global agreed not to oppose any application for $2.39 million or less. *Id.* § 9.2, PageID #1499. Any amount awarded by the court less than $2.39 million would revert to Global. *Id.* § 8.3, PageID #1499. Class members released all claims against Global (and other "Released Parties") related to the factual predicate of the Third Amended Complaint. *Id.* §§ 15, 2.23, 2.24, PageID #1492-93, #1510.

The claims administrator sent individualized notice by postcard to 601,494 class members, and email notice to just under half the class; approximately 90% of the

Postcard Notices were delivered to potential class members. Dahl Decl., RE 126-1, PageID #2153-55.

C. The Blackman objection.

Joshua Blackman, a class member, Texas citizen, law professor, and former Sixth Circuit clerk, objected through non-profit counsel after receiving notice of the settlement. Blackman Objection, RE 122, PageID #2078-81; Blackman Declaration, RE 122-1. While Blackman clerked at the Sixth Circuit and resided in Louisville, Kentucky, he joined a Louisville Urban Active gym, but cancelled his membership, making him a member of the class and the Membership Cancellation subclass; he made a claim for $25 under the settlement. Blackman Decl. at PageID #2114. Blackman did not remember whether he qualified for the Facility Improvement Fee Subclass, and his notice failed to tell him, and he thus did not make a $20 claim for that subclass. *Id.* Blackman objected that the settlement, which would pay $2.4 million to attorneys, and likely much less to the class because of the claims-made process, was one-sided in favor of the class attorneys and failed to comply with the Sixth Circuit's *Dry Max Pampers* decision forbidding "preferential treatment" to class attorneys over unnamed class members. Objection at PageID #2077-93. Blackman further objected to the clear-sailing clause and reversion of any excess fees to the defendant. *Id.* at PageID #2094-97. Blackman argued that any fee award in a claims-made settlement should be based on actual payments to the class, rather than hypothetical maximum payments. *Id.* at PageID #2099-2107.

Global moved to strike Blackman's objection on the grounds that he had already received a full refund when he cancelled his membership. RE 125. Blackman conceded this factual premise, but argued that the class and subclass definition did not distinguish between class members who had refunds and those who did not, that he was a class member and subclass member under the settlement definition, and that "any class member may object" to a settlement proposal under Rule 23(e)(5). RE 134. Global conceded this point at the fairness hearing. Transcript, RE 139, PageID #2747-48.

In opposition to the objection, plaintiffs argued that *Dry Max Pampers* did not apply to a settlement that offered cash to the class, and that the availability of $15.5 million if every class member made a claim meant that the settlement and a less-than-lodestar fee request were fair. RE 128. Blackman defended his objection in a reply. RE 133.

The claims administrator ultimately calculated that 49,808 class members were "Allowed Claimants" who made claims for $1,593,240. Dahl Decl., RE 140-1, PageID #2798. Over 550,000 class members thus would receive nothing under the settlement.

D. The fairness hearing, and magistrate's report and recommendation.

Magistrate Judge King held a fairness hearing on February 13, 2014. Transcript, RE 139. The parties' claims administrator testified that one would not expect a large percentage of the class to make claims in a claims-made settlement. Transcript, RE 139, PageID #2721-22.

On April 4, 2014, the magistrate issued a report and recommendation approving the settlement and all of the requested fees and incentive awards. R&R, RE 141. Though the report found that objections were "vigorously presented and pursued," it concluded that the low number of objections "supports a finding that the Settlement Agreement is fair, reasonable, and adequate." *Id.* at PageID #2836-37. With respect to Blackman's objection to the preferential treatment to class counsel, the report held that *Dry Max Pampers* and related cases did not apply because the relief to the class was not "perfunctory," unlike the "negligible" and "illusory" relief in *Dry Max Pampers*. *Id.* at PageID #2837-52. Though the proposed fee exceeded the relief the class actually received the report found it "reasonable": it was below the lodestar, and the report held that the fact that the settlement had an "available benefit" of $15.5 million in the counterfactual world where every class member filed a valid claim meant that "the potential monetary compensation to class members should be valued at $8,546,835, *i.e.*, the midpoint between the Available Benefit of $15,500,430 and the actual payment of $1,593,240," resulting in a "reasonable" ratio of 21%. *Id.* at PageID #2864-75. The report also included $0.5 million of settlement administration costs as a "class benefit." *Id.* at PageID #2872. The report found that the "clear sailing" clause was not problematic because "the value of the settlement to the class members is reasonable" and that the kicker was not problematic because the fee was reasonable; the "risk of collusion" was thus low. *Id.* at PageID #2849-52. The court found that the claims-made process was reasonable because it would have been impossible to pay every class member with direct payments and because it produced the same low

response rate as other claims-made processes. *Id.* at PageID #2856-60. The report concluded that even though no detailed billing records were submitted for review by objectors or the court, the lodestar award was justified on the averment of class counsel. *Id.* at PageID #2870-71.

On April 17, 2014, Blackman filed timely Rule 72 objections to all of these findings and holdings of the report & recommendation, arguing that the correct calculation of the ratio was 60%, making the settlement allocation disproportionate; the objections incorporated his earlier filings. RE 142.

The report and recommendation rejected Global's motion to strike the Blackman objection, finding Blackman was a class member. R&R, RE 141, PageID #2812-13. Global did not object to the magistrate's finding that Blackman was a class member entitled to object and recommendation denying the motion to strike Blackman's objection.

E. The court approves the settlement and fee award.

The district court overruled all objections to the report and recommendation, and adopted and affirmed it. RE 146. It issued a final order approving the class action settlement and a final judgment on July 16, 2014. RE 147; RE 148. Blackman filed a timely notice of appeal on August 14, 2014. RE 150. His appeal has been consolidated with the appeal of another objector, No. 14-3761.

Summary of the Argument

The district court approved a settlement that paid class counsel and representatives $2.4 million, while distributing only $1.6 million to the class, with over 90% of the class going completely uncompensated.

As this Court has previously recognized, the "adversarial process … extends only to the amount the defendant will pay, not the manner in which that amount is allocated between the class representatives, class counsel, and unnamed class members." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 717 (6th Cir. 2013) (Kethledge, J.). But the lower court held that *Pampers* did not preclude settlement approval here because the relief to the class was not "perfunctory" and because an actual recovery of $1.6 million "should be valued at" $8.5 million because the settlement hypothetically made "available" $15.5 million that had no chance of ever being collected by the class under the claims-made settlement structure. R&R, RE 141, PageID #2875.

This is wrong. No appellate court takes such a cribbed position on the *Pampers* question of when allocational abuse demonstrates self-dealing that precludes settlement approval. In *Redman v. RadioShack Corp.*, the ratio of the $1 million fee to the $830,000 in settlement vouchers resulted in rejection of the settlement. -- F.3d --, 2014 U.S. App. LEXIS 18181, *16, 2014 WL 4654477 (7th Cir. Sept. 19, 2014) (Posner, J.). In *Eubank v. Pella Corp.*, the settlement "made available" $90 million in benefits, but the Seventh Circuit held that the $11 million fee was disproportionate to the $8.5 million that would actually be claimed under the settlement. 753 F.3d 718 (7th Cir. 2014) (Posner, J.). *Dennis v. Kellogg* held that class counsel's proposed $2

million award—38.9% of the constructive common fund—would have been "clearly excessive." 697 F.3d 858, 868 (9th Cir. 2012).

"The ratio that is relevant to assessing the reasonableness of the attorneys' fee that the parties agreed to is the ratio of (1) the fee to (2) the fee plus what the class members received." *Redman*, 2014 U.S. App. LEXIS 18181, at *16. Here, the district court erred as a matter of law by including in that ratio millions of dollars that the class never received and the defendant was at no risk of having to pay. The actual ratio is 60%—worse than *Eubank* (58%), *Redman* (55%), or *Dennis* (39%). Because the settlement put the fees in a segregated fund precluding reallocation to the class to resolve the settlement unfairness, it must be rejected as a matter of law.

Note that this is not an argument that the settlement is not large enough. Blackman is not claiming that the settlement must be $40 million or $8 million instead of $4 million. But when the parties agree to settle a case for a total of $4 million, it is inherently unfair for the class attorneys to negotiate the lion's share of that amount—in this case sixty percent—for itself. Perhaps the suit is meritless and a settlement paying the class a single peppercorn would be adequate. But if a defendant is willing to overpay to obtain a release of class action claims, it is wrong for the class counsel to shepherd that windfall for themselves. A proportionate share of the windfall must go to the class before the *Dry Max Pampers* allocation problem is resolved.

In the alternative, the district court committed several errors of law in evaluating the settlement, and remand is required for evaluation under the correct standard of law.

Argument

The settlement approval cannot stand because class counsel negotiated $2.39 million for themselves for a settlement where the class would receive $1.59 million.

The settlement in this case established a claims-made procedure: class members who made claims would be paid; identically-situated and entirely identifiable class members who did not make claims (or who made invalid claims) would waive their rights and receive nothing. It is remarkable that 49,808 class members made claims out of a 606,246-member class: that 8.2% claims rate is greater than the typical consumer class action claims-made settlement. R&R, RE 141, PageID #2860; Daniel Fisher, *Odds Of A Payoff In Consumer Class Action? Less Than A Straight Flush*, Forbes.com (May 8, 2014); Tiffaney Janowicz *et al.*, *Settlement Administration: Impacting Claims Filing Rates* (Feb. 18, 2014), *available at* http://media.straffordpub.com/products/crafting-class-settlement-notice-programs-due-process-reach-claims-rates-and-more-2014-02-18/presentation.pdf (last visited Oct. 2, 2014); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 329 n.60 (3d Cir. 2011) (*en banc*) ("consumer claim filing rates rarely exceed seven percent, even with the most extensive notice campaigns"); *cf. also Redman*, 2014 U.S. App. LEXIS 18181, at *10 ("bother of submitting a claim…may exceed the value [of recovery] to many class members"). But under the settlement, even that exceptional 8.2% claims rate meant that Global Fitness would be on the hook for less than $1.6 million in payments to the class, less than $3 a class member. Meanwhile, class counsel negotiated for itself a

$2.4 million payday, shielded by a clear-sailing agreement and a segregated fund, outstripping the class recovery.

Perhaps it is the case, as the district court held, that a settlement that paid only $1.59 million to 600 thousand class members was adequate "considering the value of the claims and the risks of protracted litigation." R&R, RE 141, PageID #2850. But the fact of the matter is that the defendants' fear of further litigation meant they were willing to put $4 million on the table. If in the district court's hindsight defendants overpaid, a fair settlement requires that the class proportionately share in any overage, rather than that miscalculation being a windfall solely for the attorneys.

Blackman's argument is one of simple math. A consumer class-action settlement designed to make class counsel the primary beneficiary—and where class counsel *is* the primary beneficiary—is *per se* unfair under Rule 23(e); in the alternative, it demonstrates a lack of adequacy under Rules 23(a)(4) and (g)(4). This Court said as much in *Dry Max Pampers*: "a settlement that gives preferential treatment to class counsel" is impermissible "for class counsel are no more entitled to disregard their 'fiduciary responsibilities' than class representatives are." 724 F.3d at 718 (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d 768, 788 (3d Cir. 1995) (Becker, J.). A "judge must assess the value of the settlement to the class and the reasonableness of the agreed-upon attorneys' fees for class counsel, bearing in mind that the higher the fees the less compensation will be received by the class members." *Redman*, 2014 U.S. App. LEXIS 18181, at *13. *Redman* endorses Blackman's argument here: "The ratio that is relevant to assessing the reasonableness

of the attorneys' fee that the parties agreed to is the ratio of (1) the fee to (2) the fee plus what the class members received." *Id.* at *16. That ratio in this settlement is (1) $2.4 million to (2) ($2.4 million plus $1.6 million) or what is effectively a 60% contingent fee. The best-case "55% contingent fee" in *Redman* was considered excessive. *Id.* So was the "56 percent of the total settlement" in *Eubank* and "38.9% of the total" in *Dennis*. *Eubank*, 753 F.3d at 727; *Dennis*, 697 F.3d at 868. It goes without saying that a 60% ratio is *a fortiori* more egregious and less acceptable than the settlements rejected for disproportion in *Redman*, *Eubank*, and *Dennis*.

True, as the lower court noted, the settlement below is not as bad as the implicit 87% ratio in *Dry Max Pampers* (724 F.3d at 716): $1.6 million in cash is better than $400,000 in *cy pres*. R&R, RE 141, PageID #2850. But *Dry Max Pampers* surely stood for a broader proposition than the bare minimum attributed to it by the lower court: it is a rare settlement that is *worse* than the *Dry Max Pampers* settlement. The lower court's requirement that relief merely be more than "perfunctory" or "negligible" is too low a bar for settlement fairness on the allocation question: after all, *Dennis* and *Eubank* each offered cash relief to the class, and even *Redman*'s coupons had at least a few hundred thousand dollars of value. *See also Vassalle v. Midland Funding LLC*, 708 F.3d 747, 756 (6th Cir. 2013) (repudiating settlement as misallocated even though it afforded absent class members an opportunity to claim $17; designating relief including such payments as "perfunctory"). "Perfunctory" is a vague term and potentially does not capture the allocational unfairness of cases like this one or *Eubank*, where the claims of class members were compromised but class

counsel was paid as if they had achieved complete success. The standard implied by *Dry Max Pampers* is the one articulated by *Redman*, and the one that should be applied here and in other consumer class actions: "The ratio that is relevant to assessing the reasonableness of the attorneys' fee that the parties agreed to is the ratio of (1) the fee to (2) the fee plus what the class members received." 2014 U.S. App. LEXIS 18181, at *16.[2]

A. Disproportionate allocation violates Rule 23(e) even without a showing of actual collusion.

The lower court rejected Blackman's complaint about the structure of the settlement on the grounds that the "risk of collusion" was low. R&R, RE 141, PageID #2850-51; Opinion and Order, RE 146, PageID #3001 ("risk of collusion…was diminished"). But Blackman's complaint has never been one of "collusion"; it is one of self-dealing by class counsel.

Impermissible self-dealing can occur without the settling parties explicitly conniving in a smoke-filled room to unfairly treat the class. Arm's-length negotiations protect the interests of the class only with respect "to the amount the defendant will

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[2] Note the limiting principle of "consumer class action"; Blackman is not proposing that the *Redman* rule be applied to 42 U.S.C. § 1983 class actions to enforce civil rights where Congress established fee-shifting statutes to vindicate specific rights beyond purely pecuniary ones. *But compare Waldo v. Consumers Energy Co.*, 726 F.3d 802, 821-27 (6th Cir. 2013) *with id.* at 827-30 (Sutton, J., concurring in part and dissenting in part). In the consumer class action *settlement* context, however, "private agreements to structure artificially separate fee and settlement arrangements cannot transform what is in economic reality a common fund situation into a statutory fee shifting case." *GMC Pick-Up Trucks*, 55 F.3d at 821.

pay, not the manner in which that amount is allocated between the class representatives, class counsel, and unnamed class members." *Dry Max Pampers*, 724 F.3d at 717. "'[A]rm's-length negotiations' are consistent with the existence of a conflict of interest on the part of one of the negotiators—class counsel—that may warp the outcome of the negotiations." *Redman*, 2014 U.S. App. LEXIS 18181, at *10-*11.

While it is *necessary* that a settlement is at "arm's length" without express collusion between the settling parties, it is not *sufficient*. Courts "must be particularly vigilant for subtle signs that class counsel have allowed pursuit of their own self-interests … to infect the negotiations." *Dry Max Pampers*, 724 F.3d at 718 (quoting *Dennis*, 697 F.3d at 864). "[T]he rule 23(e) reasonableness inquiry is designed precisely to capture instances of unfairness not apparent on the fact of the negotiations." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 948 (9th Cir. 2011). Rather than explicit collusion, there need only be acquiescence for such self-dealing to occur: "a defendant is interested only in disposing of the total claim asserted against it" and "the allocation between the class payment and the attorneys' fees is of little or no interest to the defense." *Id.* at 949 (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003) and *In re Gen. Motors Corp. Pickup Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 819-20 (3d Cir. 1995)); *accord Dry Max Pampers*, 724 F.3d at 717; *Redman*, 2014 U.S. App. LEXIS 18181, at *12; *Eubank*, 753 F.3d at 720.

The self-dealing here not only included a disproportionate fee, but a clear-sailing agreement and a segregated fund for the proposed attorneys' fees that would

revert to the defendant rather than the class, unfairly shifting litigation risk to the class. *See generally Bluetooth*, 654 F.3d at 947-49; *Redman*, 2014 U.S. APP. LEXIS 18181, at *35-*37 (discussing the "defect" of fee segregation and clear-sailing clauses). "One possible solution, in a case in which the agreed-upon attorneys' fee is grossly disproportionate to the award of damages to the class, is to increase the share of the settlement received by the class, at the expense of class counsel." *Redman*, 2014 U.S. App. LEXIS 18181, at *20; *see, e.g., Michel v. Wm Healthcare Solutions*, No. 1:10-cv-638, 2014 U.S. Dist. LEXIS 15606, at *52 (S.D. Ohio Feb. 7, 2014) ("by reducing the amount of the fund paid to Class Counsel, the Court augments the benefit to each Class Member"). But, most critically, the reversion and separate compartmentalization precludes a district court from reallocating an excessive fee request to the class to fix any disproportion: a reduction in attorneys' fees goes to the defendant, thus deterring both courts and objectors from reducing the fees. The combination unfairly insulates the fee request from scrutiny. Charles Silver, *Due Process and the Lodestar Method*, 74 TULANE L. REV. 1809, 1839 (2000) (such a fee arrangement is "a strategic effort to insulate a fee award from attack"); Lester Brickman, LAWYER BARONS 522-25 (2011) (arguing such compartmentalization *per se* unethical).

The fact that fees may not be negotiated until after the rest of the settlement (R&R, RE 141, PageID #2850) should make no difference. *In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortg. Litig.*, 418 F.3d 277, 308 (3d Cir. 2005). As long as the defendant willingly foots both bills, there is no way to avoid the

"truism that there is no such thing as a free lunch." *Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003).

The settling parties are economic actors with rational expectations who operate in "economic reality." *Dry Max Pampers*, 724 F.3d at 717. Even when the negotiations over fees are severed, the parties know in advance that those negotiations are coming, that the defendants have a reservation price based on their internal valuation of the litigation, and that every dollar negotiated for the class reduces the amount the defendants are willing to pay class counsel. *Cf. Redman,* 2014 U.S. App. LEXIS 18181, at *12-*13 (noting tradeoff and inherent conflict of interest). Because these future fee negotiations are not an unexpected surprise, the overhang of the future fee negotiations necessarily infects the earlier settlement negotiations. This is invariably at the expense of the class when there is a separate fund for fees as a matter of basic game theory, because both class counsel and defendants have an incentive to leave extra "space" for that future negotiation in a bifurcated negotiation that the parties do not need to have when they are simply negotiating for a single pot of money to go into a common fund. *Cf. Bloyed v. General Motors*, 881 S.W.2d 422, 435-36 (Tex. App. 1994); *Bluetooth*, 654 F.3d at 948 (separation of fee negotiations from other settlement negotiations does not demonstrate that a settlement with disproportionate fee proposal is fair); *see also Johnson v. Comerica Corp.*, 83 F.3d 241, 246 (8th Cir. 1996) ("[I]n essence the entire settlement amount comes from the same source. The award to the class and the agreement on attorney fees represent a package deal."); Brian Wolfman

and Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 NYU L. REV. 439, 504 (1996).

Dry Max Pampers is a perfect instantiation of this principle. There, the settling parties contended that their agreed-upon fee number was independent of class relief because it separately negotiated and was actually proposed by a neutral mediator rather than the parties themselves. *See Dry Max Pampers*, No. 11-4156, Brief of Plaintiffs 44-55 (6th Cir. Mar. 20, 2012); *id.,* Petition for Rehearing *En Banc* of Defendants 8-11 (Aug. 16, 2013); *Dry Max Pampers*, No. 10-cv-301 (S.D. Ohio.), RE 57-1, ¶¶ 17-19. This Court did not credit the parties for their attempts to elude economic reality. *Dry Max Pampers*, 724 F.3d at 721 ("[O]ne fact about this settlement is concrete and indisputable: $2.73 million is $2.73 million.").

The district court allowed its finding that there was no explicit collusion and that arm's-length negotiations occurred to short-circuit its inquiry into whether the "interests of counsel and the named plaintiffs are…unjustifiably advanced at the expense of unnamed class members." *Williams v. Vukovich,* 720 F.2d 909, 923 (6th Cir. 1983). This is by itself reversible error requiring remand even if this Court is unwilling to hold on its face unreasonable a settlement that pays the attorneys one and a half times what the class received.

B. A settlement that pays class members less than $1.6 million is not worth $8.5 million or $15.5 million; it would be legal error to hold otherwise.

The parties argued that the settlement was "worth" the hypothetical maximum benefit to the class, which the magistrate calculated to be $15.5 million, as opposed to

the actual benefit of $1.6 million. R&R, RE 141, PageID #2873. The magistrate literally split the difference, and held the settlement worth $8.5 million. *Id.* at PageID #2873-75. It was on this legally erroneous basis that the court held the $2.4 million fees reasonable, from which other legally erroneous conclusions followed. *Id.* at PageID #2875.

1. Global did not "make available" $15.5 million in a constructive common fund when there was no realistic chance that class members would claim that money.

If every single class member, including those that received no individualized notice, made a valid claim, Global would distribute $15.5 million to the class. But, as in any claims-made settlement, the odds against 0.6 million class members each making claims were astronomical. As Blackman argued below, the empirical evidence is that claims rates in claims-made settlements rarely exceed seven percent. *Sullivan,* 667 F.3d at 329 n.60; Blackman Objection, RE 122, PageID #2089-90. The 8.2% claims rate in this settlement is a rare exception—which meant that the class recovered $1.6 million instead of $1.3 million.

Claims forms and claims-made settlements are a marketing science, akin to the rebates used in selling electronics equipment at a Best Buy. Just as marketers can predict how many fewer rebates will be claimed if they require customers to cut out a UPC symbol to claim a rebate (*see, e.g.,* Brian Grow, "The Great Rebate Runaround," *Business Week* (Dec. 5, 2005)),[3] parties can reasonably predict response rates based on

[3] *Available at* http://www.businessweek.com/stories/2005-11-22/the-great-rebate-runaround.

the hoops that they require claimants to jump through. Failing to tell class members such as Blackman whether he was a member of certain subclasses, thus potentially (or even actually) deterring him from making a claim that might have been as large as it could have been, is one way to reduce the number of claims. And many class members will not find it worth their time to read a class notice and navigate the claims process simply to claim $5. *Cf. Redman*, 2014 U.S. App. LEXIS 18181, at *10; *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006) ("Given the tiny sum per person, who would bother to mail a claim?"). The parties' own claims administrator testified that one could not expect a large percentage of the class to make claims. Transcript, RE 139, PageID #2721-22.

The only reason to require class members to jump through the hoops of making a claim for $5 before being paid was because Global did not actually want to write $15.5 million of checks to class members. Blackman Objection, RE 122, PageID #2084-89; Blackman Reply, RE 133, PageID #2589-91; *cf.* Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* 13 (Federal Judicial Center 2005). Those "who perform[] an act which it is known will produce a particular result [are] from our common experience presumed to have anticipated that result and to have intended it." *Giles v. California*, 554 U.S. 353, 385 (2008) (quoting *Allen v. United States*, 164 U.S. 492, 496 (1896)). Both the defendant and the class recognize a material difference between a claims-made settlement and a direct-payment cash settlement. They should not be treated as legally identical. As *Dry*

Max Pampers held, "Cases are better decided on reality than on fiction." 724 F.3d at 721.

The Class Action Fairness Act agrees. Congress expressed concern about settlements where class members "receive little or no benefit" but "counsel are awarded large fees, while leaving class members with coupons or *other awards of little or no value*." 28 U.S.C. § 1711 note § 2(a)(3) (emphasis added). If Global had issued $5 to $75 coupons to class members, and only $1.6 million of them were redeemed, the parties would not be permitted to value the settlement as more than $1.6 million. 28 U.S.C. § 1712(a). Given that a claims-made process—like a coupon settlement—is a way to reduce the costs to the defendant of settling, a claims-made settlement should not be treated as the equivalent of a settlement that directly pays cash to every class member. "The fairness of the settlement must be evaluated primarily based on how it *compensates class members*." *Dry Max Pampers*, 724 F.3d at 720 (quoting *Synfuel Technologies v. DHL Express (USA),* 463 F.3d 646 (7th Cir. 2006) (Wood, J.) and adding emphasis). *Synfuel* itself is instructive. Though the relief in that case was not coupon relief, *Synfuel* held that its similarities with coupons meant that the Class Action Fairness Act coupon standards should be applied. 463 F.3d at 654. Similarly, this is not a coupon settlement, but a claims-made settlement "shares come characteristics" of a coupon settlement in that it requires affirmative redemption by class members before relief can be granted, and that the defendant benefits when class members fail to redeem their potential relief. Thus, the principles of valuing a settlement under the Class Action Fairness Act are applicable to a claims-made settlement. *See In re Baby Prods.*

Antitrust Litig., 708 F.3d 163, 179 n.13 (3d Cir. 2013) ("[28 U.S.C. § 1712] further supports the proposition that the actual benefit provided to the class is an important consideration when determining attorneys' fees" in a claims-made settlement."). Any other result permits precisely the danger *Dry Max Pampers* warned about: class counsel obtaining an exaggerated share of the settlement proceeds by creating the fiction of relief without actually requiring the defendant to fully compensate the class.

The split-the-baby compromise of the lower court—averaging the actual benefit with the hypothetical benefit—is just as much of a fiction. A class member who does not make a $30 claim does not think she has received a $15 benefit. *Dry Max Pampers* demonstrates the absurdity of the district court's approach. The *Dry Max Pampers* settlement made available full refunds to everyone in the multi-million-member class who happened to have a UPC code and receipt from the class period, guaranteeing an infinitesimal claims rate. 724 F.3d at 718-19. Under the lower court's methodology, that benefit was "worth" tens of millions of dollars (averaging zero with the tens of millions of dollars hypothetically available), and the settlement would have been adjudged fair. That *Dry Max Pampers* eschewed any "assertions…premised upon a fictive world" shows the mid-point approach, concocted by a district court decision[4] preceding *Dry Max Pampers*, is wrong.

The Sixth Circuit is not alone in its realistic approach. *Redman*, 2014 U.S. App. LEXIS 18181, at *16; *Eubank*, 753 F.3d at 726-27; *Baby Products,* 708 F.3d at 174 (district court should consider actual receipts to class to determine settlement

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[4] *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766 (N.D. Ohio 2010).

fairness); Notes of Advisory Committee on 2003 Amendments to Rule 23 ("it may be appropriate to defer some portion of the fee award until *actual payouts* to class members are known" (emphasis added)); *id.* ("fundamental focus is the result *actually achieved* for class members" (emphasis added); *id.* (*citing* 15 U.S.C. §§ 77z-1(a)(6); 78u-4(a)(6) (fee award should not exceed a "reasonable percentage of the amount of any damages and prejudgment interest *actually paid* to the class" (emphasis added))). *See also* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.13 (2010); Federal Judicial Center, *Manual for Complex Litigation (Fourth)* § 21.71 (2004) ("In cases involving a claims procedure…, the court should not base the attorney fee award on the amount of money set aside to satisfy potential claims. Rather, the fee awards should be based only on the benefits actually delivered."); *cf. Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012) (chronicling problem of "fictitious" fund valuations that "serve[] only the 'self-interests' of the attorneys and the parties, and not the class.").

The lower court relied upon *Boeing v. Van Gemert*, 444 U.S. 472 (1980) for the proposition that fees should be awarded based on "the total fund available to the class rather than the amount actually recovered." R&R, RE 141, PageID #2873. This Court should find *Boeing* inapplicable for at least three reasons.

First, *Boeing* was superseded by the 2003 amendments to Federal Rule of Civil Procedure 23, which created Rule 23(h). *Cf.* Samuel Isaacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM L. REV. 3165, 3171-72 (2013) (describing *Boeing* as marking an "older line of cases" that eventually "prompted legislative rejection of

compensating lawyers on the face value of the settlement, regardless of the take-up rate of the benefits by class members"). The amendments (as the Advisory Committee Notes indicate) reflect common-sense intuitions: attorneys' fees should be tied directly to what clients receive, and permitting a class member to fill out a claim form in order to receive a check simply is not equivalent to sending that class member a check directly. *Cf. International Precious Metals Corp. v. Waters,* 530 U.S. 1223 (2000) (O'Connor, J.) (respecting *certiorari* denial but noting that fund settlements that allow attorney fees to be based upon the total fund may "potentially undermine the underlying purposes of class actions by providing defendants with a powerful means to enticing class counsel to settle lawsuits in a manner detrimental to the class" and, in turn, "could encourage the filing of needless lawsuits").

Second, even if *Boeing* was not superseded, it is distinguishable from this case because *Boeing* was purely a case regarding the litigation of attorneys' fees between class counsel and a defendant. It was not a case involving the Rule 23(e) fairness inquiry; *Boeing* was a class action litigated to judgment, not a settlement.[5] Nor is it a case involving a self-serving clear-sailing agreement where class counsel negotiated a settlement with a claims-made procedure. Thus, even if *Boeing* permitted such a

[5] *Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026 (9th Cir. 1997) did, however, apply *Boeing* to a class-action settlement. *Williams*, a securities class-action, did not reconcile its decision with either 15 U.S.C. §§ 77z-1(a)(6) or 78u-4(a)(6), and seems to be simply wrong. In any event, it is distinguishable: like *Boeing*, it involved a dispute between a defendant and a class counsel over the size of the fee award, rather than a Rule 23(e) fairness inquiry.

disproportionate fee notwithstanding the creation of Rule 23(h), it does not consider or speak about the Rule 23(e) fairness of a settlement where class members have complained about *Dry Max Pampers* allocational fairness and the *Bluetooth* indicia of self-dealing. *Dry Max Pampers* and *Eubank* show that an illusory "amount available" does not create settlement fairness: fact, not fiction, is what matters in evaluating a settlement.

Indeed, the fact that class counsel chose to negotiate a claims process that results in such a low claims rate in the hopes of collecting a fee on the larger "available" fund instead of a settlement more likely to benefit class members should be formally considered another sign of impermissible self-dealing after *Bluetooth*, as suggested by the Federal Judicial Center. *Managing Class Action Litigation* 12-13 ("procedural or substantive obstacles to honoring claims" combined with "a provision that any unclaimed funds revert to the defendant at the end of the claims period" is a "hot button indicator" of "potential unfairness"). A claims-made process with reversion to the defendant (when used in lieu of feasible direct distributions to identifiable class members), like coupons or *cy pres* or injunctive relief that no class members can actually take advantage of, is precisely the sort of settlement term that creates the illusion of relief without actual relief to the vast majority of class members.

Third, to whatever extent it remains valid, *Boeing* applies only to cases with an actual common fund, not to a constructive common fund settlement like the one at issue here. *Strong v. Bellsouth Tel. Inc.*, 137 F.3d 844 (5th Cir. 1998), is directly on point. In *Strong*, the district court had denied class counsel's fee request based on an

"illusory" $64 million fund and instead reserved awarding fees until the actual amount of distributions to the class could be determined. 137 F.3d at 848. Affirming the district court's decision, the Fifth Circuit distinguished *Boeing*, which had involved a "traditional common fund." *Id.* at 852. *Strong* explained that in *Boeing*, the district court had ordered the judgment to be deposited into "escrow at a commercial bank." *Id.* Each class member had an "undisputed and mathematically ascertainable claim to part" of that judgment. *Id.* The Fifth Circuit noted that "[i]n contrast to *Boeing*, in the [*Strong*] settlement no money was paid into escrow or any other account—in other words, no fund was established at all in this case." *Id.* Instead, class members could either continue to participate in a maintenance service plan or, if eligible, receive a credit. *Id.* Class counsel's fee award was properly based on actual class member participation—the real value of the settlement—rather than the "phantom" $64 million value assigned by class counsel. *Id.* Similarly, no fund was created in this case. There was no $18 million escrowed fund of which class members can claim a portion. Like *Strong*, class counsel should not be awarded based on this $15.5 million "phantom" fund but on the actual amounts distributed to class members.

The claim that potential class benefits should be treated as identical to—or even be averaged with—actual class receipts leads to absurd results. We have already seen this in the example of *Dry Max Pampers*. A hypothetical makes it even more clear: imagine two possible settlements of the hypothetical class action *Coyote v. Acme Products*:

***Acme* Settlement One**	***Acme* Settlement Two**
Acme Products mails a $50 check to each of one million class members who purchased their mail-order rocket roller skates. A second *pro rata* distribution is made of the amount from any uncashed checks.	One million class members have the right to fill out a twelve-page claim form requesting detailed product and purchase information, with a notarized signature attesting to its accuracy under penalty of perjury. The claim form must be hand-delivered in person between the hours of 8:30 a.m. and 9:30 a.m., on November 28, 2014, at Acme's offices in Walla Walla, Washington or Keokuk, Iowa. Class members with valid claim forms receive $200.

It would be malpractice for a class attorney to refuse Settlement One and insist on Settlement Two. The overwhelming majority of class members, if polled, would prefer Settlement One to Settlement Two. A defendant would clearly prefer Settlement Two to Settlement One as substantially cheaper. But under the district court's legal rule, Settlement Two is worth twice as much as Settlement One, and entitles the class attorneys to twice as much in attorneys' fees. This Court should reject a rule that creates such perverse incentives. *Managing Class Action Litigation* 13.

Perhaps the appellees will attempt to distinguish this case from the hypothetical Acme "Settlement Two" or from *Dry Max Pampers*; after all, the Global Fitness settlement permitted claimants to file claims electronically rather than hand-deliver them, and did not require receipts. But making that argument would concede the point that a claims process reduces the value of a settlement, and that valuing "potential" benefits is improper without taking into account the likelihood that a class member will *actually* obtain the benefit. If it is improper to fully value the potential benefits of a settlement because only 0.01% of the class will make claims under the

claims process, why is it appropriate to value a settlement by its "potential" benefits when it has a claims process where less than 10% of the class will *actually* make claims? There is no principled dividing line: the way to judge the validity of a claims process—and to incentivize class counsel to maximize the result actually obtained by the class—is to rely solely on the amount that the claims process will *actually* pay the class. Attorneys' fee awards should "directly align[] the interests of the class and its counsel." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 122 (2d Cir. 2005) (quotation omitted). If settlement fairness is calculated and class counsel is entitled to virtually the same payment whether the claims period is thirty days long or ninety days long, whether the claims process requires nothing more than a name or address or whether it demands burdensome information about the claim, or whether notice actually communicates class members' rights, class counsel has little incentive to make the settlement more beneficial to the class when a defendant attempts to minimize its liability. The split-the-baby approach of the lower court would have held this settlement to be worth $7.75 million even if not a single class member filed a claim—almost equally justifying, according to the lower court's reasoning, the $2.39 million fee, since it would be less than 30 percent of the total benefit. R&R, RE 141, PageID #2875.

It is therefore not appropriate to determine the fee proportionality that settlement fairness requires based in whole or part on a speculative, maximized estimate of potential claims. It is in the defendant's interest to make it as difficult as possible for class members to make claims. If settlement fairness is based on

"potential" benefits, class counsel has the incentive to inflate the hypothetical number of claims as much as possible so as to ensure itself the maximum baseline from which to draw its fee; absent class members can only be protected if class counsel is incentivized to negotiate for a process that maximizes payment to the class. To do that, this Court should reaffirm its holding in *Dry Max Pampers* that settlement valuation is to be based on fact, not fiction: the amount actually received by the class. Because the district court did otherwise in evaluating settlement fairness and the reasonableness of the fee request, it committed reversible error.

2. In the alternative, the settlement is unfair because the claims process precluded the distribution of over $12 million to the class.

If, notwithstanding *Dry Max Pampers,* this Court is to accept the appellees' argument that the fee request was not self-dealing because *Boeing* means this claims-made settlement is "worth" $15.5 million, then it should still reverse the settlement approval for an alternative reason: the settlement was unfair because it was structured so that over 90% of the class would receive nothing. The parties used a claims-made process instead of simply paying $15.5 million in checks to the 600 thousand identifiable class members. The claims-made process meant that up to $13.9 million that could have gone to the class ended up in Global's pockets. This is unfair. *Managing Class Action Litigation* 12-13.

"Wait a minute!" Global will likely exclaim. "We didn't agree to pay $15.5 million in cash; we didn't think plaintiffs' case was worth that much given the merits of the case and the difficulties of certifying a class and proving injury. We only agreed

to pay $5 to $75 a claim because there *was* a claims process that ensured that there would not be 600,000 claims paid. The claims process was a material term of the settlement, and we would not have agreed to the settlement without that clause limiting our exposure."

Fair enough—but this is precisely Blackman's point. The parties can argue that the settlement has a *real* economic value of $1.6 million (in which case the claims process is not unreasonable, but the settlement is unfair because class counsel engaged in improper self-dealing with an excessive fee in a segregated fund) or they can argue for the fiction that the settlement should be considered a $15.5 million settlement (in which case the fees are not disproportionate, but the claims process makes the settlement unfair, because it was feasible to pay the class $15.5 million—or at least much more than $1.6 million[6]—but the parties chose not to). But they cannot have their cake and eat it too.

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[6] The parties dispute that it was feasible to directly pay *every* class member, and the court agreed (R&R, RE 141, PageID #2856-60), but this was not the basis of Blackman's objection and does not change the analysis. It was at least as easy to distribute hundreds of thousands of checks as to mail hundreds of thousands of postcards and then evaluate tens of thousands of claims, and even if only 90% (or even only half or only a quarter) of those checks for $5 to $75 were cashed, many times more class members would benefit than the 8.2% who did under the settlement claims-made process. The court's finding that the claims-made process was reasonable because it produced the same low response rate as other claims-made processes (*id.* at PageID #2860) begs the question of whether alternative means of distribution would have favored the class. Too, notice the obvious tension between simultaneously claiming that $15.5 million was "made available" and the parties' claims that it is impossible to distribute $15.5 million.

3. The $0.5 million paid to third parties for settlement administration is not a class benefit.

The lower court also counted $0.5 million in settlement administration expense as a "class benefit." This is error as a matter of law. *Redman*, 2014 U.S. App. LEXIS 18181, at *14-*16. As *Redman* notes, settlement administration costs benefit the defendant and the class counsel. By counting that money as a class benefit, "the court eliminated the incentive of class counsel to economize on that expense—and indeed may have created a perverse incentive; for higher administrative expenses make class counsel's proposed fee appear smaller in relation to the total settlement than if those costs were lower." *Id.* at *15.

In any event, whether the class benefit is $1.6 million of actual recovery or $1.6 million plus $0.5 million in settlement administration expense, it does not justify a disproportionate $2.39 million fee.

C. That the fee is less than lodestar does not make it reasonable when it exceeds class recovery in a consumer class action.

The lower court suggested that the $2.39 million fee award might be appropriate on the basis of lodestar analysis alone. R&R, RE 141, PageID #2871-72. This would be wrong when the fees are disproportionate to the class recovery. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (When applying lodestar method, district court must "consider[] the relationship between the amount of the fee awarded and the results obtained.") (superseded on other grounds); *Rawlings v. Prudential-Bache Properties*, 9 F.3d 513, 517 (6th Cir. 1993) ("[O]ne of the primary determinants of the quality of work performed is the result obtained."); *Redman*, 2014 U.S. App. LEXIS 18181, at

*23, *29 ("the reasonableness of a fee cannot be assessed in isolation from what it buys"; "hours can't be given controlling weight in determining what share of the class action settlement pot should go to class counsel"); *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1182 (9th Cir. 2013) ("Plaintiffs attorneys don't get paid simply for working; they get paid for obtaining results.").

If a lodestar award were justified no matter how little the class received, it would be reasonable for class counsel to negotiate a settlement where the class receives a single peppercorn (or enough of a cash payment so as to avoid being considered "perfunctory") as consideration for the class's release, and class counsel could recover its lodestar—and what incentive would class counsel have to attempt to accomplish any more than that in the face of resistance by a defendant? Indeed, such a rule creates a perverse incentive to bring low-merit cases where the risk of litigation will make it easy to justify a settlement that does not pay the class much while class counsel gets their whole fee. As numerous courts hold, including *Dry Max Pampers* implicitly (which rejected a settlement where counsel received less than lodestar),[7] lodestar is not dispositive when the results are disproportionate. *Baby Prods.*, 708 F.3d at 180 n.14 (lodestar multiplier of 0.37 not "outcome determinative"); *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1177 (9th Cir. 2013) (same with multiplier of 0.32);

[7] *Contrast Dry Max Pampers*, 724 F.3d at 720 (fee award must be "commensurate" with class relief), *with Dry Max Pampers*, No. 10-cv-301 (S.D. Ohio), Transcript, RE #76 at 35 (finding fee perfectly appropriate in that "it is less than what the lodestar calculation would reflect, and it properly compensates counsel for extraordinary work.")

Bluetooth, 654 F.3d at 943 (reversing settlement approval notwithstanding district court's finding that the lodestar "substantially exceed[ed]" the fee requested and awarded). "Class counsel has requested for itself an uncontested cash award based on lodestar…with only a modest discount from the claimed lodestar amount. In other words, the class is being asked to 'settle,' yet Class Counsel has applied for fees as if it had won the case outright." *Sobel v. Hertz, Inc.*, 2011 WL 2559565, 2011 U.S. Dist. LEXIS 68984, at *44 (D. Nev. Jun. 27, 2011). Over 90% of the class received nothing in this settlement. That a single-digit percentage of the class was fairly compensated, and perhaps even overcompensated, does not change the fact that the class's claims were compromised.

Moreover, the lodestar method should not have been employed as the primary fee methodology at all. Where a lodestar award is desired (as opposed to being used as a cross-check), a detailed breakdown—beyond just the claimed hourly rates and total number of hours expended—is required. *United Slate, Local 307 v. G & M Roofing & Sheet Metal Co.*, 732 F.2d 495, 502 n.2 (6th Cir. 1984) ("The documentation offered in support of the hours charged **must** be of sufficient detail and probative value to enable the court to determine with a high degree of certainty that such hours were actually and reasonably expended in the prosecution of the litigation.") (emphasis added). The R&R drastically understated the problem when it noted that "[a]lthough the best practice may have been to submit more detailed records of the costs and time expended in the litigation, the Court is satisfied that the number of hours billed and hourly rates of Class Counsel are reasonable." R&R, RE 141, PageID #2870-71

(citing several cases requiring detailed timesheet records). Here, the plaintiffs did not sustain their "burden of providing for the court's perusal a particularized billing record" so the only foundation on which a fee award could stand is as a percentage of recovery. *Imwalle v. Reliance Med. Prods.*, 515 F.3d 531, 553 (6th Cir. 2008). The absence of a particularized billing record when seeking lodestar handicaps meaningful class challenges to the lodestar request and thus flunks the Rule 23(h)(1) notice requirement. *Redman*, 2014 U.S. App. LEXIS 18181, at *37-*38; *In re Mercury Interactive Corp. Securities Litig.*, 618 F.3d 988, 993-95 (9th Cir. 2010).

The lodestar calculation neither justifies the fee nor the settlement fairness.

D. All class actions have a low number of objectors; the lack of objections says nothing about settlement fairness.

The lower court found the fact that only a handful of class members objected—even though they did so in good faith and vociferously—suggested by itself that the settlement was fair. R&R, RE 141, PageID #2836-37. This is wrong—even "naïve." *Redman*, 2014 U.S. App. LEXIS 18181, at *10; *accord Rawlings*, 9 F.3d at 516 ("it is to be expected that class members with small individual stakes in the outcome will not file objections"). Just as it is uneconomic to bring class-action litigation as individual litigation, it is even more uneconomic to object to an unfair class-action settlement. Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 73 (2007); *see also GMC Pick-Up Trucks*, 55 F.3d at 812-13; AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.05 *comment a* at 206 (2010); Brian Wolfman, *Judges! Stop*

Deferring to Class-Action Lawyers, 2 U. MICH. J.L. REFORM 80 (2013). There will never be a large number of objectors in a class-action settlement, so the absence of thousands of objectors says nothing about the fairness of a settlement. Even if Blackman's non-profit counsel spent hundreds of thousands of dollars—its entire annual budget—to recruit thousands of class members (without the benefit of the defendant's mailing list) in the short time period between notice and the objection deadline, it would not change the merits of Blackman's objection. And the settling parties would *still* argue that over 99% of the class did not object. Objections should be judged on the merits. *E.g.*, *Dry Max Pampers*, 724 F.3d at 716 (reversing settlement binding a multi-million-member class though only three objectors and only a single appellant). Allowing the lack of objections to control is tantamount to relieving the settling parties of their "burden of proving the fairness of the settlement." *Id.* at 719 (citing authorities).

Conclusion

The district court committed multiple independent errors of law, each of which by itself requires vacation of the settlement approval and award of fees and remand for consideration under the correct standards of law. But this Court should go beyond a simple remand, and reverse with instructions to reject the settlement entirely: a consumer class action settlement where class counsel has negotiated 60% of the relief for itself on its face flunks Rule 23(e)'s allocational fairness requirements.

Dated: October 2, 2014

Respectfully submitted,

CENTER FOR CLASS ACTION FAIRNESS

/s/ Theodore H. Frank
Theodore H. Frank
Adam E. Schulman
1718 M Street NW, No. 236
Washington, DC 20036
Telephone: (703) 203-3848
Email: tfrank@gmail.com

Attorneys for Appellant Joshua Blackman

Certificate of Compliance with Fed. R. App. Proc. 32(a)(7)(C)

This brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because this brief contains 10,229 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii), as counted by Microsoft Word 2010 and Microsoft Word for Mac 2011.

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Executed on October 2, 2014.

/s/ Theodore H. Frank
Theodore H. Frank

Proof of Service

I hereby certify that on October 2, 2014, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Sixth Circuit using the CM/ECF system, which will provide notification of such filing to all counsel of record.

Executed on October 2, 2014.

/s/ Theodore H. Frank

Theodore H. Frank
CENTER FOR CLASS ACTION FAIRNESS
1718 M Street NW, No. 236
Washington, DC 20036
Telephone: (703) 203-3848
Email: tfrank@gmail.com

Attorney for Appellant Joshua Blackman

Addendum of Designations of Relevant District Court Documents

As 6th Cir. R. 30(f)(1) requires, Blackman designates the following district court documents as relevant to this appeal:

RE 2, Notice of Removal, PageID # 5-13
RE 11, Motion to Remand, PageID # 129-134
RE 47, Report & Recommendation, PageID # 799-812
RE 48, Objections to Report & Recommendation, PageID # 813-822
RE 97-1, Settlement Agreement & Release, PageID # 1488-1525
RE 97-2, Exhibit 1 to Settlement Agreement, PageID # 1526-1527
RE 100, Third Amended Complaint, PageID # 1652-1684
RE 118-10, Order, *Seeger v. Global Fitness Holdings, LLC*, PageID # 2000-2002
RE 122, Objection of Joshua Blackman, PageID # 2070-2111
RE 122-1, Declaration of Joshua Blackman, PageID # 2112-15
RE 126-1, Declaration of Jeffrey D. Dahl, PageID # 2151-2201
RE 133, Reply of Joshua Blackman in Support of Objection, PageID # 2580-2605
RE 139, Fairness Hearing Transcript, PageID # 2680-2792
RE 140-1, Second Supplemental Declaration of Jeffrey D. Dahl, PageID # 2796-2798
RE 141, Report & Recommendation, PageID # 2799-2877
RE 142, Objections of Joshua Blackman to Report & Recommendation, PageID # 2878-2889
RE 146, Opinion and Order, PageID # 2996-3005
RE 147, Final Order Approving Class Action Settlement, PageID # 3006-3014
RE 148, Final Judgment, PageID # 3015-3017
RE 150, Notice of Appeal, PageID # 3020-3022