Nos. 18-3847, 18-3866

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Kenneth CHAPMAN, *et al.*,

Plaintiffs-Appellees,

v.

TRISTAR PRODUCTS, INC.,

Defendant-Appellee,

and

STATE OF ARIZONA AND ARIZONA ATTORNEY GENERAL,

Proposed Intervenors-Appellants.

On Appeal from the United States District Court
For the Northern District of Ohio,
Nos. 1:16-cv-01114-JG and 1:17-cv-02298-JG

Proposed Brief of Amicus Curiae Center for Class Action Fairness in Support of Appellant and Urging Reversal

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Corporate Disclosures

Pursuant to 6th Cir. R. 26.1, Center for Class Action Fairness makes the following disclosures:

1. Center for Class Action Fairness is a project of the Hamilton Lincoln Law Institute. The Hamilton Lincoln Law Institute is neither a subsidiary nor an affiliate of any 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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Interest of Amicus Curiae

Established in 2009,[1] the Center for Class Action Fairness ("CCAF") represents class members *pro bono* in class actions where class counsel employs unfair class action procedures to benefit themselves at the expense of the class. *See, e.g.*, *In re Dry Max Pampers Litig.*, 724 F.3d 713, 716-17 (6th Cir. 2013) (describing CCAF's client's objections as "numerous, detailed, and substantive."); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (observing that CCAF "flagged fatal weaknesses in the proposed settlement" and demonstrated "why objectors play an essential role in judicial review of proposed settlements of class actions") ("*Pearson I*"). CCAF's founder and director of litigation, Theodore H. Frank, is an elected member of the American Law Institute, and has argued before the U.S. Supreme Court. Frank has been recognized as "the leading critic of abusive class action settlements." Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 13, 2013, at A12. CCAF attorneys have won hundreds of millions of dollars for absent class members and numerous appeals, many of them landmark published decisions. *E.g.*, *Dry Max Pampers*, *supra*; *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060 (8th Cir. 2015); *Pearson I*, 772 F.3d 778; *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013); *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011). CCAF has been appointed by the Eighth Circuit as *amicus* to defend a district court's decision invoking Rule 11 sanctions against

[1] From October 1, 2015 through January 31, 2019, CCAF was part of the non-profit Competitive Enterprise Institute. On January 31, CCAF became part of the non-profit Hamilton Lincoln Law Institute.

class counsel for forum shopping a questionable settlement into state court contrary to absent class members' interests. *Adams v. USAA Cas. Ins. Co.*, 863 F.3d 1069 (8th Cir. 2017).

Summary of the Argument

As this Court has previously noted in *Dry Max Pampers*, class-action settlements are rife with conflicts of interest and perverse incentives. Among those unfortunate incentives are the lack of incentive of absent class members to participate in fairness hearings: the stakes are too small for any individual class member to spend time reading a class notice, much less provide a helpful objection to a district court. For this reason, public-interest objectors are critical if the Rule 23 system is to work. 28 U.S.C. § 1715 expressly contemplates this role for government actors to protect absent class members. But if their participation is to be at all meaningful, intervention must be freely granted to provide appellate standing. "[A]ppellate correction of a district court's errors is a benefit to the class." *Crawford v. Equifax Payment Services*, 201 F.3d 877, 881 (7th Cir. 2000) (Easterbrook, J.).

Standard of Review

Denial of intervention as of right, on the basis of any factor other than timeliness, is reviewed *de novo*. *Blount-Hill v. Zelman*, 636 F.3d 278, 283 (6th Cir. 2011). A denial of permissive intervention "is reviewed for an abuse of discretion." *League of Women Voters of Michigan v. Johnson*, 902 F.3d 572, 577 (6th Cir. 2018). "A district court by definition

abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996).

Argument

Public policy should permit state government actors to intervene in class actions to protect absent class members from abusive settlements.

Class actions play a vital role in the judicial system. Often, they are the only way plaintiffs can be compensated and defendants held to account for serious misdeeds that widely distribute their harms. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997). But Rule 23(b)(3) opt-out class actions are an "adventuresome" innovation fraught with potential conflicts. *Id.* at 614, 625-26. Rule 23 must be "applied with the interests of absent class members in close view." *Id.* at 629. Because of conflicts of interest inherent in the class action process—especially with regard to settlements—careful judicial scrutiny is necessary lest class counsel and the defendant bargain away the rights of the class members on terms that minimize payoff by the defendant, maximize benefit to class counsel, and leave injured class members out in the cold.

The majority of class actions that survive motions to dismiss are resolved by settlement. As one court has noted, "Inequitable settlements are an unfortunate recurring bug in our system of class litigation." *Pearson v. Target Corp.*, 893 F.3d 980, 982 (7th Cir. 2018) (Wood, J.) ("*Pearson II*"). "Class-action settlements are different from other settlements. The parties to an ordinary settlement bargain away only their own

rights—which is why ordinary settlements do not require court approval." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013).

In the absence of legal rules providing proper incentives, the negotiating parties' preferences—readily achieved even in the absence of explicit collusion—are to structure a settlement that maximizes the class attorneys' share of the settlement value of the case while minimizing cost to the defendant, all at the expense of absent class members. *Dry Max Pampers*, 724 F.3d at 717-18; *see generally* Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. 859, 874-903 (2016). Parties structure settlements to hide the economic reality, create the appearance of a larger recovery, and thus support a larger claim for attorneys' fees.

Hypothetically, the opportunity to object in Rule 23(e) fairness hearings should protect class members from such abuses. In practice, the incentive to do so is too small to actually protect class members. 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. "[S]ilence is a rational response to any proposed settlement even if that settlement is inadequate. For individual class members, objecting does not appear to be cost-beneficial. Objecting entails costs, and the stakes for individual class members are often low." Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 73 (2007); 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).

"[I]t is to be expected that class members with small individual stakes in the outcome will not file objections." *Rawlings v. Prudential-Bache Properties*, 9 F.3d 513, 516 (6th Cir. 1993). It is thus "naïve" to assume class acquiescence to class-action abuse from the lack of objections. *Redman v. RadioShack Corp.*, 768 F.3d 622, 628 (7th Cir. 2014) (Posner, J.). The majority of class action settlements in federal court face no substantive objection and are effectively decided *ex parte*.

Judge Posner elsewhere expressly anticipates the problem demonstrated by this case:

> A word finally on the lack of adversary procedure in this case.…Since the defendants were out of the case by virtue of their settlement—it being agreed that the lawyers' fees were to come out of the settlement amount—they had no incentive to oppose the request for fees, and they did not. No class member objected either—but why should he have? His gain from a reduction, even a large reduction, in the fees awarded the lawyers would be minuscule. So the lawyers had no opponent in the district court and they have none here. This put more work on the district judge and on us than in a case where there is an adversary to keep the plaintiff and appellant honest…. But judges in our system are geared to adversary proceedings. If we are asked to do nonadversary things, we need different procedures.

In re Continental Illinois Sec. Litigation, 962 F.2d 566, 573 (7th Cir. 1992).

The problem of low incentive to object is especially acute in this case for two reasons. *First*, objectors cannot opt out, but only by opting out could one hope to preserve personal-injury claims released by the settlement without payment. Settlement Agreement, RE-126-1, Page ID #2962; Ariz. Br. 5-6. Anyone cognizant of the harms

of the settlement waiver would not rationally choose to object, rather than opt out. *Second*, in violation of Fed. R. Civ. Proc. 23(h)'s requirement that notice of fee requests be "directed to class members in a reasonable manner," the class never received notice that class counsel would seek $2.5 million, shielding the most abusive aspect of the settlement from scrutiny. *Compare* Notice of Class Action Settlement, RE-126-2, Page ID #3010 *with Redman*, 768 F.3d at 637-38; *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993-95 (9th Cir.2010).

In this world, the role of public-interest objectors to fill the gaps is critical. As the Federal Judicial Center notes, "Institutional 'public interest' objectors may bring a different perspective... Generally, government bodies such as the FTC and state attorneys general, as well as nonprofit entities, have the class-oriented goal of ensuring that class members receive fair, reasonable and adequate compensation for any injuries suffered. They tend to pursue that objective by policing abuses in class action litigation." *Managing Class Action Litigation: A Pocket Guide for Judges* 17 (3d ed. 2010). *See also generally* Elizabeth Chamblee Burch, *Publicly Funded Objectors*, 19 THEORETICAL INQUIRIES IN LAW 47 (2018).

Governmental bodies receive notice under 28 U.S.C. § 1715, and should be authorized to timely intervene as a matter of law. "The possibility that [an appellate court] would see merit to [a proposed intervenor's] appeal cannot be called 'prejudice'; appellate correction of a district court's errors is a benefit to the class." *Crawford v. Equifax Payment Services*, 201 F.3d 877, 881 (7th Cir. 2000) (Easterbrook, J.). A district court's order denying intervention under Rule 24(a) *or* 24(b) in such a circumstance

"cannot survive even the most deferential kind of review." *Id.* "[I]t is vital that district courts freely allow the intervention of unnamed class members who object to proposed settlements and want an option to appeal an adverse decision." *Id.* "District judges are not entitled to block appellate review of their decisions by the expedient of denying party status to anyone who seems likely to appeal, as the district judge apparently tried to do in this case." *In re Synthroid Marketing Lit.*, 264 F.3d 712, 715 (7th Cir. 2001) (citing *Crawford* in reversing district court's denial of intervention to objecting class members).

If absent class members have a *per se* right to intervene because they *might* act in the interests of absent class members, surely governmental actors seeking to act in the public interest should be permitted to do so. *Cf. Pearson II*, 893 F.3d 980 (noting problem of bad-faith objectors).

Conclusion

The Court should hold that state or federal officials who have participated in a Rule 23(e) fairness hearing have, as a matter of law, the authority to intervene to preserve appellate rights and ensure appellate review of challenged settlements.

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Respectfully submitted,

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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 1,806 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii), as counted by Microsoft Word 2013.

This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Garamond font.

Executed on February 4, 2019.

/s/ Theodore H. Frank
Theodore H. Frank

Proof of Service

I hereby certify that on February 4, 2019, 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.

/s/ Theodore H. Frank
Theodore H. Frank