RECORD NOS. 12-1165(L); 12-1166; 12-1167

In The
United States Court of Appeals
For The Third Circuit

IN RE: BABY PRODUCTS ANTITRUST LITIGATION

KEVIN YOUNG; CLARK HAMPE; ALLISON LEDERER

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF OBJECTOR – APPELLANT KEVIN YOUNG

Theodore Frank
CENTER FOR CLASS ACTION FAIRNESS, LLC
1718 M Street, N.W., No. 236
Washington, DC 20036
(703) 203-3848

Counsel for Objector – Appellant Kevin Young

Table of Contents

Table of Authorities

Cases

Rules and Statutes

Other Authorities

Jurisdictional Statement

Because the underlying suit alleged violations of the Sherman and Clayton Acts, the district court had federal-question and antitrust jurisdiction pursuant to 28 U.S.C. §1331 and §1337.

This Court has appellate jurisdiction because this is a timely-filed appeal from a final judgment. 28 U.S.C. § 1291. The court's final judgment pursuant to Fed. R. Civ. Proc. 58 issued on December 21, 2011. JA10-16.[1] Appellant Kevin Young filed a timely notice of appeal under Fed. R. App. Proc. 4(a)(1)(A) on January 17, 2012. JA54-56. Appellants Allison Lederer and Clark Hampe filed timely notices of appeal under Fed. R. App. Proc. 4(a)(1)(A) and 4(a)(3) on January 18 and 19, 2012. JA57-60. All three appellants, as class members who objected, have standing to appeal a final approval of a class action settlement without the need to formally intervene in the case. *Devlin v. Scardelletti,* 536 U.S. 1 (2002).

Statement of Issues

1. Was class notice insufficient under Rule 23(e)(1) when that notice informed class members that "proof of purchase" required for a claim was necessarily an instrument that demonstrated both the fact and the date of purchase, but the settling parties and the district court *de facto* amended the settlement for the first time at the fairness hearing by holding that a photograph of a product could serve as a "proof of

[1] "JA" refers to the Joint Appendix. "Dkt." refers to the docket in *McDonough.*

purchase," without notifying the class of this relaxed standard? (Raised at JA331, JA477-79, JA486.)

Standard of Review: Review of adequacy of class notice is plenary. *In re Diet Drugs Prods. Liab. Litig.*, 89 Fed. Appx. 314, 316 (3d Cir. 2004).

2. Did the district court err as a matter of law when it approved a settlement without any notice to the class about the identities of *cy pres* beneficiaries who would receive millions of dollars of a settlement fund—such that this information would never be revealed in the notice, at the fairness hearing, in the docket, or even to this appellate Court in its official capacity? (Raised at JA333-34, JA413-14.)

Standard of Review: Whether an incorrect legal standard has been used is an issue of law to be reviewed *de novo. In re Hydrogen Peroxide Antitrust Litig.,* 552 F.3d 305, 312 (3d Cir. 2009).

3. Did the district court err as a matter of law when it approved a *cy pres* distribution that would take priority over feasible compensation to class members who had only received fractional or nominal compensation? (Raised at JA329-333, 412-414, 476-79.)

Standard of Review: Whether an incorrect legal standard has been used is an issue of law to be reviewed *de novo. Hydrogen Peroxide,* 552 F.3d at 312.

4. Was it legal error for the district court to treat a *cy pres* distribution that did not go to the class as equivalent to direct compensation actually recovered by the class when that court was determining an appropriate fee award? (Raised at JA332, 412-414, 479.)

Standard of Review: When awarding attorneys' fees, the district judge is empowered to exercise "informed discretion." *Lindy Bros. Builders., Inc. of Phila., v. Am. Radiator & Std. Sanitary Corp.,* 487 F.2d 161, 166 (3d Cir. 1973). "[W]hether an incorrect legal standard has been used is an issue of law to be reviewed *de novo.*" *Hydrogen Peroxide,* 552 F.3d at 312.

5. Did the district court abuse its discretion or exceed the legal bounds of the Rule 23(h) "reasonable" standard when it awarded over $14 million of a $35.5 million gross settlement fund in fees and costs to class attorneys—an amount several million dollars more than (and perhaps more than twice as much as) the class actually recovered without even inquiring into a precise figure of what the class would actually recover? (Raised at 319-29, 401-410, 467-75.)

Standard of Review: When awarding attorneys' fees, the district judge is empowered to exercise "informed discretion." *Lindy Bros. Builders.,* 487 F.2d at 166. "When a district court misapprehends the bounds" of a federal rule, it abuses its discretion. *Elcock v. Kmart Corp.,* 223 F.3d 734, 735 (3d Cir. 2000). Questions about the interpretation of the Federal Rules of Civil Procedure are reviewed *de novo. EBC, Inc., v. Clark Bldg. Sys.,* 618 F.3d 253, 264 (3d Cir. 2010).

Statement of the Case

Plaintiffs brought a class action against Babies "R" Us, Inc., a national retail chain selling baby products, and a number of baby product manufacturers, alleging violations of the Sherman Act: *McDonough, et al., v. Toys "R" Us, Inc., et al.* Dkt. 1; JA19. Plaintiffs alleged that Babies "R" Us conspired with other defendants to restrict

competition by requiring all retailers to sell their goods at or above a minimum resale price, thus unlawfully increasing the price that class members paid for these goods. *Id.*

On July 15, 2009, the court granted class certification and created subclasses based on different consumer products. Dkt. 586. Other consumers filed a related suit, *Elliott et al. v. Toys "R" Us, Inc., et al.*, on December 28, 2009, with additional product subclasses, plus subclasses with time-frames after *McDonough*'s filing. JA138-48. On January 31, 2011, the district court issued an order preliminarily approving a settlement of the two class actions, approving the class notice of the settlement, consolidating the *McDonough* subclasses with the putative *Elliott* subclasses for purposes of settlement, and otherwise consolidating the two cases. Dkt. 706.

After a July 6, 2011, fairness hearing (JA457-96), the court overruled objections and gave final approval to the settlement, the allocation order, and the award to class counsel of fees and expenses on December 21, 2011, issuing final judgment. See JA1-16. On January 4, 2012, the court amended its order. JA17-53. This appeal followed, as did appeals from two other objectors that have since been consolidated into this appeal. JA54-60.

Statement of the Facts

Plaintiffs alleged that antitrust violations by defendants had made consumers pay inflated prices to Babies "R" Us or Toys "R" Us in the course of consumer purchases of baby products. JA208. The parties settled after class certification. JA206-90.

A. Terms of the Settlement Agreement.

The settlement class is composed of all persons and entities who bought certain baby products from Babies "R" Us or Toys "R" Us during certain time periods, dating as far back as 1999. JA1-2, 211-12. The settlement created a $35.5 million fund. JA216. Of this, class counsel would request over $14 million, 40% of the fund. JA30. After payment to the attorneys, notice and administrative expenses, taxes, and incentive awards, the remainder—the "Net Settlement Fund"—would be split among eight different subclasses pursuant to the allocation agreement, based on the product purchased. JA215, 217-18, 264. The amount of the "Net Settlement Fund" was never disclosed on the record.

Payments to class members was not set forward in the settlement itself, but in a proposed "allocation order" signed by the court without modification. JA225-26; JA1-8. Claimants in each product grouping would be sorted into three categories of compensation, depending on the evidence they presented in their claims, all of which required a "valid, sworn" detailed four-page Claim Form. JA4-5; JA225; JA275-78. Claimants who provided both a "proof of purchase" and evidence of the actual purchase price to the claims administrator were eligible for up to 60 percent of the purchase price or $15, whichever was greater. JA4-5. (The allocation order described this 60% figure as a 20% figure eligible for a *pro rata* "enhancement" of up to triple the baseline figure. *Id.* The 20% figure itself was a rough estimate of the single damages faced by class members. JA49 n.12.) Those who provided only a proof of purchase to the claims administrator were eligible for up to 60% of an estimated

purchase price. *Id.* Claimants who did not have a documentary "proof of purchase" were eligible for only a maximum of $5.00 in compensation. JA5.

In the event that the claims rate was low enough that all claimants received the maximum compensation that the settlement allowed, the remainder "Final Excess Amount" would be directed to *cy pres* beneficiaries. JA226. The settlement did not identify the *cy pres* recipients, only a procedure for selecting them: plaintiffs and defendants would each recommend two recipients to the court at a future date. *Id.*; JA7-8. The "Final Excess Amount" and the proposed *cy pres* recipients have never been disclosed.

B. The claims process.

The settlement described the "proof of purchase" as "documentary," but did not specify or define the requirement further. JA225.

In order to file claims, claimants had six months to fill out a four-page claim form; the form also instructed class members to read "carefully" the eleven-page full notice. JA254; JA261-71; JA275. That form stated:

> To recover the maximum amount you can from the Settlement Fund for your purchases, attach documentation showing your purchase(s) of the products listed above. Acceptable proof may include receipts, cancelled checks, credit card statements, records from Toys "R" Us or Babies "R" Us, or other records that show you purchased the baby product and when the purchase was made. [JA276.]

It then asked class members to specify a day/month/year date, city, and state of purchase, including specific model number. JA277. While the notice acknowledged

that class members were eligible for reimbursement without a proof of purchase (JA266), the Claim Form itself stated "In order to be eligible to receive ***any*** compensation from the settlement, you must fill out this claim form in its entirety." JA275 (emphasis added). Any claimant then had to sign the Claim Form under penalty of perjury. JA278.

The amount to be paid to eligible claims by the settlement has never been disclosed. The fairness hearing was scheduled before the claims deadline; at that date there were only 41,000 claims, a small fraction of the number of eligible class members. JA32. The court found that (assuming 45,000 claimants, each producing a fully-documented claim for a $300 stroller) the class would receive at most $8.1 million. JA32.

C. The objections.

Objector Kevin Young purchased a Britax car seat from a Babies "R" Us store in Bridgewater, New Jersey on two separate occasions in 2008; he is therefore a class member. JA344-48. He timely filed his objection through his attorney, Daniel Greenberg of the nonprofit Center for Class Action Fairness LLC. JA306-343. Young criticized the settlement on several grounds. He argued*, inter alia*, that the settlement would wrongly give priority to the compensation of *cy pres* beneficiaries over class members; that the failure to provide notice to the class of the identity of potential *cy pres* beneficiaries was improper; and that a settlement that procured roughly 40% of its value for the class attorneys, regardless of how much of the remaining 60% went to

the class, constituted an inequitable allocation that created poor incentives for class counsel to maximize class recovery. *Id.*; JA394-423.

Allison Lederer is a member of the class who purchased a MacLaren stroller, a Medela breast pump, and two Britax car seats. JA292. Clark Hampe is a member of the class who purchased a Britax car seat. JA349. Both are eligible only for $5 claims under the settlement, and timely filed objections on June 6, 2011. JA291-305; JA349-55; JA424-29.

D. The fairness hearing and subsequent briefing.

The district court held the fairness hearing on July 6, 2011. JA457-96.

Young, through counsel, argued that the claims process was unfair because a class member legitimately might not be able to demonstrate proof of purchase, but only proof of possession, given that people do not ordinarily retain possession of all receipts—but that the claims administration procedure only allowed class members to submit a narrowly-defined "proof of purchase" (which evidenced both the fact of purchase and the date of purchase) in order to receive more than nominal compensation. JA477-79. As Young's attorney, Daniel Greenberg, noted, this problem was not unusual or hypothetical, given that precisely these circumstances applied to Greenberg's wife. *Id.*

When the court questioned class counsel about this latter issue, class counsel responded: "And in terms of proof that you purchased it without having the purchase price, pictures, any other evidence showing that it was—maybe a BRU stamp on it, something to show that it was bought at BRU, you will be compensated at the

estimated retail price." JA486. The court responded by saying that this news should make Greenberg's wife very happy, and instructed the attorneys there to "watch out for Ms. Greenberg's picture." *Id.*

E. The court approves the settlement.

On December 21, 2011, the court gave final approval to the settlement, the allocation order, and the award to class counsel of fees and expenses. See JA1-16. On January 4, 2011, the court amended its order. JA17-53.

In its decision, the court began with a recitation of the *Girsh*[2] and *Prudential*[3] factors, finding that they weighed in favor of approval. JA20-30. In its discussion of attorney fee and cost awards, the court noted that the statistical data cited by objectors would justify significantly lower attorneys' fees than class counsel had requested. JA37. It added that, with respect to fee-setting, the cases in the Third Circuit that various advocates had supplied in briefing "do not provide a definitive answer." JA38. Ultimately, after conducting another balancing test, the court found that that test, plus the lodestar cross-check, supported class counsel's award request. JA30-45.

The court noted that it would "like to admonish class counsel for its blatant oversight" of failing to post its fees and costs request on the settlement website, as class counsel had been required to do. JA34. The admonishment was without consequence, however, as the court ultimately awarded class counsel the entirety of its requested fees and costs of over $14 million. JA44-45.

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[2] *Girsh v. Jepson,* 521 F.2d 153 (3d. Cir. 1975).

[3] *In re Prudential Ins. Co. Am. Sales Prac. Litig.*, 148 F.3d 283 (3d. Cir. 1998)

Young had protested that it was unfair to award money to *cy pres* recipients when some class members would be undercompensated. JA331. The court held that Young's concern was invalid because there would be no remainder for *cy pres* beneficiaries unless "all of the claimants in all of the subclasses receive the maximum award legally available to them (in this case, the value of the claim plus treble damages, as permitted under antitrust law)." JA50-51. But as the court itself noted, claimants who flunked the "proof of purchase" inquiry would be entitled, at most, to $5.00. JA51.

The court found that, because the fund administrator would have discretion to award "the full twenty percent of the average or estimated retail price, possibly trebled" to those who supplied (for instance) a picture of the good, and because of the importance of discouraging fraud, Young's concern about the $5.00 claimants was "misplaced." *Id.* The court did not address the issue of legitimate claimants who were deterred from making any claims because of the discrepancy between the notice and class counsel's representation about a loosened definition of "proof of purchase."

The court rejected Young's claim that the class was entitled to know, and have the opportunity to object to, which organizations might be the beneficiaries of a *cy pres* distribution. JA52.

Related Cases & Proceedings

Related appeals 12-1166 and 12-1167 have been consolidated with this appeal. Young is unaware of any other related cases and proceedings.

Standard of Review

The standard of review is included with the Statement of Issues.

Summary of Argument

This appeal does not ask for a reweighing of *Girsh* factors; Young is not here to argue that the settlement should be some number other than $35.5 million. Rather, Young raises legal issues about class action settlement procedure not yet directly addressed by the Third Circuit.

The first is a question of fundamental fairness in class notice: can settling parties perform a sort of bait and switch whereby they notify the class of one settlement, and then, after objectors point out unfairness in the claims process, ask the court to approve a more favorable settlement that the class never received notice of? Class members in this settlement were confronted with a burdensome four-page Claim Form that imposed strict requirements of documentary proof. When objectors protested that the result would be an undercompensated class, class counsel disclaimed those strict requirements, and the court adopted their new definitions—but the class never got notice that the rules had changed, or that hundreds of thousands of class members previously ineligible for relief (or for more than $5) could now seek substantially more. If the district court was going to evaluate the settlement based on class counsel's new representations about eligibility for relief, it should have required notice consistent with those new standards. Instead, the court effectively evaluated a settlement different from the settlement that the class knew about. This is unfair.

The next three issues relate to *cy pres*. The potential of *cy pres* to create conflicts of interest and ethical dilemmas for the judiciary have garnered increasing attention in recent years. *See, e.g.*, *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038-39 (9th Cir. 2011) (citing authorities); Martin Redish, *et al.*, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617 (2010). Should *cy pres* awards be completely beyond the purview of members of the class? Is it appropriate to award *cy pres* ahead of class members that remain undercompensated? And should class counsel be compensated for *cy pres* awards at the same rate as if it had won actual direct benefits for the class? Young asks the Third Circuit to adopt the *cy pres* standards of §3.07 of the American Law Institute's *Principles of the Laws of Aggregate Litigation* (2010) ("*ALI Principles*"), and answer "no" to all three of these questions. Each of these three questions of first impression in the Third Circuit provide independent grounds for reversal of the settlement or fee approval.

Finally, the perverse incentives of the settlement structure and barriers to claims discussed above combined to result in a settlement where class counsel recovered over $14 million—nearly a 40% commission on the Gross Settlement Fund, including moneys paid to third-party settlement administrators, newspapers, and accountants—but the class actually recovered millions of dollars less, likely less than half of what their attorneys will walk away with. The district court awarded attorneys' fees and expenses without any determination of or reference to what the class actually recovered. Young asks the Third Circuit to adopt a legal rule that such a disproportion between class counsel recovery and class recovery is presumptively unreasonable under Rule 23(h) in the absence of extraordinary circumstances. *Cf. In re*

Bluetooth Headset Prod. Liab. Lit., 654 F.3d 935, 947 (9th Cir. 2011) (disproportionate recovery indicia of self-dealing by class counsel).

Argument

I. Notice Failed to Inform the Class of the Benefits Available in Exchange for Submission of Non-Documentary Evidence of Purchase.

Parties who will be bound by a court proceeding must receive notice that will fairly apprise them of what is at stake. *Mullane v. Central Hanover Bank,* 339 U.S. 306 (1950). "The notice must be of such nature as reasonably to convey the required information...." *Id.,* 339 U.S. at 314. Notice must "provide [class members] with the information 'needed to decide, intelligently, whether to stay in or opt out.'" *In re Diet Drugs Prods. Liab. Litig.,* 385 F.3d 386, 395 (3d Cir. 2004) (citation omitted); *accord In re Domestic Air Transp. Antitrust Litig.*, 141 F.R.D. 534, 553 (N.D. Ga. 1992). Class members did not get such notice here; the settlement, as interpreted by the district court to resolve fairness concerns, permits substantial recovery in instances where the class notice and claim form actually provided to the class said it was unavailable.

Under the terms of the settlement, differently situated class members received different levels of relief. The district court determined that that "the fund's administrator will have discretion" to give one group of class members—those who cannot produce a proof of purchase—much more than the settlement agreement promised them. According to the court, just a picture of the product "may be sufficient" in order to receive the vastly greater compensation that the notice promises to class members who supply a proof of purchase. JA51; see also JA485.

The court's pronouncement diverges substantially from the notice given to the class: furthermore, most class members did not (and, of course, could not reasonably be expected to) attend the hearing or read the opinion in which the court modified and expanded the promises of the notice.

In fact, the notice that the class members received said nothing about any discretionary powers of the fund's administrator to make awards on the basis of, for instance, a photograph of a product that could demonstrate a claimant's ownership. Rather, the claim form—which said had to be filled out "in its entirety"—explained that a proof of purchase would demonstrate "when the purchase was made." JA275-76. That notice told class members who could produce a proof of purchase that they would be eligible for a 20 percent refund payment, "subject to certain enhancements"; furthermore, the notice told class members who could *not* produce a proof of purchase that they would be eligible for a "maximum amount of $5.00, subject to certain reductions" without the opportunity for the trebling enhancement. JA284.

Imagine two class members who have bought identical car seats. Their circumstances are identical, except that one is able to furnish a proof of purchase for $289.99 and the other is not. Apparently, their compensation will differ by a ratio of more than 34:1; one will receive $5.00, while the other will receive up to $174.00. Given this disproportion, notice to the $5.00 claimant about the administrator's ability to award a much larger sum on the basis of, for instance, a submitted photograph would be quite valuable: it is easy to imagine a class member who would decide that he or she had better things to do than take the time to submit a four-page claim for $5.00, but who would be much more favorably inclined to take the trouble to submit

a claim for $174.00. *Cf. Twigg v. Sears,* 153 F.3d 1222 (11th Cir. 1998) (because settlement, on its face, supplies no relief to appellant, a similarly situated class member would be relatively unlikely to see it as relevant to him- or herself).

Objector Young's attorney at the fairness hearing, Daniel Greenberg, explained this problem at the hearing: Greenberg noted that the requirement of a proof of purchase in order to receive anything more than nominal compensation was far from a "hypothetical problem," in that (for instance) Greenberg's wife, who was in possession of a breast pump she had purchased some years ago that was included under the settlement, was nevertheless not in possession of the proof of purchase that the settlement required in order to claim more than $5.00 in compensation.[4] JA477. When questioned by the Court about the danger of people falsely attesting to their purchase of goods without "proper credentials" of ownership, Greenberg replied that a court would likely understand a photograph of the goods or even production of the goods themselves as evidence of purchase, even though the terms of the settlement seemed to disallow these alternatives. *Id.* In a surprise announcement, class counsel responded to this argument by making the following statement to the Court:

> We went through this whole process. We consulted with our administrative experts who handled the administration of these kinds of funds, and they cautioned us about the amount that we would provide for people who did not have proof of purchase to avoid fraud, and—and that's how we came up with what we believe to be a fair measure of compensation. And in terms of

[4] Although Young's attorney made a reference to his wife's personal circumstances in order to illuminate a larger problem with the settlement, he made it clear at the hearing that he only represented Kevin Young. JA462, 466.

> proof that you purchased it without having the purchase price, pictures, any other evidence showing that it was—maybe a BRU stamp on it, something to show that it was bought at BRU, you will be compensated at the estimated retail price. [JA486.]

The lower court responded to these newly announced, post-notice terms of the settlement by saying "Thank you. Well, Mrs. Greenberg should be very happy now … Make sure you watch out for Mrs. Greenberg's picture." JA486. In its justification of the fairness of the settlement, the lower court found:

> [A]s noted at the final fairness hearing, the fund's administrator will have discretion to award the full twenty percent of the average or estimated retail price, possibly trebled. A picture or even BRU stamp on the product may be sufficient. The standards are fairly low, and I want to avoid encouraging fraud by awarding additional money to those without any form of documentation whatsoever. Therefore, Young's concern over the lack of funds available to this category of claimants is misplaced and not grounds for rejecting the *cy pres* distribution. [JA51 (citations omitted).]

Notably, this justification fails on its own terms, because a claimant who supplies a picture of the goods may still be rejected in the administrator's discretion for anything above nominal compensation. The position of the lower court therefore runs the risk of not "awarding additional money" even to those *with* documentation.

Nevertheless, even under the most charitable reading of the court's finding, no notice of this expanded opportunity was ever given to class members. The claim form class members were given asked for a proof of purchase, and (per the claim form) what qualified as a proof purchase "may include receipts, cancelled checks, credit card statements, records from Toys "R" Us or Babies "R" Us, or other records that show

you purchased the baby product and when the purchase was made." JA276; *see also* JA5. The settlement the court said it was approving was a settlement where central terms of the agreement and eligibility for compensation were never disclosed to the class. That court concluded that class members were being treated fairly, and given adequate notice, by a document that set the ceiling for their claims at $5.00, despite the fact that its own decision finds that their claims are potentially worth far more than that nominal amount. That court has thus been a party to something like a bait and switch; it has found that the compensation to the class is reasonable and adequate, but has acquiesced in the failure of the notice to inform the class of the compensation that is available to it.[5]

Once a class member evaluates a notice and decides that she is ineligible for relief or that the small relief available is not worth the trouble of filling out a claim form, she is exceedingly unlikely to pay for a transcript of the fairness hearing (or even to revisit a settlement website) to determine if the parties or judge will interpret the settlement in a way inconsistent with the notice more beneficial to the class

[5] If appellees were to argue that the lower court's finding at issue—that a photograph could be a sufficient proof of purchase—was mistaken, this would also require reversal. Such an argument would imply that the lower court misunderstood the representations of class counsel, that class counsel did nothing to cure that misunderstanding even while the misunderstanding was demonstrated in a colloquy between the court and class counsel at the fairness hearing, and that the lower court approved a settlement as fair and reasonable based on a misunderstanding of ambiguous terms that were the subject of dispute in Young's objection. These circumstances would, at a minimum, require remand. *See, e.g.*, *Henderson v. Morrone,* 214 Fed. Appx. 209, 213 (3d Cir. 2007).

member. Rule 23(e) requires notification to the class of the terms of the settlement. *In re Prudential Ins. Co.,* 148 F. 3d 283, 327 (3d. Cir. 1998). If there is a failure of notice to class members, this court may remand and require renoticing. *See, e.g., De Asencio v. Tyson Foods, Inc.,* 342 F.3d 301, 313 (3d Cir. 2003) (reopening opt-in period to allow additional notice to eligible plaintiffs); *In re Veritas Software Corp. Sec. Litig.,* 496 F.3d 962 (9th Cir. 2007) (remanding for new notice in order to cure inadequate notice).[6]

[6] *Union Asset Mgmt. Holding A.G. v. Dell, Inc.,* 669 F.3d 632 (5th Cir. 2012), which affirmed a similar restructuring of a settlement without new notice, is distinguishable. In *Union Asset*, after the claims deadline passed, the court restructured the allocation plan to give a subset of class members the right to recover when the notice said they were not eligible for recovery. 669 F.3d at 640. *Union Asset* differs from this case in three material ways. *First*, the claims at issue in *Union Asset* were each worth less than $10. The harm to class members was close to *de minimis*. *Id. Cf. Reynolds v. Beneficial Nat'l Bank,* 288 F.3d 277, 282 (7th Cir. 2002) ("modest" defect in calculation of recovery not fatal to settlement). Here, however, class members were deprived of the opportunity to make claims of as much as $180. *Second*, the *Union Asset* court put particular weight on the fact "notice explicitly informed the class members that … the plan could be modified in a way that would affect their personal recovery, and … they would not necessarily receive notice of any such changes." 669 F.3d at 641. Here, there was no such caveat in the notice that the court could engage in reallocation beyond shifting between product subclasses. JA267. Moreover, the district court's modification is a change in the Claim Form instructions, rather than the allocation order. (That said, Young rejects *Union Asset*'s holding that a notice that disclaims its own meaningfulness validates an incorrect notice. The whole point of a class action is to aggregate actions that cannot feasibly be brought individually. Expecting class members to individually engage in the costs of extensive monitoring for material changes in their ability to recover from a settlement unfairly deprives class members of the advantages of Rule 23.) *Finally*, the issue of re-noticing was an afterthought in *Union Asset*. That court mustered no cases in support of its holding and alluded to the fact that the appellants cited none either. 669 F.3d at 641.

The class is entitled to notice of the settlement consistent with class counsel's representations and the court's premise for what made the settlement fair and reasonable.

II. The Third Circuit Should Require District Courts Administering Settlements With *Cy Pres* Components to Follow the *ALI Principles* and Other Restrictions on *Cy Pres* to Minimize Unfair Conflicts of Interest.

The idea of *cy pres* (from the French *cy pres comme possible*—"as near as possible") originates in the trust context, where courts would reinterpret the terms of a charitable trust when literal application of those terms would otherwise result in the dissolution of the trust because of impossibility or illegality. Susan Beth Farmer, *More Lessons From the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General,* 68 FORDHAM L. REV. 361, 391-93 (1999); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 509-10 (4th ed. 1992); BRYAN A. GARNER, BLACK'S LAW DICTIONARY 392 (7th ed. 1999). The classic example of *cy pres* was a 19th-century case where a court repurposed a trust that had been created to abolish slavery in the United States to instead provide charity to poor African-Americans. *Jackson v. Phillips*, 96 Mass. 539 (1867). Courts do not have *carte blanche* to modify trusts under *cy pres* doctrine; they must do so in a "manner consistent with the settlor's charitable purposes." Uniform Trust Code § 413(a).

In 1972, a student comment in the *University of Chicago Law Review* suggested the use of *cy pres* in the context of class actions with large classes and unclaimed remainders of funds to avoid "unjust enrichment" through reversion to a defendant found to have violated the class's rights. Stewart R. Shepherd, Comment, *Damage*

Distribution in Class Actions: The Cy Pres Remedy, 39 U. CHI. L. REV. 448 (1972). The California Supreme Court had previously adopted a "fluid recovery" mechanism in class action settlements in 1967, to distribute proceeds to a "next best" class of consumers who might differ from, but likely overlapped with, the class of consumers who had alleged injury but could not feasibly engage in a claims process. *Daar v. Yellow Cab*, 433 P.2d 732 (Cal. 1967). *But see Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1017 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974) (holding that "fluid recovery" was not permitted by Fed. R. Civ. Proc. 23, and that if it were, it would be an unconstitutional violation of due process).

Over time, parties to class action settlements have attempted to characterize any third-party distribution as *cy pres*, divorcing it from the idea of benefiting a class that has participated in an Article III adversary process. *Nachshin*, 663 F.3d at 1038-39. As "a growing number of scholars and courts have observed, the *cy pres* doctrine—unbridled by a driving nexus between the plaintiff class and the *cy pres* beneficiaries—poses many nascent dangers to the fairness of the distribution process." *Id.* at 1038. In the wake of the Class Action Fairness Act's requirement of additional scrutiny of coupon settlements, 28 U.S.C. § 1712, parties have increasingly resorted to *cy pres* as a means of exaggerating the value of a settlement to rationalize oversized attorneys' fees. Theodore H. Frank, *Cy Pres Settlements*, CLASS ACTION WATCH (March 2008) (available at http://is.gd/dyR5L-).

When *cy pres* distributions are unmoored from class recovery or *ex ante* legislative or judicial standards,

> the selection process may answer to the whims and self interests of the parties, their counsel, or the court. Moreover, the specter of judges and outside entities dealing in the distribution and solicitation of settlement money may create the appearance of impropriety.

Nachshin, 663 F.3d at 1039 (citing authorities). For example, a defendant could steer distributions to a favored charity with which it already does business, or use the *cy pres* distribution to achieve business ends. In a famous example, Microsoft sought to donate numerous licenses for Windows software to schools as part of an antitrust class action settlement, essentially using the *cy pres* as a marketing tool that would have frozen out its competitors. *In re Microsoft Corp. Antitrust Litigation*, 185 F. Supp. 2d 519 (D. Md. 2002). In another settlement against Facebook, the *cy pres* recipient was a charity created by Facebook. Nathan Koppel, "Proposed Facebook Settlement Comes Under Fire," Wall St. J. (Mar. 2, 2010).

If the *cy pres* distribution is related to plaintiffs' counsel, such as an attorney's *alma mater*, it would result in class counsel being double-compensated: the attorney indirectly benefits both from the *cy pres* distribution, and then makes a claim for attorneys' fees based upon the size of the *cy pres*. *See* Frank, *supra*; *cf. also* Redish, 62 Fla. L. Rev. at 661 (*cy pres* awards "can also increase the likelihood and absolute amount of attorneys' fees awarded without directly, or even indirectly, benefitting the plaintiff"). Permitting class counsel to collect attorneys' fees based on unmoored *cy pres* awards "threatens to undermine the due process interests of absent class members by disincentivizing the class attorneys in their efforts to assure [classwide] compensation of victims of the defendant's unlawful behavior." Redish, 62 Fla. L. Rev. at 666. This

would be a breach of the class counsel's fiduciary duty to put her clients' interests ahead of her own. *Compare Klier v. Elf Atochem N. Am., Inc.,* 658 F.3d 468, 474 (5th Cir. 2011) ("The settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members.") *with Diamond Chemical Co. v. Akzo Nobel Chemicals BV*, 517 F. Supp. 2d 212 (D.D.C. 2007) (evaluating proposed *cy pres* distribution to lead counsel's *alma mater* where neither the parties nor the court raised the issue of conflict of interest). *See also* Alison Frankel, "Legal Activist Ted Frank Cries Conflict of Interest, Forces O'Melveny and Grant & Eisenhofer to Modify Apple Securities Class Action Deal," AmLaw Lit. Daily (Nov. 30, 2010) (successful objection by Young's appellate counsel to distribution to school where lead class counsel sat on board).

When the charitable distribution is related to the judge, or left entirely to the judge's discretion, the ethical problems and conflicts of interest multiply. Class action settlements require judicial approval: one can readily envision a scenario where a judge looks more favorably upon a settlement that provides money for a judge's preferred charity than one that does not. Even if a judge divorces herself from such considerations, the parties may still believe that it would increase the chances of settlement approval to throw some money to a charity associated with a judge.

Moreover, charities that know that a judge has discretionary funds to distribute can—and do—lobby judges to choose them, blurring the appropriate role of the judiciary. "[A]llowing judges to choose how to spend other people's money 'is not a true judicial function and can lead to abuses.'" Adam Liptak, *Doling Out Other People's Money*, N.Y. TIMES (Nov. 26, 2007) (quoting former federal judge David F. Levi); *see*

also id. (quoting Judge Levi as saying "judges felt that there was something unseemly about this system" where "groups would solicit [judges] for consideration as recipients of *cy pres* awards"). *Accord Nachshin*, 663 F.3d at 1039; *In re Pet Food Prod. Liab. Lit.*, 629 F.3d 333, 363-64 & n.4 (3d Cir. 2010) (Weis, J., concurring and dissenting). As tempting as it is to permit judges to play Santa Claus with settlement money, Congress has not given courts this authority, and the judiciary should not seize this ethically and constitutionally problematic power for themselves.

The American Law Institute has produced guidelines for evaluating *cy pres*:

> A court may approve a settlement that proposes a cy pres remedy even if such a remedy could not be ordered in a contested case. The court must apply the following criteria in determining whether a cy pres award is appropriate:
>
> (a) If individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement proceeds should be distributed directly to individual class members.
>
> (b) If the settlement involves individual distributions to class members and funds remain after distributions (because some class members could not be identified or chose not to participate), the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair.
>
> (c) If the court finds that individual distributions are not viable based upon the criteria set forth in subsections (a) and (b), the settlement may utilize a cy pres approach. The court, when

> feasible, should require the parties to identify a recipient whose interests reasonably approximate those being pursued by the class. If, and only if, no recipient whose interests reasonably approximate those being pursued by the class can be identified after thorough investigation and analysis, a court may approve a recipient that does not reasonably approximate the interests being pursued by the class.

ALI Principles §3.07. Courts have approvingly cited these guidelines. *Klier*, 658 F.3d at 474-75 & nn. 14-16; *Nachshin*, 663 F.3d at 1039 n.2; *Masters v. Wilhelmina Model Agency, Inc.,* 473 F.3d 423, 436 (2d Cir. 2007) (citing Draft version); *see also Pet Food*, 629 F.3d at 363-64 & n.4 (Weis, J., concurring and dissenting). The Third Circuit should explicitly adopt §3.07 as sound public policy. And because the settling parties and the district court ignored §3.07 in several independent important respects, the settlement and fee approval should be reversed.

A. The District Court Erred in Approving a Settlement Without Identifying or Giving Class Members an Opportunity to Object to *Cy Pres* Recipients Due Millions of Dollars of Class Settlement Money.

Under *ALI Principles* §3.07(c) and the decision of every appellate court to directly consider the issue, the discretion to award *cy pres* is strictly cabined. *Cy pres* may only be used "for another purpose as close as possible" to the original purpose of the lawsuit. *E.g., In re Pharm. Industry Avg. Wholesale Price Lit.*, 588 F.3d 24, 33 (1st Cir. 2009). Conversely, a *cy pres* award "will be rejected when the proposed distribution fails to provide the 'next best' distribution." *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1308 (9th Cir. 1990). Any such distribution must "adequately target the plaintiff class." *Id.*; *accord Nachshin.* Young objected that neither the class

notice nor the settlement nor any of the filings with the court notified class members of who would receive millions of dollars of *cy pres* allocated by the settlement. Their identities remain a mystery to this date, even after the fairness hearing. In rejecting Young's objection, the district court effectively held that class members are entitled to no say over whether the parties and district court correctly follow the law in making a *cy pres* allocation. This is wrong.

The rationale of a notice requirement is that it allows "the parties to make conscious choices that affect their rights in a litigation context." *See* 2 *Newberg on Class Actions,* §8.04 at 8-17; 7B Charles Alan Wright et al., *Federal Practice and Procedure,* §1787 at 220 (2d ed. 1986). Notice gives class members "the information 'needed to decide, intelligently, whether to stay in or opt out.' " *In re Diet Drugs Prods. Liab. Litig.,* 385 F.3d at 395 (3d Cir. 2004) (quoting *Amchem Prods. v. Windsor,* 521 U.S. 591, 628 (1997)). It must be "reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. Rule 23(e) requires class members to be given notice of the terms of the settlement. *Rosenau v. Unifund Corp.,* 646 F. Supp. 2d 743, 750 (E.D. Pa. 2009). If the creation of *cy pres* beneficiaries could reasonably be predicted by operation of the settlement, those beneficiaries' identities should be included in the notice. The use of the *cy pres* remedy in the event of settlement approval was not simply conjecture—instead, even before the fairness hearing, the existence of leftover funds for *cy pres* was so predictable as to be certain. Its use must therefore necessarily have been in the reasonable contemplation of the outcome of the settlement by the parties to it.

The lower court claimed that Young provided "no legal support" for the argument that adequate notice requires identification of *cy pres* recipients. JA52. This is wrong. As Young argued below, courts have rejected settlements because of faulty *cy pres* provisions: a court should not have an unfettered ability to choose a *cy pres* recipient without class input. *ALI Principles* §3.07(c) *and comment b* (constraints on *cy pres* recipients); *Nachshin*, 663 F.3d 1034; *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 682 (8th Cir. 2002); *Houck v. Folding Carton Admin. Cmte.*, 881 F.2d 494 (7th Cir. 1989).[7] Therefore, because class members can successfully object to the identity of a *cy pres* recipient, it is a material term of a settlement, whether or not a settlement self-servingly says otherwise.

In its opinion, the lower court claimed that it would "retain the right to approve *cy pres* recipients [in the future] and will ensure that they serve the underlying interests of the class members." JA52. That is, the lower court's posture is that it shall retain the right to unilaterally determine the appropriateness of *cy pres* beneficiaries, subject only to the settling parties' nomination of *cy pres* prospects. JA52. The identity of these beneficiaries was never revealed: not in the notice, not in the settlement, and not even at the fairness hearing. That anti-disclosure posture has had the unwelcome effect of concealing the identity of *cy pres* recipients not only from class members, but from this appellate Court; if a district court is allowed to select *cy pres* beneficiaries

[7] *See also, e.g.*, *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 362 F. Supp. 2d 574, 577 (E.D. Pa. 2005) (rejecting local *cy pres* distribution); *In re Wells Fargo Secs. Litig.,* 991 F. Supp. 1193, 1197 (N.D. Ca. 1998) (same); *In re Compact Disc Minimum Advertised Price Antitrust Litig.,* MDL No. 1361, 2005 U.S. Dist. LEXIS 16468 (D. Me. Aug. 9, 2005) (rejecting *cy pres* distribution to New York City charities as lacking "national scope").

(either unilaterally or in concert with the settling parties) after final approval, untouched by class members' commentary or scrutiny, and entirely immune from any appellate review, this implies that it is by definition impossible for the district court that makes the final call on *cy pres* recipients to abuse its discretion. *Cf. True v. Am. Honda Motor Co.,* 749 F. Supp. 1052, 1076 (C.D. Cal. 2010) (court troubled by fact that defendant-created educational DVD critical to settlement had not been produced at time of fairness hearing). This is wrong. Simply put, a district court is not entitled to treat the *cy pres* process as beyond appellate review or scrutiny from class members.

The identity of *cy pres* recipients is material to the fairness of the settlement for multiple additional reasons. The availability of this information preserves the right of class members to distance themselves from causes or institutions that they would rather not support. A class member has the right not "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Galda v. Rutgers,* 772 F.2d 1060, 1063 (3d. Cir. 1985) (quoting *Wooley v. Maynard,* 430 U.S. 705, 715 (1977)). In the settlement at bar, the information can underpin a valid objection if there is an abuse of the *cy pres* mechanism. In applying *cy pres* principles, the court appropriately may consider: "(1) the objectives of the underlying statute(s), (2) the nature of the underlying suit, (3) the interests of the class members, and (4) the geographic scope of the case." *Schwartz*, 362 F. Supp. 2d at 576. The *cy pres* recipients must be properly tailored to the class: abuses can occur, *inter alia*, when the intended recipient is related to class counsel or the defendant, or when there is a geographic incongruence between the class and the *cy pres* recipient. *ALI Principles*, §3.07 *comment b*; *see also, e.g., Nachshin*, 663 F.3d at 1038-39; *Schwartz,* 362 F. Supp. 2d at 576.

Approval of a settlement containing "charitable contributions to which members of the class never voiced any interest or approval" is "a procedure subject to criticism as an inappropriate judicial function." *In re Pet Food Prods. Liab. Litig.,* 629 F.3d 333, 363 (3d Cir. 2010) (Weis, J., concurring and dissenting) (concluding that distribution to class members who had been incompletely compensated is a superior alternative to *cy pres* distribution).[8] The *cy pres* distributions originate from class members' property, and the class has a right to know to whom their money is going and how it will be utilized. *Cf. Klier,* 658 F.3d at 474 ("The settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members.").

The prospect of contingent *cy pres* awards to unnamed beneficiaries denies class members the information they need in order to evaluate the proposed distribution. The identity of *cy pres* recipients is material to the settlement, and the court should not approve it without providing the class a full and fair opportunity to object to any material changes to it. *Cf., e.g., In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988 (9th Cir. 2010) (Rule 23(h) notice). The district court's approval of this settlement without

[8] The *cy pres* issue in *Pet Food* was raised *sua sponte* by Judge Weis in his concurrence with the substantive result of the fairness hearing (namely, a remand to the lower court); none of the objector-appellants raised the *cy pres* issue in briefing. As his opinion noted, "*Sua sponte* determination of an issue may be especially appropriate where the matter involves more than just the individuals, and addresses a matter of concern to the courts and the judicial system." *Pet Food,* 629 F.3d at 360 (Weis, J., concurring and dissenting). Judge Weis's discussion of the issue is therefore not at odds with the *Pet Food* majority's view, which simply avoided *sua sponte* discussion without briefing.

notice to class members—or anybody else—of the *cy pres* beneficiaries requires reversal. Every other appellate court to consider the question has held that district courts do not have unlimited discretion to award *cy pres* from class funds. This Court should similarly cabin the discretion of the district court under §3.07, and require the settling parties to provide notice and an opportunity to object to the class of any proposed *cy pres* recipient.

B. The District Court Erred as a Matter of Law in Approving a Settlement That Put *Cy Pres* Recipients' Interests Ahead of the Class's.

The district court approved the settling parties' plan to direct millions of dollars of settlement funds to *cy pres* beneficiaries. JA50-52. Any settlement's allocation plan must itself meet Rule 23 standards. "The court's principal obligation is simply to ensure that the fund distribution is fair and reasonable as to all participants in the fund." *Walsh v. Great Atlantic & Pacific Tea Co.*, 726 F.2d 956, 964 (3d Cir. 1983). "In general, a plan of allocation that reimburses class members based on the type and extent of their injuries is reasonable." *In re Auto. Refinishing Paint Antitrust Litig.*, No. MDL-1426, 2004 U.S. Dist. LEXIS 29161, at *26 (E.D. Pa. Sept. 27, 2004) (internal quotation omitted).

But this settlement's *cy pres* scheme did not meet these standards, because it allowed for *cy pres* distribution to occur even in the face of fractional compensation to claimants who submitted declarations of class membership and entitlement to relief under penalty of perjury.

1. Cy Pres Distributions Should Be Impermissible When the Class Is Less Than Fully Compensated and It Is Administratively and Economically Feasible to Make Further Distributions to Class Members.

Class members are entitled to receive their own property, property that has been procured in their name, rather than have to watch it get funneled to inferior "next-best" *cy pres* beneficiaries. *Cf. Klier,* 658 F.3d at 474 ("The settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members."). More precisely, the district court's approval of a $5.00 compensation ceiling on a subset of deserving class members, combined with the delivery of the remaining funds to *cy pres* beneficiaries, is unfair: it is unreasonable to expect class members to maintain receipts or other proofs of purchases for as long as twelve years (the settlement class dates back to 1999) and presume that they are trying to defraud the class when they have not. A settlement with a large number of small beneficiaries would economically use a *cy pres* remedy "only where the cost per class member of distributing the residual funds substantially outweighs the amount each class member would receive." *In re American Tower Corp. Secs. Litig.,* 648 F. Supp. 2d 223, 224 n.1 (D. Mass. 2009); *accord ALI Principles* §3.07. This settlement cannot pass that test.

A *cy pres* distribution which would only become operational once all class members have been fully compensated is, as such, unobjectionable; *see In re Tyco Intern. Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 262 (D.N.H. 2007) (class members to be compensated until it is "economically unfeasible to continue doing so," with remainder to go to *cy pres*); *Gov't Employees Hosp. Ass'n v. Serono Intern., S.A.,* 246 F.R.D.

93, 95 (D. Mass. 2007). *See also In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 82 (D. Mass. 2005). But because the settlement at issue here already contains a method to distribute funds to class members, using *cy pres* to lop off a chunk of what rightfully should go to class members is inappropriate. "*Cy pres* payments are important where practical considerations prevent the distribution of funds directly to class members." *McClintic v. Lithia Motors,* No. C11-859RAJ, 2012 U.S. Dist. LEXIS 3846, at *13 (W.D. Wash. Jan. 12, 2012) (citing *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011)). "In this case, the only impediment to full distribution [of the fund] to class members is the artificial payment cap the parties have imposed … The parties do not explain why they wish to cap relief to class members in favor of *cy pres* relief. In a case like this one, *cy pres* payments ought to be limited to a distribution of money that the parties cannot distribute to class members with reasonable efforts." *Id.*, at *13-14. (explaining why the *cy pres* component of the settlement at issue is a factor that prevents its preliminary approval) (citation omitted).

More generally, ***any*** *cy pres* distribution in a settlement such as this one is unjustifiable unless and until reasonable measures are taken to ensure that the class members are completely compensated. If class members are entitled to compensation, and that compensation can be feasibly distributed to individual class members without unreasonable administrative burdens, the lower court's willingness to assign any significant portion of the settlement funds to third parties should be without lawful foundation. A "district court ha[s] a fiduciary responsibility to the silent class members," *Grant v. Bethlehem Steel Corp.,* 823 F.2d 20, 23 (2d Cir. 1987), and class counsel owes a fiduciary duty to their putative clients to put those clients' interests

first when negotiating a settlement. Class counsel violated this fiduciary duty when it engineered the creation of a charitable donation with settlement money that could just as easily have gone to putatively represented clients. A charity to be named by class counsel later is not the class counsel's client; the class members are. And the failure of class counsel and the class representative to put the interests of the class first in negotiating this settlement raises severe Rule 23(a)(4) concerns: how can these parties be said to fairly and adequately represent the class when the settlement at hand pursues the interests of third parties at the class's expense? To the extent that the *cy pres* distribution represents an abandonment of the duties that were owed to the class, the lower court bears some responsibility as well: "Under Rule 23(e) the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members.... [T]he court cannot accept a settlement that the proponents have not shown to be fair, reasonable and adequate." *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.,* 55 F. 3d 768, 785 (3d Cir. 1995) (internal quotation omitted).

2. The Lower Court Misapplied the Law to the Facts.

The above *cy pres* concerns were raised at the district court level. JA329-35, 412-14, 476-79. The lower court defended the priority of *cy pres* awards over compensation to class members in four ways.

First, the court argued that a class member who (for instance) could not produce satisfactory proof of purchase would be "completely compensated" because he or she would have received "the maximum award legally available." JA50-51.

Given the undercompensated $5 claimants, this is a *non sequitur* that contradicts *Klier*. 658 F.3d at 480. The district court's reasoning would allow settling parties to lower compensation to the class down to almost nothing as a general matter while assigning whatever remained to *cy pres* beneficiaries. Moreover, it confuses the *legal* rights to the actual damages that class members generally are entitled to with the settlement's *stipulated* $5.00 ceiling that the settling parties concocted for the Settlement Agreement. See, e.g., JA4-5. A $5.00 payment ceiling cannot supersede or restrict antitrust remedies, even if that is the desire of the settling parties.

Second, the lower court justified the *cy pres* remedy on the theory that class members who submit only a sworn affidavit might find it difficult to prove damages at trial. JA51. That is certainly a reason to favor class members with good evidentiary claims over class members without good evidentiary claims. Were the question solely how to distribute amongst competing class members a fund that would otherwise be exhausted, it would be justifiable to give preference to the class members with receipts over the class members without receipts. *Cf. In re Ins. Brokerage Antitrust Lit.*, 579 F.3d 241, 270-71 (3d Cir. 2009). If this were a claims-made settlement where there was a reversion to the defendant, a defendant would have standing to insist on the benefit of the bargain that its compromise capped the compensation of class members with weaker claims. But neither situation is the issue here; rather, the only question is whether to give money to class members or to give money to third parties who are not class members. In that context, the court's reasoning is a *non sequitur;* the higher priority should be for funds to go to class members when practicable, not to the "next best" *cy pres* beneficiaries who should be recipients of last resort.

Third, the court argued that "the fund's administrator will have discretion" to give class members who could not produce a proof of purchase more than their due under the settlement agreement; according to the court, just a picture of the product "may be sufficient." JA51. But, as discussed in Section I, only a tiny sliver of the class could have received notice of this apparent opportunity for increased compensation: most class members did not attend the hearing in which class counsel improved the terms of the settlement; and the opinion in which the court announced this remarkable finding did not come out until months after the claims deadline. Furthermore, nothing in the court's opinion precludes the settlement administrator from exercising the same discretion to ignore the *dictum* and preserve the settlement fund for class counsel's favorite charitable recipient.

Fourth, the court argued that delivering the settlement remainder to *cy pres* beneficiaries was reasonable because compensating class members who could not provide satisfactory proof of purchase ran the risk of "encouraging fraud." JA51. But because settlement funds must go to the class whenever feasible, this was error. The actual effect of the lower court's decision, which places *cy pres* beneficiaries at a higher level of priority than uncompensated class members, will prevent the hypothetical problem of fraud only by creating an actual and demonstrable reduction in compensation to an entire category of claimants. Because the court was concerned about the possibility that *some* of the money would go to non-class members who made fraudulent claims, it ruled that *all* of the money would go to third parties are not class members. Rather like the apocryphal American soldier in Vietnam who explained that "we must destroy the village in order to save it," the lower court's

justification for its plan of action gives up a sizable and unambiguous benefit to the class in exchange for an abstract and contingent outside-the-class payment whose benefit to the class is uncertain, indirect at best, and as yet unknowable.

That is not to say that fraud is not a legitimate concern in constructing a settlement; a settlement that fails to distinguish between class members' and non-class members' access to a limited fund can be unfair. But it is unreasonable to presume that class members who did not hold on to receipts for over a decade are committing fraud if they make a claim for full compensation. There are less onerous ways to protect a settlement fund from fraud. One such method was already used in this case: a jurat under penalty of perjury. JA278. The Third Circuit has previously approved measures that block fraud but are not detrimental to class interests: namely, assigning audit rights. *Cf. In re Diet Drugs Prods. Liab. Litig.*, 582 F.3d 524, 531 (3d Cir. 2009); *In re Diet Drugs Prods. Liab. Litig.*, 427 Fed. Appx. 233 (3d Cir. 2011).[9] And this Circuit has previously rejected settlement provisions that unnecessarily "pose significant

[9] *Cf. also In re Linerboard Antitrust Litig.*, 321 F. Supp. 2d 619, 626 n.6 (E.D. Pa. 2004) (discussing extensive class member protections in the event an audit reduces compensation); *In re Currency Conversion Fee Antitrust Litig.*, 264 F.R.D. 100, 117 (S.D. N.Y. 2010) (noting that "a number of the large claims have been audited by the claims administrator"); *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 410 F. Supp. 706, 713 (D. Minn. 1975) (specifically requiring only a post-claim check for fraud and error and no proof of purchase for claims under $150); *Stewart v. Rubin*, 948 F. Supp. 1077, 1097 (D.D.C. 1996) (one of every ten claims audited, overruling objection that the settlement was "awarding money to virtually any claim."); *In re Domestic Air Transp. Antitrust Litig.*, 1:90-cv-2485, 1994 U.S. Dist. LEXIS 20451, at *26-30 (N.D. Ga. Nov. 2, 1994).

barriers to" class recovery, even though settling parties rationalized them as "necessary to prevent fraud." *GMC Pick-Up Truck Fuel Tank,* 55 F.3d at 809.

To the extent that the district court is instead arguing from the premise that it is legally impossible for a class member without a receipt to prove damages, and therefore anything above $0 "completely compensates" the class, it is wrong for two reasons. *First*, the district court is confusing the *quality* of a claim with the *amount* of a claim. But this Court has already held that there is nothing unfair about equally compensating members of the same class who might have claims of the same amount but different quality. *Sullivan v. DB Investments*, 667 F.3d 273 (3d Cir. 2011) (*en banc*) (affirming approval of settlement that compensated class members who had no right of indirect purchaser action same as those who had meritorious right of indirect purchaser action). *Second*, the district court's premise that a class member's testimony would be insufficient to prove damages is legally erroneous. *See, e.g., Hollywood Fantasy Corp. v. Gabor*, 151 F.3d 203, 215 (5th Cir. 1998) (oral testimony could be competent evidence of damages for breach of contract without documentation); *Elliott v. United States*, 184 Ct. Cl. 298, 304 (1968) (awarding $50 of breach damages based upon uncorroborated oral testimony).

The district court attempted to distinguish *Klier* by arguing that *Klier* "is inapplicable because it called for a *cy pres* distribution before all of the subclass members were compensated in full." JA52. This is wrong: this settlement, like *Klier*'s, wrongly creates a *cy pres* distribution even before some of the class members (here, the $5 claimants) are "compensated in full." In both *Klier* and the case at hand, the settling parties provided for limited or incomplete compensation to go to at least class

members, and in both cases the *cy pres* compensation operated in tandem with capped compensation to those class members short of full compensation. In particular, *Klier* held that the settling parties' argument that *Klier* members "have already been fully compensated because they were paid in full according to the terms of the Agreement" was unavailing:

> The fact that the members of Subclass A have received the payment authorized by the settlement agreement does not mean that they have been fully compensated. As a general matter, "few settlements award 100 percent of a class member's losses, and thus it is unlikely in most cases that further distributions to class members would result in more than 100 percent recovery for those class members" [*Klier,* 658 F.3d at 480 (footnotes omitted).]

Thus, *Klier* said:

> Because the settlement funds are the property of the class, a *cy pres* distribution to a third party of unclaimed settlement funds is permissible "only when it is not feasible to make further distributions to class members." Where it is still logistically feasible and economically viable to make additional pro rata distributions to class members, the district court should do so, except where an additional distribution would provide a windfall to class members with liquidated-damages claims that were 100 percent satisfied by the original distribution. A *cy pres* distribution puts settlement funds to their next-best use by providing an indirect benefit to the class. *That option arises only if it is not possible to put those funds to their very best use: benefiting the class members directly* (emphasis added and footnotes omitted). [*Id.* at 475.]

The district court apparently took the position that this argument did not apply because a *cy pres* distribution would only take place after class members received "the maximum award legally available to them," JA50, and that this was like a case in

which class members were "all … compensated in full." JA52. But as the district court itself acknowledged, several class members (such as appellants Lederer and Hampe) would not be "compensated in full," but would have their claims capped at $5. JA51. This is inappropriate: as *Klier* correctly held, the entirety of settlement funds belong to the class. 658 F.3d at 474 n.14 (*citing ALI Principles* §3.07 *comment b*).

In the instant case, the lower court also attempted to distinguish between the settlement at hand and the one in *Klier* by arguing that the *Klier* court "was dealing with a settlement agreement bereft of a spillover clause. There was no mechanism allowing for excess funds to move from one subclass to the next before distribution to third-party groups." JA52. This is also wrong. Contrary to the assertion of the lower court, *Klier* contains an extensive discussion of the settlement's mechanism that required the district court to reallocate excess funds between subclasses. *Klier,* 658 F.3d at 476-79 (discussing requirement of reallocation of funds "for the benefit of the class as a whole," "as long as further distributions were feasible and equitable"). Structurally, these two cases are essentially indistinguishable.

The lower court finally distinguished between *Klier's* compensation for personal injury and the instant case's compensation for antitrust violations. JA52. This *non sequitur* is further legal error: nothing in the law of class actions or the fiduciary duty of attorneys to clients finds gratuitous *cy pres* less problematic in the antitrust context. *E.g.*, *In re Folding Carton Antitrust Lit.*, 744 F.2d 1252, 1254-56 (7th Cir. 1984) (preferring additional time for class members to make claims over *cy pres*).

This Circuit should follow §3.07 and the national trend of those Circuits which have rejected the use of *cy pres* where distribution to the class is economically feasible.

See, e.g., *Klier*; *Masters,* 473 F.3d at 436 (disparaging *cy pres* distribution where neither side contended that "it would be onerous or impossible to locate class members or [that] each class member's recovery would be so small as to make an individual distribution economically impracticable"); *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (rejecting proposed *cy pres* distribution where potential damages were sufficient to make individual payments feasible); *Molski v. Gleich*, 318 F.3d 937, 955 (9th Cir. 2003) (rejecting *cy pres* as an inadequate substitute for individual damages when "there is no evidence that proof of individual claims would be burdensome or that distribution of damages would be costly."), *overruled on other grounds by Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010). The conflicts of interest that *cy pres* awards can create are easily eliminated by restricting such awards to those narrow circumstances in which pecuniary relief to the class is infeasible. Feasible compensation to class members should have priority over *cy pres* payments that do not directly benefit the class. But because the district court let second-best trump best, its legal error provides grounds for reversal.

C. A Fee Award Should Not Be Structured So as To Make Class Counsel Indifferent Between Benefiting the Class as Compared to Benefiting Non-Class Members through *Cy Pres*.

Though there were hundreds of thousands of class members over the decade-plus-long class period, the restrictions of the claims process meant that only 41,000 submitted claims as of the fairness hearing, and class members made claims on less

than a quarter (and likely less than a fifth) of the settlement fund. JA32.[10] Young believes that one reason the settlement ended up with an overly burdensome and confusing claims process that withheld relief from the vast majority of the class is because class counsel had no incentive to do any better: class counsel's fee request was based on the Gross Settlement Fund, not the amount the class would actually receive. Thus, as the class counsel request and court's award of settlement funds to class counsel was structured, class counsel had no incentive to make it easier for class members to recover: class counsel requested almost exactly 40% of the Gross Settlement Fund, and got that percentage whether that money in the Gross Settlement Fund went to notice expenditures, settlement administration, *cy pres* recipients, accountants, or the class members class counsel was representing. This is wrong. The class is not indifferent between a settlement where $1 million goes to the class and $20 million goes to class counsel's favorite charity and a settlement where $20 million goes to the class and $1 million goes to class counsel's favorite charity. But the formula proposed by class counsel and adopted by the court would treat the two settlements as identical.

Because class counsel will sometimes "be highly imperfect agents for the class … an agent must be located to oversee the relationship between the class and its lawyers." *In re Cendant Corp. Litig.,* 264 F.3d 201, 255 (3d Cir. 2001). "Traditionally,

[10] As previously noted, no one has disclosed in the record either the "Net Settlement Fund" or the "Final Excess Amount" figures. Actual class recovery would be the difference between the two.

that agent has been the court." *Id.* "Under such a regime, it was essential for courts to scrutinize fee requests to protect the interests of absent class members." *Id.*

Basic economic principles—involving the creation of incentives that both encouraged class counsel to work efficiently so as to maximize compensation to the class and discouraged class counsel to run up hourly billing figures without any relation to the class's welfare—have led to the abandonment of lodestar calculations as the primary method of determining compensation in this Circuit. *Id.* at 256. Because the "lodestar [method] compensates lawyers based on hours worked rather than results achieved, there is a risk that it will cause lawyers to work excessive hours, inflate their hourly rate, or decline beneficial settlement offers that are made early in litigation." (citing Report of the Third Circuit Task Force, *Court Awarded Attorney Fees,* 108 F.R.D. 237, 247-48 (1985)). Because of such criticisms,

> the 1985 Task Force Report recommended a different device for setting attorneys fees in common fund class actions: the percentage-of-recovery method. This Court has generally accepted that recommendation. Under the percentage-of-recovery approach, a court charged with determining whether a particular fee is "reasonable" first calculates the percentage of the total recovery that the proposal would allocate to attorneys fees by dividing the amount of the requested fee by the total amount paid out by the defendant; it then inquires whether that percentage is appropriate based on the circumstances of the case. In making that decision, this Court has directed district courts to consider numerous factors, as well as recommending that they employ a lodestar "cross-check." [*Cendant Corp.,* 264 F.3d at 256 (citations omitted).]

Though the Third Circuit recommends a percentage-of-recovery method, somehow this has been elided to a "percentage of the fund," regardless of the relationship between the "fund" and the class "recovery." This is wrong. A settlement should be valued by the amount the class *actually* receives. *See* 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 ALI Principles* § 3.13; Federal Judicial Center, *Manual for Complex Litigation (Fourth)* § 21.71(2004) ("the fee awards should be based only on the benefits *actually delivered*."). "[N]umerous courts have concluded that the amount of the benefit conferred logically is the appropriate benchmark against which a reasonable common fund fee charge should be assessed." *In re Prudential Ins. Co. America Sales Practices Litig.,* 148 F.3d 283, 338 (3rd Cir. 1998). "In determining the appropriate amount of attorneys' fees to be paid to class counsel, the principal consideration is the success achieved by the plaintiffs under the terms of the settlement." *Schwartz v. Dallas Cowboys Football Club, Ltd.,* 157 F.Supp.2d 561, 579 (E.D. Pa. 2001). The "key consideration in determining a fee award is reasonableness in light of the benefit *actually conferred*." *In re HP Inkjet Printer Litig.,* No. 5:05–cv-3580 JF, 2011 WL 1158635, at *10 (N.D. Cal. Mar. 29, 2011) (emphasis in original) (internal citation and quotation omitted). In short, class counsel is entitled to request a share of the benefits it *actually provides* the class. This is the best way to "directly align[] the

interests of the class and its counsel." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005).

Thus, when "[t]he class benefit conferred by *cy pres* payments is indirect and attenuated," it is "inappropriate to value *cy pres* on a dollar-for-dollar basis." *In re Heartland Payment Sys., Inc.,* MDL No. 09-2046, 2012 U.S. Dist. LEXIS 37326, at *105-06 (S.D. Tex. Mar. 20, 2012); *see also ALI Principles* §3.13 *comment a*. When the settlement is structured so as to place class members at an equal or lower priority with *cy pres* beneficiaries—rather than at the highest priority, as Young contends they should be—then it courts should reduce the compensation of class counsel accordingly. *E.g., Heartland Payment Sys., supra*; *Perry v. FleetBoston Financial Corp.*, 229 F.R.D. 105, 123 n.9 (E.D. Pa. 2005) ("To remain on the conservative side, the Court will not consider the $50,000.00 *cy pres* donation or the noneconomic benefits obtained for the class in valuing the settlement 'fund'").[11] Without such a discount, class counsel has no economic incentive to give the interests of the class top priority. Indeed, if, as in this case, class counsel has the potential to direct who the beneficiary of *cy pres* will be, and the class has no opportunity to object to any conflicts of interest in the recipient's selection, class counsel will have the perverse incentive to reduce

[11] *Staton v. Boeing*, 327 F.3d 938, 974 (9th Cir. 2003), makes a similar point in the context of injunctive relief: because direct benefit to class members is more valuable than indirect benefit, this distinction should be reflected in the award of attorneys' fees. "We hold, therefore, that only in the unusual instance where the value to individual class members of benefits deriving from injunctive relief can be accurately ascertained may courts include such relief as part of the value of a common fund" when awarding counsel a percentage of recovery. *Id.*

class recovery—a mass of relatively anonymous class members—to benefit its preferred charity. "By making the amount of the fee dependent on the net recovery of the class, however, the costs of litigation are incorporated into the class counsel's incentive structure in pursuing the litigation." *Lachance v. Harrington*, 965 F. Supp. 630, 648 (E.D. Pa. 1997). Counsel is entitled to compensation on the basis of what it achieved for its clients; to the extent that it was compensated on the basis of achieving a *cy pres* remedy when the monies could have practicably been distributed to its clients instead, that portion of its fees should have been reduced. Young requests that this Court hold that attorneys' fees should be primarily based on the amounts class members *actually receive*, that any award based on *cy pres* or other indirect compensation be rewarded at a lower rate, and this court should remand to the district court for a downward adjustment in attorneys' fees.

III. The Disproportion Between a $14 Million Award to Class Counsel and an $8.1 Million Award (at Best) to the Class Should Be Considered Facially Unreasonable Under Rule 23(h).

The combination of class counsel's request for 40% of the gross settlement fund, the perverse incentives in the structuring of the fee request, the prioritizing of *cy pres* over class recovery, and the lack of notice to the class of what constituted a valid claim, have created a result that provides an independent reason for remand: under the district court's order class counsel will away from this litigation with over $14 million, while, using unrealistically optimistic calculations, the class will end up with at most $8.1 million (JA32). Though the settling parties refused to disclose exact figures to the court and the court refused to ask for that data, when all is said and done, the

class recovery will very likely be less than half of what the attorneys have successfully asked for, and a lot less than half at that.

In *Sullivan v. DB Investments*, this Court upheld a 25% fee award because the appellants did not challenge the "propriety of this approach" of the district court. 667 F.3d at 330. Young does challenge the propriety of the district court's approach in this case. In Section II.C, Young challenges the district court's decision to award the same percentage of the *cy pres* award as the percentage of the amount the class actually recovered, and argues for a rule appropriately incentivizing class counsel to maximize class recovery. In this section, Young raises a separate, independent reason why the $14 million award in this case should not be held to meet the Rule 23(h) reasonableness standard.[12]

Simply put, there is something wrong when attorneys are recovering more than their clients in a Section 1 antitrust action to recover past damages. At some point, a

[12] Class counsel purported to divide the $14,063,108.93 it was awarded between $11,833,333.33 of "fees" and $2,229,775.60 of "expenses." JA30. Given that money is fungible, given that the "expenses" included such overhead items as "secretarial overtime" and "public relations," and given that Rule 23(h)'s "reasonable" requirement applies to both "fees and nontaxable costs," Young sees no reason to separate the inquiry on fees and expenses. Financial outlays are financial outlays, whether they are used pay for paralegal salaries and office rent and library books ("fees") or hotel rooms and online-legal research databases ("expenses"). Class counsel will no doubt protest that they received "only" 37% of their lodestar (JA42) due to the artificial segregation of fees and expenses, but 37% of lodestar is still lucrative. For example, class counsel suggested a lodestar rate of $425/hour for an associate (Dkt. 738-2 at ¶5) that they surely were not paying $850,000 a year—or even 37% of $850,000/year.

disproportion between class counsel's fees and class recovery has to become untenable. If the *Gunter* test applied by the district court (JA30-41) can produce such a result where class counsel receives 40% of a gross settlement fund and 65% to 70% (or more!) of the net recovery, then additional legal constraints are needed to prevent such facial abuse of the class action process. When class counsel ends up with the majority of the pecuniary recovery, it means that they are getting more than twice the so-called "twenty-five percent benchmark" that most courts adopt. *Pet Food*, 629 F.3d at 361 (Weis, J., concurring and dissenting); *In re Bluetooth Prod. Liab. Lit.*, 654 F.3d 935, 942 (9th Cir. 2011); *cf. also id.* at 947 (noting disproportion between fees and class recovery is "red flag" sign of self-dealing).[13] At a minimum, class counsel should not be recovering more than their clients except in a situation of extraordinary circumstances, such as a civil-rights case over important non-pecuniary constitutional rights.

Here, the district court did not even test to see what the class actually recovered other than to find that it would be less than $8.1 million, and then based the fee on the gross settlement fund—though millions of dollars of that fund would be going to third parties unrelated to the class—instead of the "actual recovery" of the class that Rule 23(h) suggests is appropriate. *See* Section II.C., *supra*.

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[13] *See also, e.g.*, *Erie County Retirees Ass'n. v. County of Erie,* 192 F. Supp. 2d 369, 381 (W.D. Pa. 2002) ("the 25% benchmark is often appropriate in these cases [of multi-million-dollar funds] in order to prevent a windfall to counsel."); *In re LG/Zenith Rear Projection Tel. Class Action Litig.,* No. 06-5609, 2009 WL 455513, at *9 (D.N.J. Feb. 18, 2009); *Pozzi v. Smith,* 952 F. Supp. 218, 225 (E.D. Pa. 1997); *Seidman v. Am. Mobile Sys.,* 965 F. Supp. 612, 622 (E.D. Pa. 1997); *Lachance,* 965 F. Supp. at 648.

Any result affirming the sort of disproportionate fee award here—where class counsel was awarded over $14 million of a $35.5 million gross settlement fund without even being required to prove the amount that class members actually recovered—effectively makes fee awards unreviewable. Precedents approving such disproportionate fee awards act as a one-way ratchet under *Gunter*'s "awards in similar cases" test. A 70% recovery of the net settlement fund in this case will be used to argue a 75% recovery is not inappropriate in the next case, and so on until there is no requirement to benefit consumers in class actions at all. In essence, Young is asking this Court to decide if the Rule 23(h) requirement that fees be "reasonable" has any semantic meaning. If it does, then there are surely limits. If the Court is not to establish a benchmark, *Bluetooth, supra*, the least it could do is create a bright-line rule that class attorneys collecting more than their clients is presumptively unreasonable. *Id.* at 947.

Conclusion

For the foregoing reasons, this Court should reverse the settlement approval and remand with instructions to give the class notice of the expanded claims procedure and proposed *cy pres* recipients; calculate class counsel recovery under Rule 23(h) with more of an eye to what the class "actually received" and appropriate deductions for moneys in the settlement fund not actually going to class members; and abide by the *ALI Principles*' restrictions on *cy pres* awards.

Dated: April 24, 2012

Respectfully submitted,

/s/ Theodore H. Frank

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

Counsel for Objector/Appellant Young

Request for Oral Argument

Objector-appellant Young hereby respectfully requests, through his counsel and pursuant to Third Circuit Local Appellate Rule 34.1, that the Court grant oral argument in this appeal, with twenty minutes for appellant Young and twenty minutes to be split between the appellee settling parties. The dispositive issues in this case are non-frivolous issues of first impression in this Court; they have not been authoritatively decided by this Court, so the Court's decisional process will be significantly aided by oral argument. Fed. R. App. Proc. 34(a)(2).

Dated: April 24, 2012

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/s/ Theodore H. Frank

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

Counsel for Objector/Appellant Kevin Young

Relevant Rules

Federal Rule of Civil Procedure 23. Class Actions.

(a) Prerequisites.

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

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

…

(e) Settlement, Voluntary Dismissal, or Compromise.

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

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

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

…

(h) Attorney's Fees and Nontaxable costs.

In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner. …

Combined Certifications

1. Certification of Bar Membership

I hereby certify that I, Theodore H. Frank, counsel for Kevin Young, am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit as of May 5, 2010.

2. Certification of Service

I hereby certify that, on this 24th day of April, 2012, I electronically filed the foregoing brief on the electronic docketing system for the Court of Appeals for the Third Circuit, thereby effecting service on counsel of record under L.A.R. 113.4.

I hereby certify that, on this 24th day of April, 2012, I caused ten true and correct copies of the foregoing brief to be mailed via UPS Next Day Air to: Office of the Clerk, United States Court of Appeals for the Third Circuit, 21400 United States Courthouse, 601 Market Street, Philadelphia, PA 19106.

I hereby certify that, on this 24th day of April, 2012, I caused this foregoing document to be filed electronically with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to the following registered CM/ECF users (all counsel has consented to electronic service):

Christopher Bandas, *Objector Counsel-Appellant*
William Caldes, *Class Counsel-Appellee*
Carolyn Feeney, *Defendant Counsel-Appellee*
Elizabeth A. Fegan, *Class Counsel-Appellee*
Michael Hahn, *Defendant Counsel-Appellee*
David Martin, *Defendant Counsel-Appellee*
Neil McDonell, *Defendant Counsel-Appellee*
Kendall Millard, *Defendant Counsel-Appellee*
James H. Price, *Objector Counsel-Appellant*
Melissa Rubenstein, *Defendant Counsel-Appellee*
Eugene Spector, *Class Counsel-Appellee*
Jeffrey Spector, *Class Counsel-Appellee*
Mark Weyman, *Defendant Counsel-Appellee*
Margaret Zwisler, *Defendant Counsel-Appellee*

3. Certification of Word Count

I hereby certify that this brief complies with the page limitation of Fed. R. App. Proc. 32(a)(7)(B) because this brief contains 13,714 words in the main body of the brief, excluding the parts of the brief exempted by Fed. R. App. Proc. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Fed. R. App. Proc. 32(a)(5) and the typestyle requirements of Fed. R. App. Proc. 32(a)(6) because this brief has been prepared in proportionally-spaced typeface using Microsoft Word 2010 in 14-point Garamond font.

4. Certification of Identical Compliance of Briefs

Pursuant to L.A.R. 31.1(c), I hereby certify that the electronic and hard copies of this brief in the instant matter contain identical text.

5. Certification of Virus Check

Pursuant to L.A.R. 31.1(c), I hereby certify that a virus check of the electronic .PDF version of the brief was performed using McAfee SecurityCenter software, and the .PDF file was found to be virus free.

Dated: April 24, 2012

Respectfully submitted,

/s/ Theodore H. Frank

Theodore H. Frank
CENTER FOR CLASS ACTION FAIRNESS LLC
1718 M Street NW
No. 23-6
Washington, DC 20036
Telephone: (703) 203-3848
Email: tedfrank@gmail.com

Counsel for Objectors/Appellant Young