Case Nos. 18-2417

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

In re National Football League Players' Concussion Injury Litigation

On Appeal from the United States District Court
for the Eastern District of Pennsylvania,
No. 2:14-md-02323-AB and MDL No. 2323

Brief of *Amicus Curiae* Hamilton Lincoln Law Institute's Center for Class Action Fairness in Support of the Faneca Objectors

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Corporate Disclosure Statement

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. 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"). 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*, 724 F.3d 713; *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060 (8th Cir. 2015); *Pearson*, 772 F.3d 778; *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011). CCAF has been awarded attorneys' fees for its work in 18 out of its 20 fee petitions that it has filed in its ten-year history. *See, e.g.*, *McDonough v. Toys*

[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.

"R" Us, 80 F. Supp. 3d 626 (E.D. Pa. 2015) (awarding CCAF $742,500); *In re Citigroup Inc. Sec. Litig.*, No. 07-cv-9901, 2017 U.S. Dist. LEXIS 141719 (S.D.N.Y. Sept. 1, 2017) (awarding CCAF over $33,000 in fees). CCAF has been appointed by the Eighth Circuit as *amicus* to defend a district court's decision invoking Rule 11 sanctions against 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).

CCAF has an interest in ensuring that objectors are appropriately compensated for improving settlements, and in reducing collateral litigation over the issue through establishing consistent standards for attorney fees for objectors.

Federal Rule of Appellate Procedure 29 Statement

In accordance with Rule 29(a)(4)(E), the undersigned states that (i) no party's counsel authored the brief in whole or in part; (ii) no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and (iii) while CCAF is part of the non-profit HLLI, which is funded in part through charitable contributions, no person contributed money to HLLI that was directed or intended to be directed toward preparing or submitting this brief.[2]

[2] Counsel for CCAF, Theodore H. Frank, was personally represented by MoloLamken, counsel for the Faneca Objectors, in unrelated litigation that concluded before this brief was written. Frank paid his attorneys a contractually agreed-upon market-based rate proposed by MoloLamken before that litigation began, and before Frank was aware of this appeal. Frank has also been adverse to MoloLamken in still other unrelated litigation. *Frank v. Gaos*, 139 S. Ct. 2041 (2019).

In accordance with Rule 29(a)(2), the undersigned states that counsel for the plaintiffs-appellees and Faneca Objector appellants consented to the filing of this brief.

Summary of Argument

In its order allocating attorneys' fees in this case, the district court awarded the Faneca Objectors $350,000 in fees, a small fraction of their lodestar, out of the $20 million they requested for increasing the value of the settlement for the class by $122.6 million. JA105-106. Hamilton Lincoln Law Institute's Center for Class Action Fairness ("CCAF") submits this brief to respectfully urge the Court to recognize the important role that good-faith objectors play in class actions by vacating the district court's order and awarding the Faneca Objectors fees, while setting forth the appropriate legal standards for an award of attorneys' fees when objectors' work materially benefits the class.

This result is consistent with legal precedent and also sound policy. Class members who step forward to object in good faith, reintroduce an adversarial element to the settlement proceedings, and confer a concrete benefit upon the class should be permitted to recover their attorneys' fees and expenses—and not treated as second-class litigants. Good-faith objectors are essential to the class action eco-system. Because of the agency problems inherent in representational litigation such as class actions, objectors perform a valuable service to the class. They identify shortcomings in settlements such as the one here and excessive fee requests at a point in the litigation when both parties are urging the court to give its stamp of approval. *See* Section I. When courts fail to award attorneys' fees in recognition of the benefit objectors provide to

the class, they implicitly encourage bad-faith objectors, who can command six-figure payments to dismiss an appeal of their objection without ever benefiting the class. *See* Section II. Such decisions also encourage class counsel to continue to submit unfair settlements and excessive fee requests because they suffer virtually no consequence, and know that good-faith objectors will likely suffer financial disadvantage if they challenge the problems.

This result is out of step with Circuit precedent that acknowledges the valuable role that objectors can play and the need to award fees using traditional fee analyses where objectors materially enhance the benefit to the class.

Argument

I. Good-faith objectors protect the class from the recognized incentive problem of class-action settlements and should recover fees when they provide a benefit to the class.

Unlike settlements in bilateral civil litigation, due process for absent class members requires that class-action settlements and fee awards require court approval under the standards set out in Federal Rule of Civil Procedure 23. Due process requires, and Rule 23 provides, absent class members the right to object to a proposed settlement or request for attorneys' fees. Fed. R. Civ. P. 23(e)(5). The need for court approval as an additional layer of review, during which the court acts as a fiduciary of the class and class members may present their objections, arises from the self-interested incentives inherent in the representative nature of class actions. Because of these incentives, there is rarely any adversarial presentation of the issues at the settlement stage without good-faith objectors.

The potential for conflict in class-action settlements is structural and acute because every dollar reserved to the class is a dollar defendants cannot pay class counsel. "Ordinarily, 'a defendant is interested only in disposing of the total claim asserted against it,' and 'the allocation between the class payment and the attorneys' fees is of little to no interest to the defense.'" *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 949 (9th Cir. 2011) (quoting *Staton v. Boeing*, 327 F.3d 938, 964 (9th Cir. 2003)). "Defendants, once the settlement amount has been agreed to, have little interest in how it is distributed and thus no incentive to oppose the fee." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 52 (2d Cir. 2000). Class counsel, meanwhile, have an obvious interest in maximizing the fee award for themselves. *Id.* at 52-53. "[B]ecause the adversary system is typically diluted—indeed, suspended—during fee proceedings," "fixing a reasonable fee becomes even more difficult." *Id.* at 52; *see also Pampers*, 724 F.3d at 718 ("district court cannot rely on the adversarial process to protect the interests of the persons most affected by the litigation—namely, the class"). In short, every dollar spent on compensating the class for its alleged injuries is a dollar that the defendant will not be willing to pay for attorneys' fees. The incentives of the parties—no explicit collusion required—is to shortchange the absent class members. But because courts are overworked and rely upon adversary presentation, they are "ill equipped" to perform an investigatory function in response to the *de facto ex parte* presentation of the proposed settlement; "vocal objectors" are required so that district courts need not analyze settlements in a "non-adversarial posture." *E.g., Keepseagle v. Vilsack*, 118 F. Supp. 3d 98, 122 n.7 (D.D.C. July 24, 2015).

During the settlement process, "a lawyer with objector status plays a highly important role for the class and the court because he or she raises challenges free from the burden of conflicting baggage that Class Counsel carries." *In re Prudential Ins. Co. Am. Sales Practice*, 278 F.3d 175, 202 (3d Cir. 2002) (Rosenn, J., concurring and dissenting).

This Circuit recognizes the important role of objectors: "When objecting counsel raises pertinent questions concerning the conduct of Lead Counsel, the terms of the proposed settlement, and the costs and fees to be paid from the settlement fund, he or she not only renders a service to the class, but also aids the court." *Prudential Ins. Co. Am. Sales Practice*, 278 F.3d at 202 (Rosenn, J., concurring and dissenting). Consistent with the substantial benefit doctrine, this Court has long held that where objectors provide a material benefit to the class, the district court should "evaluate the value of the benefit … and compensate the [objector] to that extent." *In re Cendant PRIDES Sec. Litig.*, 243 F.3d 722, 744 (3d Cir. 2001). This same common-sense approach to fees for objectors who provide a benefit has been adopted by Circuits nationwide. *See, e.g.*, *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014); *Rodriguez v. W. Publ'g. Corp.*, 563 F.3d 948 (9th Cir. 2009); *Gottlieb v. Barry*, 43 F.3d 474, 491 (10th Cir. 1994); quoting *White v. Auerbach*, 500 F.2d 822, 828 (2d Cir. 1974).

With respect to the source of the fee payment, the class should not suffer through reduced recovery because objector involvement was needed to improve the class benefit. Nor should class counsel escape without consequence, when they had complete responsibility for the poor initial settlement proposal and resulting need for objectors to begin with. Without some incentive not to accept bad deals on behalf of the class,

repeat-player class counsel always win in a "heads I win, tails you lose" posture, no matter if the initial settlement terms have to be substantially revised, as here. Objector fees should be paid out of class counsel's fee award as a matter of equity. "[T]he 'common benefit' theory is premised on a court's equity power." *United Steelworkers of Am. v. Sadlowski*, 435 U.S. 977, 979 (1978). And as between the class members and class counsel, "equity requires that the loss, which in consequence thereof must fall on one of the two, shall be borne by him whose fault it was occasioned." *Neslin v. Wells*, 104 U.S. 428, 437 (1882). The class should not have to pay twice for a benefit they should have received at the outset via the counsel purporting to represent them. This view is shared by numerous courts that also have awarded objector fees from class counsel's fee award.[3]

Paying objector fees from class counsel's award is also good public policy. It provides a practical incentive for class counsel to avoid proffering settlements that have

[3] *McDonough*, 80 F. Supp. 3d. at 651 (debiting objector's fee award from class counsel's fee award because class benefit was only achieved on the "second try"); *Belleville Catering Co. v. Champaign Mkt. Place, LLC*, 350 F.3d 691, 694 (7th Cir. 2003) ("[C]lients [should] pay just once for the litigation … [and should] not pay for lawyers' time that has been wasted for reasons beyond the clients' control"); *In re Celexa & Lexapro Mktg. & Sales Practices Litig.*, No. 09-2067-NMG,2014 U.S. Dist. LEXIS 125041, at *27 n.1 (D. Mass. Sept. 8, 2014) (same); *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 816-817 (N.D. Ohio 2010) (same); *Parker v. Time Warner Entm't Co., L.P.*, 631 F. Supp. 2d 242, 277 (E.D.N.Y. 2009) (same); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 273 F. Supp. 2d 563, 573 (D.N.J. 2003), *aff'd* 103 Fed. Appx. 695, 697 (3d Cir. 2004) (same); *In re Ikon Office Solutions*, 194 F.R.D. 166, 197 (E.D. Pa. 2000) (same); *Duhaime v. John Hancock Mut. Life Ins.*, Co., 2 F. Supp. 2d 175, 176 (D. Mass. 1998) (same); *In re Horizon/CMS Healthcare Corp. Secs. Litig.*, 3 F. Supp. 2d 1208, 1215 (D.N.M. 1998) (same).

a high probability of being objectionable to class members and to courts. Without the possibility of fees, objectors are even less likely to participate. Class members simply do not find it cost-effective to pay attorneys to investigate the possibility of settlement benefit left on the table or potentially excessive fee requests except on a contingency basis. Affirming the district court's ruling—which has no substantive analysis and awarded a sub-lodestar award equal to less than 1% of the claimed benefit—deters future good-faith objectors. Not only do objectors not recover for their work, but they are now unfairly forced into complicated collateral litigation over that lack of recovery. Without any incentive for objectors or their counsel to undertake the time-consuming objection process, it becomes more likely that future class counsels will agree to settlements that short-change the class, as they initially did here. Confirming this fact, plenty of unfavorable settlements are approved quickly, quietly, and unopposed, without even a single objection. *See Vought v. Bank of Am.*, 901 F. Supp. 2d 1071, 1093 (C.D. Ill. 2012) (citing, *inter alia*, a 1996 FJC survey of several federal districts that reported between 42% and 64% of settlements engendered no filings by objectors).

Without clear legal standards for objector fee awards, district courts have a tendency to characterize the results of objectors' work as "commonsense" or a result the court would have reached without their objection and, as a result, deny their fee requests in whole or substantial part. *See, e.g.*, *Fraley v. Batman*, 638 Fed. Appx. 594, 600 (9th Cir. 2016); *In re Transpacific Passenger Air Transportation Antitrust Litig.*, No. C 07-05634, 2015 U.S. Dist. LEIXS 106943 (N.D. Cal. July 31, 2015) (crediting only $1 million of $5.1 million fee reduction to CCAF for purposes of awarding fees). But the courts reach these decisions only after they have the benefit of objectors' filings. Further

undermining this rationale, the result certainly wasn't so obvious to class counsel who submitted the deficient settlement or excessive fee request in the first instance—and if it was, it perversely rewards the class counsel for submitting filings that are "obviously" deficient.

In any event, "objectors must decide whether to object without knowing what objections may be moot because they have already occurred to the judge." *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 288 (7th Cir. 2002). If class counsel is concerned that "obvious" objections may result in disproportionate payout to successful objectors, the solution is to avoid settlements and fee requests that have obviously objectionable issues. In no other legal posture can courts refuse to award litigants fees because their filings were destined to be successful regardless of the skill of the attorney. Imagine if a court declined to award plaintiffs' counsel more than nominal fees for filing the action because the defendant was obviously in the wrong. Because class counsel is best positioned to control the settlement process, the burden should be on them not to submit deficient settlements, and when good-faith objectors identify material improvements to the terms or other ways to enhance the benefit to the class, the default should be to award them fees.

II. Denying good-faith objectors attorneys' fees when they benefit the class discourages their participation and encourages bad-faith objectors to use the class-action process for personal gain.

Fee awards for meritorious objections also serve to protect the legal process from the negative effects of bad-faith objectors. In recent years, the class action system has seen an unfortunate rise in bad-faith or "professional" objections. "Professional

objectors are attorneys who file stock objections to class action settlements—objections that are most often nonmeritorious—and then are rewarded with a fee by class counsel to settle their objections." *Garber v. Office of the Comm'r of Baseball*, No. 12-CV-03704, 2017 WL 752183, at *4 n.9 (S.D.N.Y. Feb. 27, 2017) (cleaned up). "Professional objectors primarily seek to obstruct or delay settlement proceedings so as to extract attorneys' fees in exchange for the withdrawal of the objection." *Id.* (citing 7B Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1797.4 (3d ed. 2005)). This type of objector threatens to disrupt a settlement unless plaintiffs' attorneys or defendants buy them off with a substantial payment. They essentially "get paid to go away," and the payments "benefit only the [objectors] at the expense of all other parties to the litigation." *Vollmer v. Selden*, 350 F.3d 656, 660 (7th Cir. 2003). The threat of an appeal can be a valuable weapon and, as a result, objector blackmail can be quite lucrative. *See* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623, 1634, 1637 n.67 (2009).

Bad-faith objectors burden the judicial system with meritless filings yet are able to extract payments in the tens and hundreds of thousands of dollars. *See, e.g., Edelson PC v. Bandas Law Firm PC*, No. 16-cv-11057, 2018 WL 3496085, at *11 (N.D. Ill. Jul. 20, 2018) (allowing claims to proceed against objectors' counsel which collected $225,000 in attorneys' fees due to "pattern of reprehensible conduct that has harmed Plaintiff and others and benefits no one other than . . . themselves.").

On the other hand, when objectors are successful and achieve a benefit for the class, their efforts often go uncompensated or substantially under-compensated, as happened below. In the absence of a reasonably compensatory attorneys' fee award, a

good-faith objector is almost always worse off if he objects than if he hadn't shown up at all. As the Seventh Circuit asked rhetorically in a case in which no class member objected: "but why should he have? His gain from a reduction, even a large reduction in the fees awarded the lawyers would be miniscule." *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992). Under the approach adopted by the district court, losing an objection and settling on appeal is a much more profitable business model than successfully litigating an objection as the Faneca Objectors did here. Even if an objection has merit, objectors know that they have a better chance of being paid by settling than by successfully litigating the objection.

If good-faith objectors always incur costs, with only a small chance of recovering fees well below their lodestar, then the system grooms only bad-faith objectors to participate in the Rule 23 settlement process. That effect is compounded where, as is common in CCAF's experience, class counsel imposes additional burdens on objectors by setting numerous hoops for objectors to jump through just to file an objection, serving abusive discovery requests, and making *ad hominem* attacks in responsive court filings. Those burdens increase the time, expense, and overall unpleasantness for absent class members who seek to exercise their Rule 23(e) right of objection in good faith. Much of that asymmetrical burden can be alleviated by awarding attorneys' fees to those objectors who benefit the class. Indeed, such good-faith objectors can even help to safeguard the class action process from bad-faith objectors. *See Pearson v. Target Corp.*, 893 F.3d 980 (7th Cir. 2018) (reversing and remanding denial of CCAF's motion to intervene seeking to disgorge side settlements reached by three other objectors).

Under the district court's ruling here, we are left with a slanted system that disfavors class members who assist the court by filing meritorious objections. There is no guarantee a court will honor even meritorious objections, creating a high risk of non-payment. Even a successful objection may merely scuttle an unfair settlement; if no second settlement is reached, there will be no class benefit creating an entitlement to attorneys' fees, making meritorious good-faith objections far riskier to the attorneys' bottom line than other meritorious contingent-fee litigation. And, in the absence of clear standards for objector fees, class counsel, who are repeat players that wish to discourage objectors in future settlements, have every incentive to challenge—as they do here—an objector's entitlement to fees even after an objection results in a material improvement in direct benefit to the class. *E.g. McDonough*, 80 F. Supp. 3d at 660. Class counsel already have an "incentive to punish successful objectors by withholding fees." *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 201 n.17 (3d Cir. 2005). The collateral litigation over fees—usually without recovery for the time in that collateral litigation—can burden objectors to a far greater proportion than collateral litigation over fees does in other types of litigation. The decision below exacerbates this problem by treating objectors' counsel as less worthy of attorneys' fees for the role they play in protecting the class and securing settlement benefits for them.

If this Court blesses the district court's treatment of the Faneca Objectors, the effect will be to perpetuate the problem of bad-faith or "professional" objectors. Rule 23 should not countenance this result. Although Rule 23 was amended last year to ameliorate the problem of objector blackmail by requiring court approval of payment to objectors in exchange for withdrawing their objection or dismissing their appeal, it

does not set any standards for courts to follow before blessing objector payoffs. The amendments fail to address the real problem: objectors are more motivated to bring bad-faith objections than good-faith objections because there is a greater chance of payment in objector blackmail than in successfully litigating an objection. The problem will further persist without counterbalancing precedent allowing objectors who benefit the class to recover fees. There needs to be an express recognition by courts that objectors who realize a benefit for the class are entitled to attorneys' fees. Otherwise, and if the district court decision stands, only non-profit organizations, which lack the resources to appear in more than a small fraction of cases with an unfair proposed settlement, will have the ability to consistently see through meritorious objections.

In a world where only non-profit objectors can "afford" to object, class counsels will be able to freely abuse the system. Heads, no one objects to even "obvious" deficiencies and they extract unfair rents; tails, they get a costless do-over without consequence to do what they should have done in the first place. Except non-profit objectors appear in far less than 50% of fairness hearings over abusive settlements.

There are positive public policy consequences from ensuring that objectors will be paid when settlements are rectified. If class counsel knows that objectors have the financial incentive to expose settlement flaws, and that they will pay the objectors when those flaws are corrected, it appropriately aligns their incentives with the absent class members in the first place. Settling parties will self-police to avoid the cost of paying good-faith objectors, abusive settlements will become less likely, and there will be less collateral litigation in the district court and appellate court over settlement fairness.

But under the district court's decision, no for-profit objector will be incentivized to litigate a meritorious objection because they risk recovering a mere fraction of their fees, when they could simply receive a payment to dismiss an appeal with a fraction of the work. This Court should vacate the fee award, award the Faneca Objectors fees, and expressly recognize its precedent holding that objectors are entitled to attorneys' fees when they realize a material benefit for the class. A remand inviting further litigation without clear standards would be punitive.

Conclusion

This Court should vacate the fee award to the Faneca Objectors and award fees to the Faneca Objectors sufficient to incentivize other for-profit objectors to make good-faith meritorious objections.

Dated: October 18, 2019

Respectfully submitted,

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Combined Certifications

1. **Certification of Bar Membership**

   I hereby certify under L.A.R. 28.3(d) that I, Theodore H. Frank, am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. **Certification of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements**

   I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,963 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Garamond font.

3. **Certification of Service**

   I hereby certify that on October 18, 2019, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Third Circuit using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

4. **Certification of Identical Compliance of Briefs**

   In accordance with 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

In accordance with 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 Internet Security software and the PDF file was found to be virus free.

Executed on October 18, 2019.

/s/ Theodore H. Frank
Theodore H. Frank