NO. 20-6097

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE: SAMSUNG TOP-LOAD WASHING MACHINE MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION

JOHN DOUGLAS MORGAN,
Objector-Appellant.

On Appeal from the United States District Court for
the Western District of Oklahoma
Case No. 5:17-md-02792-D
The Honorable Timothy D. DeGiusti, Presiding

Reply Brief of Appellant John Douglas Morgan

ORAL ARGUMENT REQUESTED

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Glossary of Terms

A:	Appendix.
DB:	Defendants' Brief.
Dkt.:	Docket in No. 5:17-ml-02792-D (W.D. Okla.).
DSA:	Defendants' Supplemental Appendix.
HLLI:	Hamilton Lincoln Law Institute (counsel for appellant Morgan)
Kennedy:	*Kennedy v. Samsung Elecs. Am., Inc.*, No. 2:14-cv-04987 (D.N.J.).
OB:	Appellant Morgan's Opening Brief.
PB:	Plaintiffs' Brief.
PSA:	Plaintiffs' Supplemental Appendix.
Samsung:	Samsung Electronics America, Inc., the primary defendant.
Settlement:	Settlement Agreement between named plaintiffs and Samsung filed June 1, 2018. Dkt. 92-1 (A27-A87).

Introduction

Does Rule 23(g)(4) permit class counsel to take steps to reduce potential recovery to class members, or is that a breach of their fiduciary duty? Appellees cite no appellate precedent defending such actions; indeed, defendants never mention the rule once. Samsung was willing to pay millions to settle the case; plaintiffs structured the settlement with a segregated fund for fees to ensure the class could never get that money. Morgan successfully negotiated with Samsung to increase the cash payouts to the class by what would have been an order of magnitude. Rather than be happy for the dramatic increase in pecuniary benefit for their fiduciaries, plaintiffs scuttled the side-agreement by falsely accusing Morgan of wrongdoing and creating litigation risk. The record shows that those actions were the sole reason for the side-agreement fell through. In negotiating a segregated fund and then affirmatively obstructing a side agreement designed to ameliorate its adverse effects on the class, plaintiffs *actually* cost the class between $1.3 million and $2.1 million of common benefit with their actions. That money that is now in defendant Samsung's pockets instead of the class's. Affirmance of the district court's tolerance of this behavior will not only mean that these attorneys get away with it at the class's expense, but that future class attorneys can do so fearlessly in ways that will cost future class members even more.

Appellees cite cases where courts have permitted approval of settlements with segregated fees, but this will be the first appellate case considering the legal consequences of the specific scenario where the kicker *indisputably costs the class money*. If reversion clauses—which use segregated fee funds to preclude class members of

standing to challenge excessive attorney-fee requests by ensuring that any reduction will return to a defendant who has agreed not to challenge fees rather than the class—are ever legally improper, they have to be in this scenario. Contrary to Samsung's characterization (DB24-25), the state AGs do not ask to ban fee reversions, but just a "hard line": "it is time for the Court, which has never spoken on these arrangements, to take a hard line with respect to the use of fee reversion arrangements in class action settlements with agreed-upon fee amounts." *Amicus* 9.[1] In contrast, plaintiffs do not challenge the specific test Morgan proposes of actual reversion resulting in harm to the class (OB42, OB46-47),[2] and appellees propose no alternative test whatsoever and cite no appellate authority that such "kickers" are *always* acceptable.

Because class counsel blocked at least a $1.3 million common benefit, they "can't be trusted to represent the interests of the class." *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 725 (7th Cir. 2016). "[I]f at any time the trial court realizes that class counsel should be disqualified, the court is required to take appropriate action." *Id.* It was reversible error for the district court to refuse to disqualify class counsel and appoint new class counsel.

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[1] That attorneys general choose to devote scarce CAFA resources to appeals rather than district courts (DB24) is hardly surprising or sinister. *Cf.* Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 Fordham L. Rev. 3165, 3179 n.62 (2013) (noting "limited effectiveness" of CAFA notice as a "monitoring device").

[2] Samsung calls (DB28) this test "unworkable," but it's hard to imagine a test easier to apply than this bright-line rule.

Argument

I. Class counsel breached their fiduciary duty to the class by obstructing a side-agreement between Morgan and Samsung that would have provided a $1.3 million common benefit for class members.

Class counsel dealt themselves plum terms in the Settlement: a $6.65 million clear-sailing agreement where Samsung would not oppose attorneys' fees, *and* the "gimmick" of a "kicker" where unawarded fees from a segregated fund would return to Samsung to deter objectors and courts from scrutinizing this request. OB21; *Pearson v. NBTY, Inc.*, 772 F.3d 778, 786 (7th Cir. 2014) ("*Pearson*").

Objector Morgan—with a minuscule fraction of the leverage and manpower of class counsel—got Samsung to agree to partially unwind the kicker. OB23; A187. Under the proposed agreement, if the court awarded less than $6.65 million in fees and costs, Samsung would have sent most of the unawarded fees back to the class. A194. The district court *did* award less—over $2.1 million less than plaintiffs had requested, and over $2.5 million less than Samsung had agreed not to oppose. A282. Given the district court's fee award, if class counsel had not obstructed Morgan's deal with Samsung, Samsung would have deposited over $1.3 million in cash for the class.

Instead, class counsel implicitly threatened Samsung and Morgan, calling the supplemental agreement to provide additional benefits to the class "misconduct" and a violation of the Settlement. This intimidation succeeded in scuttling the side agreement. In so doing, class counsel breached their duties to the class, and confirmed that it negotiated the Settlement itself to favor attorneys over their absent clients. For this reason, class certification violated Rule 23(g)(4), and final approval must be reversed

and the class decertified. Then plaintiffs with new representation can structure a deal eliminating the kicker term.

Plaintiffs incorrectly argue (PB26) that the district court's factual findings preclude a breach of fiduciary duty. But even if the district court was right there was "no indication that the side agreement would *certainly* benefit the Settlement Class" (A229-30 (emphasis added)), cost-free *conditional* benefits *are* benefits to the class because of their option value. OB33. A fiduciary would actively pursue them. Class counsel's fiduciary duty to the class "requires a lawyer to take all steps that have reasonable potential to make one or more parties or represented persons better off without harming others." American Law Institute, *Principles of the Law of Aggregate Litig.*, § 1.05, *comment f* (2010) (Samuel Isaacharoff, Reporter).

Plaintiffs repeat the district court's *non sequitur* in calling the Agreement worthless because it's "contingent." But appellees never deny that the Agreement has option value. In the context of the limited "warranty" (which appellees do not deny will receive no more than perhaps $100,000 worth of claims), plaintiffs know that insurance has an actuarial value even if when it's not used. PB37. So too here, except instead of a gerrymandered claims process of little worth, the contingent value of Morgan's side-deal turned out to be worth over $1 million.

Plaintiffs argue (PB30-32) that the deal would not be worth $1.3 million to the class, because the class would not actually receive the entire sum—ironic again, given appellees' other arguments about "potential relief to the class" and "actual" or "present value of the future guarantee" of their own settlement. *E.g.*, DB35; DB42; PB38. Morgan doesn't say that class members would receive $1.36 million, but that Samsung

would deposit that amount of cash would for the common benefit of the class. OB33. Plaintiffs understand the common benefit fund includes attorneys' fees. PB36 n.4. Morgan had no clear sailing for his fees, and plaintiffs would have been free to oppose them, but even after fees, the value to class was material. As plaintiffs recount (PB31), no fees would result at all unless at least $600,000 was first sent to the class—the class is not at the "bottom" of the "pyramid," but an indispensable first-in-line beneficiary.

Samsung side-steps this issue by arguing this Court can affirm the Settlement as fair without deciding whether plaintiffs obstructed the side-deal. DB48. But this ignores whether the district court erred in ruling on the Rule 23(g)(4) question, a rule Samsung never mentions.

Appellees purport to make public-policy arguments against disqualification, but these are based on fictional premises mischaracterizing Morgan's position. Contrary to plaintiffs' claim (PB28), Morgan never contended that adversity in other cases requires disqualification. Instead, Morgan simply offered a motive for plaintiffs' choice to harm class members. The *breach of fiduciary duty* to the class requires decertification, not the "conflict." PSA131-32. The district court erred in basing its conclusion on the strawman instead of addressing Morgan's argument. OB35-36. Morgan agrees with Samsung (DB49) that policy should favor beneficial settlements for class members. The only way to encourage this is to remove plaintiffs' counsel that selfishly obstruct such deals.

A. As Samsung says, the side-agreement fell through because HLLI walked away from the deal, and the only record evidence shows HLLI did so because of litigation risk from plaintiff.

Unlike plaintiffs' characterizations (PB29), Samsung does not misrepresent the record of the side-settlements: the deal remained on the table and would have occurred but for Morgan and HLLI walking away. DB48. The sole, undisputed evidence is that HLLI walked away because they could not bear the litigation risk of class counsel's implied threats. A211-12. The district court's finding otherwise contradicts the record, and is clearly erroneous.

Class counsel would have secured this additional benefit for their putative clients by simply *agreeing not to sue Morgan or his counsel* after falsely accusing Morgan of wrongdoing. To this day, they have no explanation why they could not simply issue a single sentence in an email. Plaintiffs had a duty to pursue even potential benefits for their clients—and the side-agreement would prove to be very valuable.

Plaintiffs' argument (PB32-33) that they have no duty to negotiate with objectors, much less agree to objector payoffs, is responding to a strawman. Morgan never argued that plaintiffs have an obligation to *initiate* negotiation with objectors or even to respond to a *unilateral* settlement offer made by objectors by themselves. But if the *defendant* voluntarily wishes to resolve an objection in a manner that will improve the settlement for the class, then the plaintiffs have a duty *not to harm the class* by obstructing an agreement to improve class benefit. And that's what the record shows happened here. Plaintiffs do not deny they have a duty not to harm the class, and do not deny that a court can disqualify them for doing so. Nor can they. *ALI Principles*, § 1.05, *comment f*. So the only question on appeal is whether class counsel breached this duty. They did,

and it cost the class over a million dollars of common benefit. There must be consequences.

1. Plaintiffs aimed misconduct accusations at HLLI.

Plaintiffs misleadingly truncate Morgan's filing to suggest (PB26) Morgan "admitted" they did not threaten him. The full quote shows otherwise: "class counsel believes the side agreement is unlawful and refuses to disclaim that characterization or negotiate to allow Morgan to enter the agreement without risking litigation." PSA132.

Plaintiffs' assertion (PB26-27) that they only had "one line" accusing only defendants of wrongdoing simply contradicts the record. *See* OB14; A200 (Agreement is "*misconduct by HLLI* and Samsung" and "misbehavior" (emphasis added)); A201 ("Samsung's *collaboration with HLLI*—in direct violation of the Settlement" (emphasis added). As HLLI was a party to the Agreement, the threat was real. A36-37.

Morgan reasonably asked "We simply need an assurance that you will not sue Morgan or HLLI for executing a substantially identical agreement to the one [Samsung] shared with you last week." A212. The record shows plaintiffs' self-serving statement denying they had made an explicit threat (PB17; DB48) falls far short of such an assurance given the unquestioned implicit threat and the negative pregnant of refusing to simply provide the assurance. OB15-16. If plaintiffs sincerely thought they were being misunderstood, all they needed to do was write a single sentence agreeing not to sue HLLI and Morgan for the Agreement. OB38. Plaintiffs refused to do so, and ensured the class would get less money as a result. This is the unconscionable breach of fiduciary duty that requires disqualification.

Plaintiffs falsely accuse HLLI of violating a court order. PB5; PB28. The district court ordered Morgan to "disclose all details of any agreements that they have reached." A191. Morgan did not violate this order: he did not reach a side agreement because plaintiffs obstructed it on the eve of execution. Had Morgan and Samsung reached a deal, they would have filed it, just as the *Kennedy* side-deal was. Dkt. 234. Plaintiffs cannot pretend the agreement's existence was a "matter of conjecture" (PB5): they received a complete copy of the draft agreement on February 11. A207-08; A212.

2. Plaintiffs' opposition to the payment to New Jersey counsel is pretextual; they raised no objection to the *Kennedy* agreement, which the district court approved.

Plaintiffs assert (PB25-27, PB32-33) that they opposed the side deal to prevent a "sordid" payoff to selfish objectors (PB33), but this mischaracterizes the side agreement. Morgan received not a single penny under the deal unless (1) the class first received $600,000; (2) Morgan made a motion for fees based on the class award that plaintiffs and Samsung each had a right to oppose; and (3) the court granted Morgan's motion for fees. A194-96; OB14.

There was a separate side agreement with *Kennedy* counsel (OB19), but plaintiffs said not one word in opposing that deal after its terms were filed, and the agreement did nothing for the class but guaranteed those attorneys a floor of $750,000. Dkt. 234-1. The district court approved this deal as "to the ultimate benefit of the Settlement Class." A253; OB36 n.10. Plaintiffs' opposition to selfish settlements of objections seems selective at best; HLLI has a superlative record on the issue, having litigated the only appellate victory unwinding such a deal. *Pearson v. Target Corp.*, 968 F.3d 827 (7th

Cir. 2020). The contingent possibility of fees for Morgan *if* the class actually received substantial payments far beyond what plaintiffs had obtained was not grounds to obstruct a deal that provided additional benefits to the class.

In fact, plaintiffs' argument only shows that they *still* do not understand what their fiduciary duty required. Essentially, they still think it more important that Samsung not pay Morgan a cent in fees, even though it would have meant the possibility of two cents for their putative clients. That is not the behavior of a zealous fiduciary.

II. Clear sailing and kicker provisions are not *per se* unfair, but they should be impermissible when, combined with an oversized fee request, they actually harm class members, as they did here.

Appellees cannot dispute that class counsel negotiated Samsung's assent to pay fees and costs up to $6.55 million. OB39-40. The district court properly awarded *$2.5 million less*—a vast sum that dwarfs recovery in the underlying settlement and that appellees cannot deny could have feasibly gone to the class had counsel not earmarked the money for their exclusive benefit. Appellees complain about the "pejorative" terms "clear sailing" and "kicker" (PB42, DB31),[3] but Morgan does not ask to reject the settlement approval for these terms *per se*. Instead, by negotiating *disproportionate* attorneys' fees that resulted in reversion to the defendant that could have gone to the class, class counsel harmed the class and so breached their fiduciary duty. OB42-43.

[3] Samsung argues that no "true kicker" existed because appellees structured a settlement that provides no common-benefit fund (DB31), but this is wrong. As Morgan observed (OB40), and Samsung does not address, the "kicker" in *Bluetooth* itself involved no common-benefit fund. *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011).

Plaintiffs say (PB42) there is no such thing as "unawarded" fees, but of course there are. Plaintiffs and defendants agree to create a segregated fund and divide it among themselves with no benefit to the class in a proceeding where plaintiffs will make an unopposed motion through clear sailing. Out of that fund (money that could have paid class members) the court will award some or all to plaintiffs, and the remainder (or, in other words, the unawarded amount) reverts to the defendant—though the defendant was willing to pay that much to resolve the litigation. *Bluetooth* says there is "no apparent reason" why the class should not get that money. 654 F.3d at 949; OB34. Neither appellee supplies one here either.

Appellees contend that the clear-sailing and kicker terms are innocuous because—as the district court found—"defendants want to know their total maximum exposure and the plaintiffs do not want to be sandbagged." PB43-44; DB26; A273. But neither of those interests explain inserting a "kicker" into the deal. A kicker only serves to prevent class members from benefitting from part of that exposure, and deprives class members of standing to challenge an excessive attorney fee on appeal without challenging the settlement approval. Morgan explained this precise problem: no matter *how* the settlement was struck, plaintiffs negotiated away a potential class benefit by agreeing to the kicker. The defendant's total outlay is fungible; the cash they pay can be either class benefits or fees. This type of agreement forms a constructive common fund. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. 1995). Here, class counsel fought for clear sailing on a disproportionate

attorneys' fee request that the district court simply could not and did not approve.[4] Defendants' acquiescence to the $6.55 million consumed part of the gross allowance Samsung's decisionmakers could approve. Because of the excessive earmark for fees, class counsel left money on the table, a disservice to class members.

Plaintiffs insist that the settlement was not disproportionate given an expert report, but they use the wrong benchmark. Without discussing any of Morgan's objections to the report, the district court assumed the extended claims process, which yielded at most $94,118.31 worth of claims for the first seven years of coverage would be worth $6.44–11.31 million for the remaining four years of coverage. OB44. The district court compared this preposterous valuation to the attorneys' fees actually awarded—but a comparison to the "proposed" clear sailing amount of $6.55 million, as commanded by Rule 23(e)(2)(C)(iii), confirms the disproportionality by any measure.

A. Neither clear-sailing agreements nor segregated fee funds are necessary for defendants to know their total exposure.

Appellees argue that clear-sailing agreements allow defendants to know their total exposure. But that confuses what is sufficient with what is necessary. The Settlement includes both a fee cap prohibiting class counsel from requesting more than $6.55 million (A67) *and* a clear sailing agreement (A61, A66). Morgan has never objected the *fee cap* here. The parties can limit class counsel's maximum fee request without a clear-sailing clause; and whatever the benefit of a clear-sailing clause, such a clause does not require a segregated fund. Plaintiffs conflate the distinction and pretend as if a fee

[4] Samsung says (DB28-29) that Morgan waived arguments about disproportionate fees making the settlement unfair. Untrue. A177-78; A185-86.

cap is synonymous with clear sailing—a defendant's agreement *not to oppose* a particular fee request. PB43. Untrue; unlike clear-sailing and kicker provisions, the fee cap or ceiling doesn't require class members to sacrifice benefit for the sake of their attorneys.

Appellees suggest that the negotiating conditions can defy economic gravity, but they cannot. PB42-43; DB34. Plaintiffs speak of the fee agreements as a "subsequent part of the settlement," but appellees cannot deny the settlement comprises a single agreement executed on one date. If any part of it were objectionable to defendants, they would not have executed it. Whether parties negotiate attorneys' fees first or last, defendants' total exposure must be palatable for them to sign. The *Kennedy* settlement that Samsung rejected proves this. OB46. Samsung cannot deny that *Kennedy* negotiated fees last, nor that disagreements on fee terms contributed to the disintegration of that potential settlement. DB37 n.9. Samsung simply alleges that other disagreements were more "key" than fees. *Id.* Morgan's point stands: negotiating fees last does not ensure class members maximum recovery.

Indeed, the fact that parties may not negotiate fees until after the rest of the settlement makes no economic difference. The settling parties are economic actors with rational expectations. Even when they sever negotiations over fees, the parties know in advance that those negotiations are coming. Defendants have limit on the overall exposure they will tolerate based on their internal valuation of the litigation; every dollar negotiated for the class reduces the amount the defendants are willing to pay class counsel. OB45. Because these future fee negotiations are not an unexpected surprise, the overhang of the future fee negotiations necessarily infects the earlier settlement negotiations. Even if the parties do not reopen settlement benefits, they *can* reopen

them at any time until they execute the deal, as the rejected *Kennedy* deal shows. OB46. As *Pearson* says, the district court's claim that sequential negotiation makes any difference "is not realistic." 772 F.3d at 786. *Cf. also Bluetooth*, 654 F.3d at 948 (separation of fee negotiations from other settlement negotiations does not demonstrate fairness of settlement with disproportionate fee proposal); *see generally* Brian Wolfman and Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 NYU L. Rev. 439, 504 (1996).

Appellees don't mention *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 308 (3d Cir. 2005) (postponing discussion of fees "would not allay our concern."). OB45. Plaintiffs instead cite an earlier inconsistent Third Circuit opinion. PB42; *see also GMC Pick-Up Truck*, 55 F.3d at 804. Appellees' citations endorsing "separately negotiated fees" (PB41, DB33) uniformly concern settlements where courts did not find fees excessive or disproportionate, or where the settlement could not possibly benefit the class with the small sums at stake. This case is different; millions of dollars were left on the table. To the extent that district courts arrive at the wrong conclusion, that reflects the practical difficulties of settlement review. "No matter how virtuous the judge, the fact remains that courts are overworked, they have limited access to quality information, and they have an overwhelming incentive to clear their docket. They cannot reliably police the day-to-day interests of absent class members." Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. Davis L. Rev. 805, 829 (1997). "Without the adversarial process, there is a natural temptation to approve a settlement, bless a fee award, and be done with the litigation." *Marshall v. Deutsche Post DHL*, 2015 WL 5560541, 2015 U.S. Dist. LEXIS 125869, at *2 (E.D.N.Y. Sept. 21, 2015).

Like the district court (A273), appellees rely (PB43-44, DB33) on a *dicta* footnote from *Malchman v. Davis*, concerning views of "the author of this opinion." 761 F.2d 893, 905 n.5 (2d Cir. 1985). But the majority of the *Malchman* panel wrote separately; the concurrence and dissent each found plaintiffs' self-dealing in negotiating fees problematic. The concurrence explained "[i]t is unlikely that a defendant will gratuitously accede to the plaintiffs' request for a 'clear sailing' clause without obtaining something in return. That something will normally be at the expense of the plaintiff class." *Id.* at 908 (Newman, J., concurring) (musing that "perhaps they should be forbidden in all cases"). The dissent went further and would have banned such agreements *per se* because they tempt class counsel to not "negotiate a more advantageous settlement for the class members." *Id.* (Mansfield, J., dissenting). Parties cannot pretend that an agreement on fees isn't part of a unitary settlement; if the "fee figure appeared to the defendants to be excessive they would remain free to withdraw completely from the settlement." *Id.* at 909. Appellees and the district court ignore these sound opinions to pluck out non-binding *dicta* from a footnote written thirty-five years ago.

Other courts get it right. They consider clear-sailing clauses a "questionable feature" that "at least in a case…involving a non-cash settlement award to the class…should be subjected to intense critical scrutiny." *Redman v. RadioShack Corp.*, 768 F.3d 622, 637 (7th Cir. 2014).[5] Combined with a reversionary "kicker" from the

[5] Defendant's cite to the remanded *Bluetooth* order proves the Ninth Circuit declined to bless the order of negotiation. The Ninth Circuit did *not* credit the "fees negotiated last" excuse from the district court's original vacated order. *In re Bluetooth*

segregated fund for fees, a clear-sailing clause removes all obstacles to class counsel receiving the fee that it desires in the absence of a public-minded objector or a court willing to use scarce time as an investigator without the benefit of adversarial presentation.

Likewise, a mediator's presence (PB43; DB34) does not prevent self-dealing. A mediator may deter *collusion*, but it cannot protect against self-dealing from those parties at the expense of absent class members, much less satisfy Rule 23. *Roes 1-2 v. SFBSC Mgmt. LLC*, 944 F.3d 1035, 1049-50 & n.13 (9th Cir. 2019); *Sharp Farms v. Speaks*, 917 F.3d 276, 292 (4th Cir. 2019); *In re Payment Card Antitrust Litig.*, 827 F.3d 223, 234-35 (2d Cir. 2016); *Bluetooth*, 654 F.3d at 948. After all, arm's-length negotiations' protections "extend[] only to the amount the defendant will pay, not the manner in which that amount is allocated" among class members. *In re Dry Max Pampers Litig.*, 724 F.3d 713, 717-18 (6th Cir. 2013).

It's about incentives: class counsel negotiates fees for themselves. The problem isn't that defendants limited their own exposure (PB44), but that class counsel won a concession from defendant that *only* benefits counsel. Here, those benefits were disproportionate.

This Court endorsed comparing fees to benefits in *Fager* (OB44-45), and Samsung does not cite the case at all. Plaintiffs contend *Fager*'s logic should be limited

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Headset Prods. Liab. Litig., 2009 U.S. Dist. LEXIS 144736, at *3-*4, *11 (C.D. Cal. Oct. 22, 2009). If negotiation timing was dispositive, *Bluetooth* would have turned out differently.

to percentage-based fees, but nothing in the *Fager* opinion commends this limit.[6] The addition of Fed. R. Civ. P. 23(e)(2)(C)(iii) bolsters *Fager*'s suggestion, as it explicitly obligates courts to compare the adequacy of class relief against counsel's proposed fee request. And contrary to plaintiffs' repeated insinuation, no fee-shifting statute governs this appeal. PB49-50; PB33-34. CAFA does not authorize fee shifting, is simply does not "*prohibit* the application of a lodestar with a multiplier method," where such fees are otherwise authorized. 28 U.S.C. § 1712(b). Because statutory fees do not exist, fees must be justified by the *equitable* common benefit doctrine exception to the American rule, which is another reason to insist that fees not dwarf class recovery.[7]

Appellees suggest that this Court pooh-poohed the problem of disproportionate attorneys' fees in *In re Motor Fuel Temperature Sales Practices Litig.*, 872 F.3d 1094 (10th Cir. 2017).[8] As defendants admit (DB25), *Motor Fuel* did not "squarely address" that objection. It did not embrace disproportionate fee provisions. To the contrary, without mentioning *Fager*, *Motor Fuel* simply declined to impose a "bright line" rule, while finding several unique merits to that settlement. *Id.* at 1121. The *Motor Fuel* settlement offered

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[6] Plaintiffs also argue that *Sears* limits *Pearson* to common fund cases, but in fact it simply noted the presumption of proportionality was "not irrebuttable." *In re Sears*, 867 F.3d 791, 793 (7th Cir. 2017).

[7] Samsung misrepresents Morgan as arguing *all* settlements must have a common-fund structure, then faults Morgan for not raising this imaginary argument before the district court. DB40-41. But Morgan's appeal does not challenge constructive common-fund settlements that do not revert unawarded fees to the defendant. Morgan instead argues class counsel was inadequate under Rule 23(g)(4) for putting their own interests first, and Samsung does not respond to this argument. OB25.

[8] Morgan drafted a section of his opening brief addressing *Motor Fuel*, but an editing error a few hours before filing caused Morgan to delete the discussion from the filed brief. We regret and are chagrined by the error.

"positive societal effects" to the public at large even though "significant compensation to class members is out of reach" because of necessary division by *tens of millions* of class members. *Id.* Here, neither condition applies: the settlement only provides modest benefits to a pre-existing and ongoing voluntary recall program, but cash compensation to class members was eminently feasible. Samsung offered millions of dollars to settle, but plaintiffs' attorneys' earmarked the lion's share for themselves. In fact, significant pecuniary compensation *would have occurred but for class counsel* actively impeding it. Samsung agreed-in-principle to deposit another $1.3 million to class members. The *Motor Fuel* objectors did not demonstrate the kicker's harm; Morgan has.

Appellees argue that clear-sailing and kicker provisions are acceptable when the district court thoroughly analyzes the fee request (PB45, DB38), but lack of scrutiny is just one potential harm from these provisions. Public-interest firms like Morgan's counsel lack the resources to create an adversarial process for absent class members in every settlement. In any event, in none of appellees' cited cases did the appellate court consider the consequences of leaving significant money on the table as happened here. This is thus a question of first impression.

Samsung's citation to *Southwest* is especially instructional. DB38. The Seventh Circuit affirmed the underlying settlement based on the belief that class members could receive no additional benefit, a mistake the court recognized in a later appeal. *In re Southwest Airlines Voucher Litig.*, 898 F.3d 740, 746 (7th Cir. 2018). On remand, HLLI negotiated a reduction of plaintiffs' supplemental attorneys' fee request that caused defendant to agree to *triple* the relief they offered to class members. *Id.* Contrary to

defendants' implication, *Southwest* vividly highlights how class benefits and attorneys' fees are intimately linked, even when "negotiated last."

Finally, Rule 23(e)(2)(C) requires a comparison of fees to benefits (OB41), and ensuring proportionality constitutes good policy besides. Such a rule "impedes sweetheart deals by insuring that attorneys' recoveries are directly tied to the actual return to the class and by providing an incentive for attorneys to maximize the size of the pot from which they will draw their fees. [When] plaintiffs' attorneys recover only to the extent that the class is benefitted," good results and good public policy ensues. Isaacharoff, *Conflicts*, 30 U.C. DAVIS L. REV. at 830.

Class counsel breached their fiduciary duty in negotiating *disproportionate* fees, with clear sailing and kicker provisions, and the district court's approval of them without express analysis violated Rule 23(e)(2)(C)(iii).

B. The district court compounded its erroneous analysis of the Rule 23(e)(2)(C) issues by failing to address Morgan's objections to the settlement's inflated valuation.

As Morgan noted in his opening brief (OB39-41), the district court committed reversible error by failing to provide a "reasoned response" to several of Morgan's objections. *Accord Johnson v. NPAS Solutions LLC*, 975 F.3d 1244 (11th Cir. 2020). Remarkably, plaintiffs never mention Rule 23(e)(2)(C) or (e)(2)(C)(iii). Samsung does, but argues against the strawman that a court cannot defer determination of attorneys' fees. DB46-47. But Morgan never argued that a court cannot defer determination of attorneys' fees. Morgan's argument is that Rule 23(e)(2)(C)(iii) requires a court to consider the disproportionality, because the money that is going to fees could be going

to class members instead. The court's analysis that Samsung trumpets (DB46-47) is the conclusory statement that the sequence of negotiation meant that the requested "fee award does not reduce the recovery to the class." A252. That's it, that's the entire analysis. The court did not address disproportion. OB30. And the conclusory analysis is economically erroneous. *See* Section II.A above.

Appellees characterize (PB53-54; DB47) the omission as a technicality and a "harmless error" because of a second order on fees, but the problem here is not whether the court addressed the argument in a single order or across two orders; the district court never addressed Morgan's objection in either order.

Plaintiffs contend that the district court found no disproportion (PB36), but this only occurred because the court credited a multi-million dollar value for a "warranty" that produced less than $100,000 in claims (and class benefit) for the first seven years of coverage. OB44. Furthermore the court only considered the proportion between its reasonable fee award *after* its reduction—not the hard-fought agreement for $6.55 million in fees and costs. A279.

The settlement does not define a warranty in form or function. Instead, the settlement allows class members to file claims for two specific types of defect until each machine is seven years old or for three years for a subset of the class. OB43. Because the covered washing machines were manufactured between 2011 and 2016, most coverage under the agreement has already lapsed. Appellees do not dispute that payment of past claims totals just $94,118.31. OB44. The claims process provides no conceivable benefit at all for older washing machines already seven years old, and for

the latest machines the process ends in 2023. *Compare* OB43-44; A51; A54 *with* PB37 (erroneously referring to claims "paid over the next seven years").

But in spite of the meager benefit achieved so far, and without acknowledging Morgan's criticisms of an expert valuation, the district court found that the remaining zero to four years of coverage makes the settlement benefits worth "future warranty protection with an estimated value of $6.44–11.31 million." A246. (Taking the "mean value" of two fictional numbers (DB42) is still a fictional number.) But the settlement agreement did not define a warranty or even use the word; it's simply a claims process. OB44.

Plaintiffs contend that a "warranty" is a generic concept for providing some type of insurance, and not a "talismanic word." PB38. Nonsense. While "warranty" is not a talisman, it's a legal term of art, and a manufacturer that purports to offer a warranty without obeying the Magnuson–Moss Warranty Act and state consumer protection laws does so at its peril. A178-80. These statutory protections don't apply to the claims process administered by Samsung—it's simply not a warranty, but an inferior benefit, and the district court misclassified it. OB44.

Moreover, plaintiffs' expert valued the settlement by comparing the circumscribed and non-warranty claims process for two *and only two* types of machine defects with true consumer warrantees that provide comprehensive coverage. *Id.* Thus, contrary to plaintiffs' assertion, no "retail market" for such "similar promises of refunds" exists (PB39); the settlement provides a discrete non-warranty protection limited as a matter of fact and law. Plaintiffs (PB38) and the district court (A267-68 n.3) cite cases that credit warranties at retail value, but all of these involve actual, legally-

protectable warranties, which *have* a retail value. The settlement does not describe a warranty, and therefore none of these cases apply. While Morgan agrees the future claims process has some value (*contra* PB36-37), it would be in the ballpark of $190,000—double the amount claimed for the first seven years of coverage. OB45. No reasonable consumer would pay 100 times more for "insurance" than the expected value of the loss. OB44.

The court below committed legal error and abused its discretion by not addressing non-frivolous criticisms of the expert's report. OB43-44. Appellees argue that the district court *did* consider Morgan's criticisms by denying his motion to strike the belatedly served expert report under *Daubert*. PB39; DB44 n.11. That didn't happen. In denying his motion to strike, the district court discussed none of Morgan's criticisms, but instead denied the motion because *Daubert* supposedly does not apply to class-action settlements.[9] Having summarily rejected Morgan's motion, the district court never examined Morgan's critique, much less any of the more extensive criticisms Morgan filed *after* the denial of his *Daubert* motion. Dkt. 191 at 4-12; A178-A183; Dkt. 247 at 4. Appellees do not cite a single remark in the record where the district court suggests any awareness of these arguments, let alone a reasoned rejection of them. For a district court's settlement approval to "survive appellate review," the district court "must give a reasoned response to all non-frivolous objections." *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012); *see also Motor Fuel*, 872 F.3d at 1120 (faulting the

[9] A questionable decision given that Federal Rules of Evidence apply to all "civil cases and proceedings." *Compare* A174 *with* Fed. R. Evid. 1101(b). OB44 n.11. Morgan mentions this in a footnote (PB40) not as an independent reason for reversal, but as part of the gestalt of why the court erred in its Rule 23(e)(2)(C) analysis.

district court in *Pampers* for "fail[ing] to address any of the objector's objections"); *New England Health Care Employees Pension Fund v. Woodruff*, 512 F.3d 1283, 1290-91 (10th Cir. 2008) (reversing where district court neglected to address objectors' arguments). Appellees cite no express evidence at all the lower court considered Morgan's arguments at all.[10]

The self-dealing clauses to protect class counsel's fees ultimately cost the class millions of dollars that Samsung was willing to pay to settle this case. The self-dealing segregated fee fund and the resulting disproportionality of this settlement—which allotted $6.55 million for unopposed attorneys' fees and costs compared to a claims process that might optimistically yield $250,000 for the class—demonstrates why its approval must be vacated.

III. Samsung's ad hominem attacks are irrelevant and false.

Regrettably, Samsung tries to distract from the issues of first impression on this appeal by engaging in *ad hominem* attacks (DB39-40) against Morgan's counsel. Even if HLLI, a non-profit public-interest law firm, was as odious and "unsuccessful" as Samsung claims, that is no reason to prejudice absent class members injured by appellees' unfair agreement to favor class counsel at the class's expense. *Pearson v. Target*, 968 F.3d at 831 n.1.

[10] Samsung complains (DB44) that Morgan's brief does not rehash his criticisms of the expert report in greater detail, but that misses the point. The error Morgan raises here is more basic: the district court did not expressly consider or reject *any* of Morgan's arguments, and this was by itself reversible error.

But Samsung's characterizations are baseless. HLLI has won hundreds of millions of dollars for class members and national acclaim for its attorneys' work. *E.g.*, Andrea Estes, *Critics hit law firms' bills after class-action lawsuits,* Boston Globe (Dec. 17, 2016) (then "over $100 million"); *see also, e.g.*, Editorial Board, *The Anthem Class-Action Con*, Wall St. J. (Feb. 11, 2018) ("The U.S. could use more Ted Franks"). An HLLI attorney recently became Solicitor General of Utah.

HLLI's attorneys have litigated in over a hundred class-action settlements. A handful of district courts have criticized those objections, but these occasions are so rare that Samsung resorts to quoting out of context a case *in which a court awarded Frank attorneys' fees* after winning $2 million for the class. *Lonardo v. Travelers Indemnity Co.*, 706 F. Supp. 2d 766, 813-17 (N.D. Ohio 2010). While *Lonardo* criticized Frank's then-novel argument about segregated fee funds, Frank's litigation later prevailed on that exact same argument. *E.g.*, *Pearson*, 772 F.3d 778; *Bluetooth*, 654 F.3d 935. Any argument against segregated fee funds is no longer "short on law."

And *Lonardo* shows how faithful fiduciaries will put class members first—even when they negotiate fees separately from class relief. Although *Lonardo* class counsel negotiated outsized fees at the outset, they agreed with the defendant to shift a portion of those fees to the class to make the underlying settlement more proportional as a result of Frank's client's objection. *See* Dkt. 233 at 2-3.

Samsung's appellate attorneys are known for high-quality work, and these *ad hominems* are disappointing and beneath them. They certainly do not provide a basis to deprive the class of representation that will adhere to its fiduciary duty.

Conclusion

Settlement approval must be reversed. On remand, the court must appoint new class counsel.

Dated: November 3, 2020

Respectfully submitted,

/s/Theodore H. Frank

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Certificate of Service

I hereby certify that on November 3, 2020, I electronically filed this Appellant's Reply Brief with the Clerk of the United States Court of Appeals for the Tenth Circuit using the CM/ECF system, which will provide notification of this filing to all who are ECF-registered filers.

/s/Theodore H. Frank
Theodore H. Frank

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